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CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES

FEBRUARY—MARCH, 1911

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OF THE

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⁷ Appointed January 31, 1911. Designated to serve one year in Commerce Court.

⁸ Appointed January 31, 1911.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS
AND THE CIRCUIT AND DISTRICT COURTS

PRESTON v. STURGIS MILLING CO.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1910.)

No. 2,035.

1. TAXATION (§§ 2, 26*)—CONSTITUTIONAL LAW (§ 68*)—NATURE AND SOURCE OF TAXING POWER.

It is a fundamental principle that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority. The scope of such principle is that each step in the process of taxation from beginning to end can be taken only as the Legislature may prescribe, and that courts may exercise the power of taxation in respect to any of such steps only when, and to the extent, the Legislature has so provided. Even where there has been an assessment and levy of the tax, so that the amount due from each taxpayer is exactly ascertainable, in the absence of legislative authority a court has no power to collect the tax and pay it over to the party entitled thereto.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 2; Dec. Dig. §§ 2, 26;* Constitutional Law, Cent. Dig. § 125; Dec. Dig. § 68.*]

2. EQUITY (§ 46*)—GROUNDS OF JURISDICTION—INADEQUACY OF LEGAL REMEDY.

The scope of the general principle of equity jurisprudence that, all legal remedies having failed, equity should give a remedy, is that the legal remedy in its nature or character must be inadequate, and the principle does not apply if such remedy is adequate in theory and in law, but, owing to external causes not contemplated by the law, it cannot be enforced.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159, 163; Dec. Dig. § 46.*]

3. TAXATION (§ 585*)—PRIVATE ACTION FOR COLLECTION OF TAX—JURISDICTION OF COURT.

Act Ky. Feb. 18, 1870 (Sess. Acts 1869-70, c. 366), provided for the issuance of bonds in aid of the construction of a railroad, for the levy of a tax to pay such bonds, which "shall be a lien on the real estate of the person taxed," and that the tax should be collected by the sheriff, or on his failure to give the required bond by a commissioner to be appointed by the county court, who should have power to levy upon and sell real estate of the person taxed as on execution. Complainant recovered judgments in a federal court on bonds issued by a district under such act, for the payment of which assessments were made and a tax levied as provided therein; but its collection was forcibly prevented by the taxpayers of the district, and thereupon complainant brought suit in such federal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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court against a single taxpayer for collection of the tax assessed against him by enforcing the lien given by the statute on his real estate. *Held* that, in the absence of legislation expressly authorizing such a proceeding, the court had no power to grant the relief sought.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1185, 1188, 1189; Dec. Dig. § 585.*]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Suit in equity by A. J. Preston against the Sturgis Milling Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, 183 Fed. 19, 20.

Helm Bruce (Helm & Helm, of counsel), for appellant.

H. X. Morton and James F. Fairleigh, for appellee.

Before SEVERENS and WARRINGTON, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. The appellant, Preston, was complainant in the court below, and he appeals from a decree dismissing his bill on demurrer. The relief which he sought was the subjection of certain specifically described real estate owned by the defendant, Sturgis Milling Company, appellee here, located in the town of Sturgis within the Caseyville district of Union county, Ky., to the payment to him of the sum of \$7,155.74 and costs. He claimed that there was lien on the real estate for that amount and that he was entitled to enforce it. The way in which he claimed that this lien had arisen and that he had become entitled to enforce it was this:

Theretofores he and his wife, who had since died, had obtained several judgments in the lower court on its law side against the Caseyville district for the principal and interest of certain bonds duly issued on its behalf under an act of the Legislature of Kentucky entitled "An act to incorporate the Madisonville and Shawneetown Straight Line Railroad Company," approved February 18, 1870 (Sess. Acts 1869-70, vol. 1, p. 342, c. 366), in aid of the construction of the railroad, which if built was to run through the district, upon which judgments executions had issued and been returned unsatisfied; and pursuant to the provisions of the act a tax sufficient to pay the judgments had been duly levied, and the property subject thereto had been duly assessed. The appellee owned taxable property within the district, of which that sought to be sold was a part, and \$7,155.74 was the amount of the tax due from it according to the levy and assessment. The act provided that the tax authorized by it should be collected by the sheriff of the county upon his giving bond therefor, and that upon his failure for 30 days after its levy to do so he should forfeit his office, and the county court should appoint a collector who upon giving bond should collect the tax. By section 25 thereof it was provided as follows, to wit:

"That sheriffs and other officers having in their hands for collection taxes levied under this act shall have all the powers of distraining and selling personal property which sheriffs have in the collection of the state revenue; and when such officer shall be unable to find personal property liable to sale for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the unpaid tax of any individual, he may levy the same on any real estate of such person situated in the county and shall sell the same under the regulations prescribed by law for the selling of real estate under execution; and all taxes levied under this act shall be a lien on the real estate of the person taxed, which shall lie in the county in which such tax is levied; but the owner of any real estate sold may redeem the same at any time within five (5) years after such sale, by paying the purchase money and ten (10) per cent. per annum thereon, with all taxes of every description paid by the purchaser after his purchase, and ten (10) per cent. per annum thereon."

The taxpayers of the district had repudiated its indebtedness incurred in aid of the construction of the railroad and determined to prevent its collection, and, if violence was necessary to this end, to resort to it. The sheriffs of the county from fear, or from sympathy with the position of the taxpayers, had repeatedly refused to give bond for the tax, or, after doing so, had resigned, so that, for much the greater portion of 18 years previous to the bringing of this suit, the county had been without a sheriff. Collectors had from time to time been appointed, but with a single exception had refused to qualify or resigned after qualifying. In that instance the collector appointed had proceeded to the performance of his duty by distraining the personal property of one of the taxpayers and advertising same for sale at the county seat, but on the day of sale a crowd of 600 or 800 armed men assembled there, and not only prevented the sale, but compelled the collector to flee the county for his life, to which he had never returned.

It was by virtue of the clause in section 25 of the act in these words, to wit:

"And all taxes levied under this act shall be a lien on the real estate of the person taxed, which shall lie in the county in which such tax is levied"

—that appellant claimed that there was a lien on appellee's real estate for that sum, and it was because of his inability to collect it otherwise that he claimed that he was entitled to enforce this lien. The facts stated appeared from the allegations of the bill which were admitted to be true for the sake of the demurrer.

The lower court denied appellant the relief he sought on the ground that there was no legislation authorizing its granting. It has been earnestly and ably argued here that he is entitled to such relief; but, after carefully considering all that has been said, we are constrained to hold that the lower court's position was well taken, and that it was powerless to relieve the situation.

Before stating more in detail than above the grounds upon which it is claimed that appellant is entitled to the relief which he sought, we desire to make good the fundamental principle which underlies the lower court's decision and to indicate its scope. That principle is that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority. It seems to us that if one will enter into the possession of this principle and comprehend its full scope he will have no difficulty in reaching the conclusion that the decision was correct. The scope of the principle is that each step in the process of taxation from beginning to end can be taken only as the Legislature may prescribe. This is true of the levy of the tax, of the assessment of the property subject thereto, if it be an ad valorem tax, of the col-

lection of the tax, and of its disbursement after it has been collected. Courts of law by the writ of mandamus have power to compel persons charged with the performance of these duties to perform them. But in exercising such jurisdiction they do not to any extent exercise the power of taxation. That power is exercised only in the taking of any of the steps in the process of raising and disbursing taxes. It is not, however, within the scope of this principle that the judiciary shall in no event exercise this power of taxation. Its scope is that it shall not exercise it unless the Legislature shall so provide. If the Legislature does so provide, it may exercise it to the extent provided.

That this is a fundamental principle of jurisprudence, and that such is its scope, has been settled beyond question by the Supreme Court of the United States in the following cases, to wit: *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72; *Heine v. Board of Levee Commissioners*, 19 Wall. 655, 22 L. Ed. 223; *Barkley v. Board of Levee Commissioners*, 93 U. S. 258, 23 L. Ed. 893; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Thompson v. Allen County*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472.

Each one of these cases had to do with a tax duly authorized to be raised from the taxpayers within a certain political legal entity to pay certain obligations incurred by it, and in each one the tax had not been paid, and a United States Circuit Court had been appealed to for its assistance in enabling the holder of such obligations to obtain the tax. In the first three cases the tax had never been levied, and the relief sought was its levy, collection, and payment to plaintiff. No relief was sought as to the assessment of the property subject to the tax unless that was included in its levy. Possibly the assessment of property for general purposes answered the purpose of an assessment as to the particular tax involved. In the last two cases the tax had been levied and property assessed, and the relief sought was the collection of the tax and its payment to plaintiff.

We will first dispose of the three cases in which no levy had been made. In the *Rees* and *Heine* Cases there was opposition to the payment of the tax, and its levy had been evaded by the officials whose duty it was to make it, or so many of them as not to leave a quorum, resigning; in the *Barkley* Case there had been no evasion. The trouble there was that the political legal entity had ceased to exist and the officials whose duty it was to levy the tax had gone out of office with such cessation. In the *Rees* and *Barkley* Cases judgments had been obtained at law for the amount of the indebtedness and executions returned thereon unsatisfied; in the *Heine* Case no such judgment had been obtained. The indebtedness there was simply due and unpaid. In the *Rees* and *Heine* Cases the relief was sought in equity; in the *Barkley* Case at law, by the writ of mandamus. In all three cases the way in which levy, collection, and payment of the tax was sought was by a direction to the United States marshal for the district to levy, collect, and pay. It is not so clear that this was so in the *Heine* Case, at least from Mr. Justice Miller's opinion therein. But it appears from the brief of counsel for the appellant as given in the Lawyer's Co-operative Publishing Company's edition of the Supreme Court Re-

ports that such was the case. The suit had been originally brought against the officials whose duty it was to make the levy. They set up that they had resigned and disclaimed any interest in the matter. Thereupon an amended bill was filed against the defendants as representative taxpayers seeking to have the United States marshal directed to levy, collect, and pay the tax. The breadth of the opinion of Mr. Justice Miller calls for this condition of things. Otherwise it would have been sufficient to have limited the opinion to the case as made by the original bill and held that it was not maintainable because there was an adequate remedy at law, to wit, mandamus, of which the lower court had no original jurisdiction, but only as ancillary to a judgment for the amount of the indebtedness, which had not been obtained. He did not so limit the case, but considered it as if direction to the marshal to levy, collect, and pay had been sought, the right to which relief was not affected by the fact that no judgment had been obtained. In the Rees Case relief beyond a direction to the marshal to levy, collect, and pay was sought, in addition to such direction. It was sought also that the court itself apportion the indebtedness amongst the taxpayers and then direct the marshal to collect the apportioned amounts from each, or in default to sell his property, which Mr. Justice Hunt said would accomplish the same result as a direction to the marshal to levy, collect, and pay, but "under a different name."

The Supreme Court held in each one of these cases that the lower courts had properly denied the plaintiffs the relief sought; Justices Clifford and Swayne dissenting in the first two. And just here it is important to understand the reason why it so held, because appellant's counsel would deny these decisions any relevancy here because in those cases no levy had been made; whereas, here a levy and assessment had been made and the exact amount of tax due from the appellee had been ascertained before suit was brought. It was not because the machinery of a court of equity or a court of law was not adequate to making or bringing about a levy and assessment which are but steps in an apportionment. The Supreme Court, in the earlier case of *Lee County v. United States*, 7 Wall. 175, 19 L. Ed. 162, had affirmed the judgment of the United States Circuit Court for the District of Iowa in a case at law awarding a mandamus against the United States marshal for that district commanding him to levy and collect and pay a tax. This it did because there was legislation in Iowa authorizing similar action by its courts. In the case of *Rees v. Watertown*, Mr. Justice Hunt had this to say as to the adequacy of the machinery of a court of equity in this particular, to wit:

"The difficulty and embarrassment arising from an apportionment or contribution amongst those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and, if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity would make the apportionment more convenient than a court of law."

Mr. Justices Clifford and Swayne had no idea that there was any such inadequacy. They thought that the plaintiffs in the Rees and Heine Cases were entitled to the relief which they sought, placing their position on the ground that the tax was a trust fund and equity would

never suffer a trust to be defeated by the refusal of the trustee to administer the fund.

The real ground of the decision in each of these cases was the fundamental principle which we have put forward, to wit, that the power of taxation is legislative and cannot be exercised otherwise than as the Legislature provides. The lower courts had no power to direct a levy and assessment or itself to make one because to do so would be to exercise the power of taxation and this power had not been conferred on the judiciary by the Legislature. In the Rees Case Mr. Justice Hunt said:

"This power to impose burdens and raise moneys is the highest attribute of sovereignty and it is exercised, first, to raise money for public purposes only; and, second, by the power of the legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important."

In the Heine Case Mr. Justice Miller said:

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or nation. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute or to vest this power in some other tribunal. It certainly is not vested as in the exercise of original jurisdiction in any federal court. It is unreasonable to suppose that the Legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

And in the Barkley Case Mr. Justice Bradley said:

"The truth is that a party situated like the present petitioner is forced to rely on the public faith of the Legislature to supply him a proper remedy. The ordinary means have failed by the lapse of time and the operation of unavoidable contingencies. It is to be presumed that the Legislature will do what is equitable and just; and in this case legislative action seems to be absolutely requisite."

Such being the ground of decision in these cases, they are direct authorities in support of the position that where a levy and assessment has been made the judiciary have no power to collect and pay the tax whose amount has thus been exactly determined, since for it to exercise such power would be to exercise the power of taxation which it cannot do in the absence of legislation. If it cannot levy, collect, and pay because to do so would be to exercise such power, it cannot for the same reason collect and pay. Hence those decisions are relevant here, notwithstanding there has been a levy and assessment.

This brings us to the other two cases which are more in point because in each of them there had been a levy and assessment and the amount of tax due from each taxpayer had been rendered exactly ascertainable and the relief which was sought was limited to a collection

of the tax and payment thereof to the plaintiff. In the Garrett Case there had been no evasion of the indebtedness. The political legal entity there concerned was the city of Memphis. By mismanagement its financial affairs had gotten in a bad shape and it had become insolvent. A large portion of taxes which had been levied for general purposes and specifically to pay certain indebtedness had been allowed to remain uncollected past the time they should have been collected through carelessness and incompetency of the officials chargeable therewith. That suit was then brought in the lower court for the appointment of a receiver to, amongst other things, collect the unpaid taxes and apply those which had been so specifically levied on the debts which they had been levied to pay. Within a very short time after the bringing of the suit the Legislature of Tennessee took a hand in the matter. It repealed the city's charter and provided for the government of its territory in another way and for the appointment of a collector of the taxes which were unpaid whose duty it was to collect them and apply them to the purposes for which they had been levied, and that position was thereafter filled. The lower court granted the relief sought, but on appeal the Supreme Court reversed the decree and ordered the bill dismissed. This it did because the granting of the relief sought was an exercise of the power of taxation and that the lower court had no right to exercise in the absence of legislation. Mr. Chief Justice Waite announced the conclusions of the court in eight brief propositions. The third one is in these words:

"The power of taxation is legislative and cannot be exercised otherwise than under the authority of the Legislature."

It is here that we obtained the phraseology in which we have stated the fundamental principle in question.

In the fourth proposition, as to the taxes in question, he said that they could not "be collected through the instrumentality of a Court of Chancery at the instance of the creditors of the city." "Such taxes," he said, "can only be collected under authority from the Legislature. If no such authority exists, the remedy is by appeal to the Legislature, which alone can grant relief." Then as if there could be some possible question as to the scope of said principle, he said:

"Whether taxes levied in obedience to contract obligations or under judicial direction can be collected through a receiver appointed by a Court of Chancery if there be no public officer charged with authority from the Legislature to perform that duty is not decided, as the case does not require it."

Mr. Justice Field on behalf of himself and Justices Miller and Bradley delivered an opinion in which he set forth their reasons for concurring in those conclusions. In it he cited the Rees, Heine, and Barkley Cases as controlling of the case there involved, notwithstanding the fact that there had been no levy in either one of them, and a levy had been made in the case in hand. And for the reasons heretofore given it must be held that they were controlling. In the course of the opinion he recurred again and again to a statement of the fundamental principle which we are emphasizing as if he felt it important to drive it home. He said:

"In the distribution of powers of government in this country into three departments the power of taxation falls to the Legislature. It belongs to that department to determine what measures shall be taken for the public welfare and to provide the resources for the support and due administration of the government throughout the state and all its subdivisions. Having sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom it shall be enforced."

He quoted these words from the opinion of Mr. Justice Bradley in the lower court in the Heine Case:

"The judicial department has no power over the subject. If the officers who are charged with the duty of laying or collecting the taxes refuse to perform their functions, the court in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of mandamus, compel them to perform acts which are ministerial, as distinguished from judicial or discretionary. This is all that the judicial department can do on the subject, unless the Legislature has expressly conferred upon it further powers."

Again he said:

"These authorities—and many other to the same purport might be cited—are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies through which taxes are collected must belong to it."

And again he said:

"No federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the federal court, it cannot seize the power which belongs to the legislative department of the state and wield it in their behalf."

Finally, concerning the power of the federal judiciary, he said:

"It cannot make laws when the state refuses to pass them. It is itself but the servant of the law. If the state will not levy a tax or provide for one, the federal judiciary cannot assume the legislative power of the state and proceed to levy the tax. If the state has provided incompetent officers of collection, the federal judiciary cannot remove them and put others more competent in their place. If the state appoints no officers of collection, the federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of the state Legislature. It would ill perform the duties assigned to it by assuming the power properly belonging to the legislative department of the state."

Justices Strong, Swayne, and Harlan dissented. Justice Strong delivered a dissenting opinion. The ground upon which he based the position that the lower court had the right to appoint a receiver was the same as that upon which Justices Clifford and Swayne dissented in the Rees and Heine Cases. He contended that the decision in those and the Barkley Case was not controlling of the one in hand on what we think we have shown to be the untenable ground that in neither one of those cases had there been a levy; whereas, in that one there had.

This brings us to the other one of the two cases, the last one cited. Its origin is to be found in the reservation made by Mr. Chief Justice Waite in his fourth proposition, which we have quoted. It came from Kentucky. There a tax had been levied by the appropriate officials of

Allen county to pay two judgments rendered against it by the United States Circuit Court for the District of Kentucky for interest upon bonds issued by it in aid of a railroad, and the act under which the tax was levied provided for the appointment of a collector to collect the tax and pay it over in satisfaction of the judgment. By reason of the hostility of the citizens and taxpayers of the county, no one could be found who would accept the position of collector and perform the duties of the position. Thus was brought about the situation covered by that reservation. There was no public officer charged with authority from the Legislature to perform the duty of collecting the tax. Thereupon a bill in equity was filed for the appointment of a receiver to collect the tax, and the question was presented whether in that contingency it was proper to grant the relief sought. The county and 30 of the principal taxpayers thereof were made defendants, and the value of the assessed property of each and the amount of tax due from him was set forth in the bill. It was held that the plaintiff was not entitled to the relief he sought. The decisions heretofore considered, both those where there had been no levy and the Garrett Case, where there had been one, were cited as controlling. In his opinion on behalf of the court, Mr. Justice Miller said but little as to the power of taxation being legislative and not capable of being exercised otherwise than under legislative authority. He referred to it mainly in quotations made from the opinions in the previous cases. He gave the matter a somewhat different turn by emphasizing that what was asked was in effect the filling by the federal court of the vacancy in the state office of tax collector occasioned by the refusal of any one to act, which it had less right to do than to fill a vacancy in the position of United States marshal.

It was this fundamental principle that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority, recognized and applied in these cases, then, which lay at the bottom of the lower court's decision. And it was this principle, in connection with the position that section 25 of said act did not authorize the granting of judicial relief of the kind sought herein, that led the court to render the decree of dismissal. We will not now consider the question whether the act did contain such authority, but proceed to take up the grounds upon which it is urged that the lower court erred in so doing, which we are now in position to appreciate. In the course of the consideration thereof that question will arise for determination.

We do not understand that the inadequacy of the summary mode of collection provided for by section 25 due to the hostility of the taxpayers and the inability to get any one to act as collector and the absence of any other relief at law are relied on by themselves independently of any other consideration as affording a right to the equitable relief sought. So far as they are relied on at all, it is as a buttress to or part of other grounds. They certainly cannot be relied on as a ground of right to such relief in and of themselves.

This matter was dealt with in the cases we have analyzed, mainly in the Rees and Thompson Cases, and it was held that there was nothing in the general principle of equity jurisprudence that, all legal remedies

having failed, equity should give a remedy to warrant a court of equity granting relief in cases like those involved there and here. The scope of that principle is that the legal remedy in its nature or character must be inadequate, which cannot be said of the summary remedy provided by section 25. It is not sufficient that it is inadequate because those charged with executing it will not do so from fear or are prevented from so doing by hostility on the part of the taxpayers. In the Rees Case Mr. Justice Hunt said:

"The remedy is in theory and in law adequate. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: The writ of habere facias possessionem is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York confederations of settlers and tenants disguised as Indians and calling themselves such, who resisted the execution of this process in their counties and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a Court of Chancery. The enforcement of the legal remedy was temporarily suspended by means of illegal violence, but the remedy remained as before. It was the case of a miniature revolution. The courts of law lost no powers; the Courts of Chancery gained none."

And in the Thompson Case Mr. Justice Miller said:

"By inadequacy of the remedy at law is here meant, not that it fails to produce the money—that is a very usual result in the use of all remedies—but that its nature or character is not fitted or adapted to the end in view."

The statement of Mr. Justice Fuller in the case of Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005, that:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it is as efficient as the remedy which equity would confer under the same circumstances"

—and of Mr. Justice Blatchford in the case of Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82, that:

"Under section 723, Rev. St.,¹ the remedy at law, in order to exclude equity, must be *as practical and efficient to the ends of justice* and its prompt administration as the remedy in equity"

—which appellant's counsel have quoted, the italics being his, do not import any other doctrine. What is meant is that the remedy must be "as efficient" or "as practical and as efficient" in its nature or character.

Nor does the rule that equity has jurisdiction to subject property fraudulently conveyed by a debtor to the payment of his debts after judgment and return of an execution unsatisfied to which reference is made import otherwise. Such jurisdiction does not exist because otherwise the creditors cannot reach the property, but because the remedy which the law affords is so partial and insufficient in its nature and character that complete justice can only be done by means of the equity jurisdiction.

¹ U. S. Comp. St. 1901, p. 583.

There is then nothing in this general principle of equity jurisprudence to help appellant, at least in and by itself. Indeed, the fundamental principle of jurisprudence that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority negatives its application in such a case as we have here. That principle we understand to be one of universal application, admitting of no exception or qualification. The two principles in a case of this sort cannot, therefore, stand together. One or the other must give way.

The main ground relied on by appellant's counsel as entitling appellant to the relief sought—he states it as if it were the only ground—is that this is a case for the exercise by a court of equity of its jurisdiction to enforce liens. The exact amount due from the appellee has been ascertained or rendered ascertainable by the levy and assessment which has been made, its obligation to pay this amount is fixed, a lien to secure its payment exists by virtue of section 25 of the act on appellee's real estate in the county, the bill describes that real estate specifically and seeks to have it subjected to the payment of the tax as liens are enforced in equity, and the enforcement of liens is one of the heads of equity jurisdiction. In the exercise of such jurisdiction, therefore, it is argued appellant should have been granted the relief sought. He thus states it; the italics being his:

"The only question in the case is as to whether or not a court of equity has jurisdiction to *enforce a lien upon property securing a fixed obligation to pay a fixed sum of money* by decreeing a sale of the property for that purpose. We cannot see any other question in the case, and we cannot see how any but an affirmative answer can be given to the question."

We do not understand that there is involved in this position any claim that the Legislature intended by section 25 that the lien created by it should be enforced in this way. The position is that, irrespective of the question whether the Legislature so intended, appellant was entitled to so enforce it. It has created a lien; it has done that at least; equity has jurisdiction to enforce liens; the amount of the lien has been fixed by the levy and assessment—there is, therefore, no hindrance to equity exercising its jurisdiction in this particular, and it should exercise it and give the relief sought. Such we think is a fair statement of the position.

It is claimed that, in that this case presents this question, it differs from each one of the cases analyzed above, and is thereby taken from under them. It must be conceded that in this particular this case does differ from those cases. But in saying this we do not mean that in none of those cases was there a lien to secure the tax. This would not be true. For instance, in the Barkley Case, Mr. Justice Bradley said:

"Much reliance is placed by the counsel of the petitioner on the fact that the taxes described to be imposed by the acts of 1858 and 1859 were made a first lien and privilege upon the property liable thereto. We do not see how this can affect the present application. Liens for taxes are very generally created throughout this country; but it is never supposed that the public creditors to whom the money raised by the tax is to be paid have the benefit of such lien. It is created for the public authorities to enable them with greater certainty and facility to collect the taxes, without the embarrassment of other pretended claims against the property."

And in the Thompson Case the act authorizing the tax sought to be collected—which was an act of the Legislature of Kentucky—contained a provision like that which we have here, and counsel for the appellant, as appears from the synopsis of his brief in the Lawyer's Co-operative Publishing Company's edition of the Supreme Court reports, urged the existence of this lien on the Supreme Court as a reason why appellant should be adjudged entitled to the relief he sought. He said:

"The taxes here levied are by law a lien on the property against which they are assessed. They are made so by express provision of statute. It is the peculiar province of a court of equity to enforce liens where no other mode of enforcing them exists. We do not claim that such a lien exists until the levy is made. This distinguishes this case from *Rees v. Watertown* and *Heine v. Levee Commissioners*."

The particular wherein this case differs from those in the matter of lien is that there the suit was not to enforce the lien—in the *Barkley Case* it was for mandamus to the United States marshal directing him to levy and collect the tax from all the taxpayers, and in the Thompson Case it was for the appointment of a receiver to collect the tax from all the taxpayers—whereas, the suit here is against a single taxpayer, the real estate subject to the lien is specifically described in the bill, and the lien is sought to be enforced.

The position here taken involves that if it had occurred to the counsel for the judgment creditor in the Thompson Case to sue each of the taxpayers separately and to shape his bill as the one here has been shaped, which the facts warranted him in doing, the result in that case would have been different. He lost his case because he did not pursue the right course.

No authority exactly in point is relied on to uphold the position, but cases which are claimed to be analogous are cited to that effect. They are: *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157; *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 493, 66 N. E. 395.

Each of these cases involved a statutory lien; the first two a mechanic's lien and the other a lawyer's lien. The statute in the first case provided for an action at law to enforce the lien, and the question was whether the federal court sitting in equity had a right to enforce it notwithstanding the remedy at law. It was held that it had. In the second case the question was whether the defendant was entitled to a trial by jury, and it was held that he was not. And in the last case the statute provided a remedy for the enforcement of the lien, and the question was whether the lien was enforceable in equity. It was held that it was. The ground of decision in all three of these cases was the same, to wit, that the enforcement of liens was an equitable proceeding. In the first case Mr. Justice Brewer said:

"The foreclosure of a mechanic's lien is essentially an equitable proceeding."

In the second case Judge Elliott said:

"A court of equity has jurisdiction to foreclose liens by decree of foreclosure. One of the maxims of equity jurisprudence is that 'equity acts spe-

cifically,' and, under this maxim, Courts of Chancery have assumed jurisdiction to foreclose liens upon real property."

And in the last case the court said:

"Actions to establish and enforce liens are among those most familiar to equity jurisprudence."

These cases, however, are not analogous to the one at hand. They did not have to reckon with the fundamental principle that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority; whereas, this case does have to reckon therewith. No tax was involved there; whereas, a tax is involved here. This consideration removes these cases from our pathway. What then is the effect of this difference between this case and those we have analyzed as a matter of principle? Is it such as to take this case from under them? We think not. It is true that here the matter is presented in such a way that to grant the relief has less the appearance of in effect appointing a tax collector—as it were filling the vacancy in that office. But, whether or not such is its effect in reality, to take jurisdiction of it is certainly to exercise the power of taxation. Whenever a court takes jurisdiction of a suit against an individual taxpayer for his tax it exercises the power of taxation—it in that way undertakes to collect the tax—and it follows from our fundamental principle that it cannot rightfully do so unless the Legislature has authorized it. If the judgment creditor in the Thompson Case had been entitled to sue separately each one of the 30 taxpayers made defendants to his bill to enforce the lien on their real estate—which he was entitled to do if appellant's contention here is sound—it is strange that neither Mr. Justice Miller nor Mr. Justice Harlan in their opinions did not refer to the matter, and that it was not held that there was nothing fundamentally wrong in the judgment creditor's case, and that he had simply mistaken the course to be pursued to get his money. We fail to see anything in Mr. Justice Miller's statement in the course of his opinion as to how a court of equity enforces its decrees as contrasted with the mode in which a court of law enforces its judgment, quoted and emphasized by counsel, that indicates that he thought that the judgment creditor could properly have taken the course pursued here.

Then, if there is any virtue in this position, it is immaterial that the tax was uncollectible otherwise than by a suit in equity. Had there been a collector duly appointed, willing to perform his duty, and no hostility on the part of the taxpayers to its collection, yet, if it was due and unpaid, appellant would have had the right to sue each taxpayer in equity for the amount of the tax and subject his real estate to its payment. In the first of the three cases relied on as analogous to this case it was held that the federal court sitting in equity had jurisdiction to enforce the lien notwithstanding the fact that there was an adequate remedy at law. And in the last one it was held that a court of equity had jurisdiction to enforce the lien notwithstanding the statute provided another remedy which was available, but had not been pursued.

Appellant's counsel seems unwilling to go this length, for, though, in the quotation we have made from his brief, he makes no mention of

the fact of the uncollectibility of the tax otherwise than in equity as being essential to the validity of his position, in the course of his presentation thereof he lays stress thereon and seemingly thinks it is.

In considering this position we make no point of the fact that it is the judgment creditor of the Caseyville district, and not that district or its collecting officer, that is asserting the right to enforce the lien. That consideration will be alluded to in connection with the other ground upon which appellant's counsel maintains that appellant was entitled to the relief sought.

That ground is that legislative authority for the suit is to be found in section 25. In view of counsel's reference to the other ground relied on, which we have just considered, as representing the sole question in the case, it is not entirely certain that he claims that legislative authority for the suit is to be found there. But in view of the extended consideration he has given to the Kentucky authorities bearing on the question of the right to sue a taxpayer for his taxes and the great reliance placed on the last one as having bearing on this case, we will take it for granted that it is so claimed. At any rate, the matter should be dealt with so as to cover the case completely.

The question then is whether the Legislature by that section authorized a suit against the taxpayer for the collection of the tax, and that by a holder of the bonds authorized to be issued by the act either before or after a judgment had been obtained for the amount thereof and the return of an execution thereon unsatisfied. It is not sufficient that this section authorized a suit to be brought to collect the tax. It is essential that it be held also that it authorized a suit by such a holder as here. This is so because here again comes in our fundamental principle to regulate matters and say what can be done. If the power of taxation is legislative, then it can be exercised by the judiciary so far as and no farther than the Legislature says. It is not for the judiciary to make up for any deficiency in the legislation; otherwise it cannot be said that the power of taxation is legislative. The cases in Kentucky dealing with the right to sue for taxes are quite numerous. They are as follows, to wit: *Portland Dry Dock & Ins. Co. v. Trustees of Portland*, 12 B. Mon. 77; *Johnston v. City of Louisville*, 11 Bush, 527; *McLean County Precinct v. Deposit Bank*, 81 Ky. 254; *Louisville Water Co. v. Hamilton*, 81 Ky. 523; *Greer v. City of Covington*, 83 Ky. 410, 2 S. W. 323; *Baldwin v. Hewitt, Auditor*, 88 Ky. 680, 11 S. W. 803; *Louisville Water Co. v. Com. of Kentucky*, 89 Ky. 248, 12 S. W. 300, 6 L. R. A. 69; *Clark v. Louisville Water Co.*, 90 Ky. 524, 14 S. W. 502; *Louisville Trust Co. v. Muhlenberg Co.*, 23 S. W. 674, 15 Ky. Law Rep. 397; *Grand Rapids School Furniture Co. v. Trustees District No. 29, Pike County*, 102 Ky. 556, 44 S. W. 98; *City of Covington v. District of Highlands*, 113 Ky. 612, 68 S. W. 669; *City of Lexington v. Wilson*, 118 Ky. 221, 80 S. W. 811.

We will refer to these cases by the name of the plaintiff in the lower court, and we will omit all reference to the Louisville Trust Company Case until we have disposed of all the rest. It is the City of Lexington Case, the last of the series, upon which so much reliance is placed. The cases are not in entire harmony. But it was not until the District of Highlands Case followed by the City of Lexington Case

that discord arose. The cases in which it was held that suit was maintainable are the following, to wit: Trustees of Portland, City of Covington, District of Highlands, and City of Lexington Cases, four in all. They will be considered in detail later. The cases in which it was held that the suit was not maintainable were the City of Louisville, Deposit Bank, Hewitt Auditor, Commonwealth of Kentucky, the Grand Rapids School Furniture Company, five in all. In none of these cases was there legislation authorizing the bringing of a suit for the tax involved. The City of Louisville, Hewitt Auditor, and the Commonwealth of Kentucky Cases were each one a suit against an individual taxpayer to recover the amount of his tax. And it was a suit by or on behalf of the political legal entity to whom the tax was due. The first two were at law, and a personal judgment was sought. The last one was in equity, and the relief sought was the appointment of a receiver to collect sufficient money to pay the tax from the resources of the defendant and pay same to the plaintiff. The usual summary remedy for the collection of the tax existed in each case. In the City of Louisville Case there was no question as to its adequacy to yield the tax. The tax was otherwise collectible than by suit. In the other two cases the tax was not otherwise collectible. In the Hewitt Auditor Case this was so because it was a suit against a personal representative of a decedent who had disbursed the entire estate in his hands. In the Commonwealth of Kentucky Case this was so because the defendant was a public service corporation, to wit, a water company, and its assets were not subject to seizure and sale. The Deposit Bank and Grand Rapids School Furniture Company Cases were, neither one, a suit against an individual taxpayer. Each sought the collection of the tax from all the taxpayers, and it sought to collect them in equity through the appointment of a receiver. In neither one of them was the suit by or on behalf of the political legal entity to whom the tax was due. In each case the tax had been duly levied, the same as here, and the suit was by the creditor of that entity for whose benefit it was levied and who would be entitled to it when collected. In the Deposit Bank Case no judgment had been obtained for the debt; in the School Furniture Company Case one had been obtained. The tax was not otherwise collectible than by the suit brought to collect it. This was so in each instance because no one would accept the appointment of tax collector, no doubt for the purpose of evading the payment of the tax. Each case was, therefore, substantially similar to the Supreme Court case of *Thompson v. Allen County*, above considered; the only difference being that in the Deposit Bank Case no judgment had been obtained for the debt. But this was not a material difference, and that case was cited by the Supreme Court in the *Thompson Case* as justifying its position.

In the *Hamilton and Clark Cases* the question was not really involved whether suit could be brought for the tax in question therein. Neither was a suit against a taxpayer. Each was a suit by a taxpayer against a representative of the political legal entity to whom the tax was due. The taxpayer was a public service corporation, to wit, the *Louisville Water Company*, defendant in the *Commonwealth of Kentucky Case*. Its assets were not subject to seizure and sale, and the

suit was brought to enjoin the personal representative from seizing and selling any of its assets to pay the tax. The validity of the tax was questioned. It was held that the plaintiff was entitled to the relief sought, but on condition that it first deposit the amount of the tax in court; if it did not do so, it would be left to its legal remedies. This was in accordance with a well-recognized principle of granting injunctive relief in such cases. *German National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91; *People's Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180.

The court perhaps went farther than it had a right to do or there was any necessity of doing in saying that if the tax was not so deposited the chancellor should place the management of the corporation in the hands of a receiver to collect the tax. These cases are not an authority for the position that suit might have been brought on behalf of the political legal entity to whom the tax was due against the taxpayer for the collection of the tax, and there is not the slightest conflict between them and the *Commonwealth of Kentucky Case*, in which it was distinctly held that no such suit could be brought.

This takes us back to the four cases in which it was held that a suit was maintainable. Each case was a suit against an individual taxpayer, and it was brought by the political legal entity to whom the same was due. In the *City of Covington Case* there was express legislation authorizing the bringing of the suit. In neither one of the other three was there any such legislation. In the *Trustees of Portland Case* the Legislature had imposed a specific tax on an insurance company in favor of the trustees, and the suit was brought to recover the tax so imposed. Judge Marshall said:

"It is objected that the action of debt cannot be maintained for the demand disclosed in the declaration, but that, if the plaintiffs are entitled to it at all, they should collect it as they do their ordinary taxes. But as the sum is certain and due by statute, and as debt is the ordinary remedy upon statutes, we do not perceive why, if the defendants are certainly bound to pay the tax to the plaintiffs, the action of debt may not be maintained, even if they might resort to a more summary mode of coercion. If a statute prohibit an injury under a certain penalty to the party injured, he may sue for it in debt, though neither the right nor the form of the action be expressly recognized in the statutes. 1 Chitty's Pleadings. Much more, if the Legislature may require payment of a certain sum by one person to another, should the person entitled to it be allowed to maintain an action of debt against the party who being bound to pay it actually owes it. If the statute creating the liability had presented a different remedy, the case might be different. But the mere fact that the statute creating this liability calls it a tax does not in our opinion preclude the remedy by action."

It is plain from this that the statute imposing the tax prescribed no remedy for its collection, for he said that if it had done so the "case might be different." He did say, however, in response to the suggestion that the tax should be collected as ordinary taxes were collected, that the action was maintainable notwithstanding that it might be so collected. The decision in this case is in no way in conflict with any of the cases in which it was afterward held that a suit was not maintainable. The *District of Highlands Case* was a suit against a public service corporation, to wit, the city of Covington.

which owned and operated its own waterworks, to recover tax due from property owned by it in the district of Highlands, a political legal entity. It thus presented the identical question decided in the Commonwealth of Kentucky Case, and, had the decision in that case been followed, it should have been held that the suit was not maintainable. But upon the erroneous notion that the decisions in the Hamilton and Clark Cases in holding that, before an injunction would be granted at the instance of a public service corporation restraining the seizure and sale of its assets to pay a tax which it claimed to be invalid, a deposit of the amount of the tax should first be made, were inconsistent with the decision in the Commonwealth of Kentucky Case, it was held that the suit was maintainable. Thus for the first time discord arose.

The City of Lexington Case was a suit by that entity to recover an occupation tax imposed on a livery stable keeper by an ordinance thereof. No remedy was provided for its collection. The case was more like the Trustees of Portland Case than any of the previous ones that preceded it and was perhaps governed by it. We see no reason to question its soundness. In the opinion therein practically all the previous cases were reviewed. The decisions in the Hewitt Auditor and Commonwealth of Kentucky Cases were disapproved, and that in the District of Highlands Case approved. No disapproval was expressed of the decisions in the City of Louisville and City of Covington Cases. The decisions in the Deposit Bank and Grand Rapids Furniture School Company Cases were expressly approved; but their holding was placed on too narrow a ground, to wit, that what the court of equity was asked to do in those cases was to fill the vacancy in the office of tax collector. It may be that that was in reality what was asked to be done. But the decisions should be placed on the broader ground—as they are placed by the opinions therein—that what was asked of the court of equity therein was the exercise of power of taxation and there was no legislation authorizing it.

Now we fail to find anything in any of these four cases, in which it has been held that a suit was maintainable, upholding the suit herein. The City of Lexington Case, which is most relied on, certainly does not. The decision therein is simply that where a tax is imposed, and no remedy whatever is provided for its collection, it may be collected by suit on the ground that the Legislature must have intended that it should be collected in some way. It recognizes our fundamental principle and upholds the suit because there is legislative action authorizing it. The opinion, however, goes farther than the point actually necessary for decision, and, in so doing, it finds support in the District of Highlands Case that, though a remedy may be provided, yet, if in its nature or character the remedy provided is inadequate to the collection of the tax, there too, as well as where no remedy at all is provided, an intention on the part of the Legislature that it may be collected by suit will be inferred, and a suit to collect it will be upheld because there is legislation authorizing it. But we do not think it is to be gathered from the point decided or anything said in the opinion that it will be inferred that the Legislature intended that if the tax

could not be collected by reason of the fact that no one can be found to act as tax collector, or if one can be found the taxpayers will not let him collect it, it may be collected by suit. To the contrary of this, it seems to us, it is said in the opinion as follows:

"The court also recognizes the rule of this court to be that, when the Legislature has prescribed a full and adequate remedy for the collection of taxes, the authority to resort to any other remedy for their collection is denied."

There is no room to claim that by full and adequate remedy was meant other than that the remedy should be full and adequate to meet the situation as it may exist otherwise than where no one will act as collector or the taxpayers will not allow him to collect the taxes. The Legislature should not be held to have contemplated such a situation. It would certainly be farfetched to hold that it did so contemplate, and that at a time when almost every one was in favor of railroads and willing to go down in their own pockets to help build them.

But, however all this may be, there is not the slightest warrant in the Trustees of Portland, District of Highlands, and City of Lexington Cases, or either of them, for the bringing of a suit by the judgment creditor of the political legal entity in whose favor the tax may be imposed. They were all suits by the political legal entity itself, and it is somewhat significant that the only two cases considered above wherein the suit was brought by the creditor and not by the political legal entity and held not maintainable were set aside to themselves and expressly approved in the City of Lexington Case.

This leaves for consideration the Louisville Trust Company Case, which we have left for consideration by itself. We have done this because it is so similar to the case in hand. In that case bonds had been issued in compromise of former bonds, and the suit was to collect the tax imposed for their payment. The act under which the original bonds were issued contained a provision exactly similar to the one in the act here. The act under which the compromise bonds were issued contained a provision as to lien also, in somewhat different phraseology. It provided that "said county shall have a lien," etc. The bonds do not seem to have been reduced to judgment. The tax was not otherwise collectible than by that suit because no one would act as collector. The suit was by the holder of the bonds against the entity and a number of the property owners thereof seeking to enforce the tax liens. The case differs from the case here in that the provisions as to the lien in the act under which the compromise bonds were issued said that "said county shall have a lien"; whereas, the act here did not in so many words say who should have the lien. The suit there was against more than one taxpayer; whereas, here it was against a single taxpayer. And it does not appear that the property of the taxpayers sought to be sold was specifically described in the bill; whereas, here it is. We do not see sufficient in these differences to lead to a difference in decision. It was held that the suit was not maintainable. Judge Hazelrigg said, referring to the two lien provisions:

"It will be observed that the language of these provisions is substantially the same as that employed in the General Statutes of the state creating similar

tax liens, so that there was no intention to give the county any other lien than that which existed prior to the passage of these acts, or to afford any additional or extraordinary remedy for the enforcement of such lien. These liens cannot be enforced in equity; courts cannot be transformed into tax collectors."

We are unable, therefore, to find anything in the decisions of the Court of Appeals of Kentucky upholding the position that the Legislature intended that the lien created by section 25 should be enforceable by suit, much less that it should be enforceable by the holder of the bonds authorized to be issued by the act. On the contrary, we think that those decisions are conclusively against this position.

Is it to be said then that we have a case here of a wrong without a remedy? No. It is not a case of a wrong without a remedy. It is a case of a wrong without a judicial remedy. It is a case of a wrong where there is a remedy, but that remedy is legislative, not judicial. It is important that the position should be maintained that every wrong should have a remedy, but it is equally important that it should be maintained that wrongs should be remedied in the right way and not in a wrong way.

The decree of the lower court is affirmed.

PRESTON v. CALLOWAY et al.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1910.)

No. 2,039.

COURTS (§ 264*)—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUIT.

A suit in equity in a federal court to enforce payment of a tax in order to obtain satisfaction to that extent of a judgment rendered by such court, although original in form, is ancillary to the original action and within the jurisdiction of the court irrespective of the amount in controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. § 264.*]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Suit in equity by A. J. Preston against F. W. Calloway and Eleanor L. Calloway, William A. Jones, and A. C. Jones. Decree for defendants, and complainant appeals. Affirmed.

Helm Bruce (Helm & Helm, of counsel), for appellant.

H. X. Morton and James F. Fairleigh, for appellees.

Before SEVERENS and WARRINGTON, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This case is exactly like that of A. J. Preston v. Sturgis Milling Company, 183 Fed. 1, in which an opinion has been handed down simultaneously herewith, except that it concerns another taxing district of Union county, to wit, the Lindle Mills district, and the amount in controversy is less than \$2,000.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The amount of the tax sought to be collected by the enforcement of the lien created by section 25 of the act referred to in the other opinion (Sess. Acts 1869-70, c. 366) is \$1,478.40. The appellee raised the question of jurisdiction in the lower court by demurrer to the bill, which was overruled and the jurisdiction sustained. We think this holding was sound. The object of the suit was to enforce payment of the tax in order to obtain satisfaction to that extent of the judgment theretofore rendered by the lower court on its law side. Though the bill was in form original, it was ancillary in its character, and hence the court had jurisdiction irrespective of the amount in controversy. *Riggs v. Johnson*, 6 Wall. 166-187, 18 L. Ed. 768; *Pacific R. R. of Mo. v. Missouri Pacific R. R. Co.*, 111 U. S. 505-522, 4 Sup. Ct. 583, 28 L. Ed. 498; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Central Nat. Bank v. Stevens*, 169 U. S. 464, 18 Sup. Ct. 403, 42 L. Ed. 807; *Phelps v. Mutual Reserve Fund Life Ass'n*, 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717; *Hatcher v. Hendrie, etc., Co.*, 133 Fed. 267, 68 C. C. A. 19; *Brun v. Mann*, 151 Fed. 145-150, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

The other questions in this case are covered by the opinion in the other case.

The decree of the lower court is affirmed.

PRESTON v. CHICAGO, ST. L. & N. O. R. CO.

(Circuit Court of Appeals, Sixth Circuit. November 28, 1910.)

No. 2,038.

TAXATION (§ 584*)—RIGHT OF ACTION FOR COLLECTION OF TAXES—EXCLUSIVENESS OF STATUTORY REMEDY.

The remedy provided by Ky. St. § 4104 (Russell's St. § 6105), for the collection of taxes due from a railroad company to a county or other taxing district by an action in the name of the commonwealth to be brought by the officer authorized to receive such taxes, is exclusive, and a railroad company is not otherwise suable for taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1185-1191; Dec. Dig. § 584.*]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Suit in equity by A. J. Preston against the Chicago, St. Louis & New Orleans Railroad Company. Decree (175 Fed. 487) for defendant, and complainant appeals. Affirmed.

Helm Bruce (Helm & Helm, of counsel), for appellant.

Edmund F. Trabue, John C. Doolan, and Attilla Cox, Jr. (Blewett Lee and Charles L. Sivley, of counsel), for appellee.

Before SEVERENS and WARRINGTON, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This case is similar to that of *Preston v. Sturgis Milling Company*, 183 Fed. 1, in which an opinion has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been handed down simultaneously herewith in that it is a suit to recover a portion of the tax levied under the acts of the Legislature of Kentucky therein referred to. It differs in that the suit is against a public service corporation, to wit, a railroad company. At the time of the levy of the tax, the appellee's railroad ran through Caseyville district involved in the case of *Preston v. Sturgis Milling Company*, and also through Lindle Mills district involved in the case of *Preston v. Calloway*, 183 Fed. 19, also decided simultaneously herewith. It was alleged in the bill and amended bill that, at the time of the levy of the tax which was made by the county court of Union county as authorized by the act, that court found and determined that $9\frac{1}{2}$ miles of appellee's railroad was located in the former district and $4\frac{42}{100}$ miles in the latter, which finding and determination was true, and that for the year in which the levy was made its railroad within the state had been assessed by the Railroad Commission for each mile thereof at the sum of \$7,000. According to this the amount of tax owing by the appellee on account of its mileage in the Caseyville district was \$22,887.65, and on account of its mileage in the Lindle Mills district was \$4,356.35, which sums the suit was brought to recover. It was claimed that a lien existed on that portion of its railroad for those sums, and the relief sought was a sale of the entire railroad to raise them, or, if that could not be had, the appointment of a receiver. The bill as amended was dismissed on demurrer, the same as in the other two cases.

It is urged on behalf of appellee that there has been no valid assessment of its property within either of those districts because in order to the validity of an assessment thereof it was essential that the Railroad Commission find and determine its mileage in each; the county court having no jurisdiction in the matter. The cases of *Commonwealth of Kentucky v. C. & O. R. R. Co.*, 122 Ky. 283, 91 S. W. 1137, and *C. & O. R. R. Co. v. Vanceburg & Stout Lane Tr. Co.* (Ky.) 104 S. W. 951, tend to bear out this contention; but we do not find it necessary to decide this question.

It is sufficient to say that what the lower court was asked to do was to exercise the power of taxation, that that power is legislative, incapable of being exercised otherwise than under legislative authority, and that there is no legislation in Kentucky authorizing the bringing of this suit. As the appellee is a public service corporation, were we left to section 25 of the act (Sess. Acts 1869-70, c. 366), possibly in view of the decisions of the Kentucky Court of Appeals in the *District of Highlands* (113 Ky. 612, 68 S. W. 669), and the *City of Lexington* (118 Ky. 221, 80 S. W. 811) Cases, referred to more fully in the opinion in the *Sturgis Milling Company Case*, it would have to be held that appellee was suable for the taxes, but not by the appellant. However, we are not left to that statutory provision. By section 4104 of the Kentucky Statutes (Russell's St. § 6105), it is provided as follows:

"Taxes, penalties and interests due the commonwealth from any railroad or bridge company may be recovered by the auditor of public accounts by action in the name of the commonwealth in the Franklin circuit court; and those due any county, city, incorporated town or taxing district may be re-

covered by the officer authorized to receive the same by action in the name of the commonwealth in any court of competent jurisdiction."

The taxes in suit here were due those two taxing districts. This provision of the Statutes of Kentucky must be accepted as exclusive. A railroad company is not otherwise suable for taxes due from it.

Appellant's counsel would apply here equitable principles which have been applied in suits against private corporations by its creditors to reach its assets. But such principles can have no application here because what is sought is that the court exercise the power of taxation which it cannot do otherwise than under legislative authority, and there is no legislation authorizing the bringing of such a suit as is brought here. It helps him not that there is no officer to bring the suit authorized by said section 4104. His appeal should be to the Legislature for relief and not to the courts.

The decree of the lower court is affirmed.

THOMAS J. CARROLL & SON CO. v. McILVAINE & BALDWIN.

(Circuit Court of Appeals, Second Circuit. November 18, 1910.)

No. 56.

1. TRADE-MARKS AND TRADE-NAMES (§ 86*)—SUIT FOR INFRINGEMENT—LACHES.

Delay in bringing suit for infringement of a trade-mark, which would bar the right to recover damages for prior infringement, will not necessarily constitute such laches as to preclude relief in equity against further infringement; the matter being within the discretion of the court, to be exercised in view of the circumstances of the particular case.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. § 86.*]

Laches as a defense in suits for infringement, see notes to *Taylor v. Sawyer, Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

2. TRADE-MARKS AND TRADE-NAMES (§ 86*)—INFRINGEMENT—RIGHT TO INJUNCTION—LACHES.

Complainant and its predecessors in Baltimore and defendant and its predecessors in New York City, each for more than 30 years, produced and sold a rye whisky under the name of "Baltimore Club." Very little of complainant's whisky was sold in New York until a short time before the suit, and the reputation and market for the brand there was created by defendant. In 1882 complainant's predecessor learned of the use of the name by defendant's predecessor, and called on him in reference thereto; but such use was continued for more than 20 years thereafter without objection from complainant. The labels in general use by the respective parties were quite distinctive and dissimilar; but a short time before the bringing of suit "Baltimore Club" whisky appeared in the New York market bearing complainant's name as maker and with labels on the bottles closely simulating those of defendant. *Held*, that complainant's laches, conceding priority of its use of the name, was such as under the circumstances disentitled it to an injunction restraining defendant from using it in the territory where it had established its business and the reputation of its goods during the intervening years.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. § 86.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Thomas J. Carroll & Son Company against McIlvaine & Baldwin, a corporation. Decree (171 Fed. 125) for defendant, and complainant appeals. Affirmed.

C. P. Goepel, for appellant.

Parsons, Closson & McIlvaine (Tompkins McIlvaine, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. About 40 years ago the predecessors of the parties to this suit were engaged in the sale of whisky; one of them in Baltimore, and the others in New York. Each of them denominated a blend of whisky in which he dealt "Baltimore Club," and his whisky became known among his customers by that name. We are satisfied that neither appropriated the other's name. There is nothing surprising in the circumstance that it occurred to two different persons at about the same time that "Baltimore Club" might be an appropriate and attractive brand for a good grade of whisky. The question presented is, Which first used the words in that way? because the first user, if he did not abandon his use, would be entitled to maintain the trade-mark thus obtained against a later user.

On the part of complainant convincing evidence was produced showing the use of the words "Baltimore Club" by Charles Carroll as a trade-mark on packages containing whisky sold by him as early as April, 1870. This was shown by entries in the books of Carroll, and by the testimony of a clerk employed by him at the time. Carroll himself was dead, and his evidence was not available. We need not discuss this branch of the case, because defendant conceded in his brief that Thomas G. Carroll first used the name "Baltimore Club Rye Whisky" in April, 1870. The testimony shows convincingly that he, the firm of Thomas G. Carroll & Son, and complainant have been ever since selling whisky thus marked, although apparently not in very large quantities. They registered the trade-mark "Baltimore Club" in November, 1874, under the act of 1870, again in June, 1881, under the act of 1881, and again in March, 1906, under the act of 1905.

In view of the concession that April, 1870, was the complainant's earliest date, it will not be necessary to consider so much of defendant's testimony as indicates the use of the name "Baltimore Club" by its predecessors subsequent to that time. The evidence relied on to show an earlier use is meager and unpersuasive. Lapse of time has greatly embarrassed defendant in its efforts to obtain testimony. Reed McIlvaine, who had founded the old firm of McIlvaine & Baldwin, died in 1902. His partner died in 1899. The corporation defendant was formed to take over the old business in 1902. Its president, who had become connected with the old firm in 1888, testified that shortly afterwards the place of business was changed from its former location in Dey street, and the old books of McIlvaine and of McIlvaine & Baldwin were left when they moved. He says:

"Our customers had changed a good deal, and the books were not complete, entirely; so we left the old books, thinking they were of no value, together with several old safes. The safes were sold, and the books left there. That was about 1903."

Whatever employes may have been with the firm during its early years had presumably died or disappeared. None of them was produced. Two personal friends of Mr. McIlvaine were called to the stand. One of them, Mr. Wells, testified that McIlvaine & Baldwin became partners prior to the death of the witness' brother in 1871, and that before that Reed McIlvaine was in the wine and liquor business under his own name. Asked what is his recollection as to "Baltimore Club" whisky, he said:

"Well, it seems that as long as I recollect Mr. McIlvaine being in the business I recollect Baltimore Club. I never drank whisky before 1875; therefore, I could not say the exact date; but I know then I drank it."

The other witness was Mr. McCullagh. He was the son-in-law of Mr. Thomas McMullen, a wine merchant, who started McIlvaine in business; the latter having sold wines for McMullen on commission since about the year 1865. Witness himself went into business January 1, 1868, which enables him to fix the date when he first came in touch with Mr. McIlvaine as either 1868 or 1869. Asked when he recollects first seeing "Baltimore Club" whisky, he answered:

"It is hard to tell that. It is an awful long time ago. I remember seeing it in Mr. McMullen's office. He kept it for his own use in a little cupboard, a little locker behind his desk. He got it from Mr. McIlvaine—McIlvaine & Baldwin."

This comes very far short of proving commercial dealing in whisky thus branded. For aught that appears, the bottle in Mr. McMullen's desk may have been one submitted to him for his opinion as a practical business man whether or not the proposed name would be sufficiently attractive to be worth pushing on the market.

This is all the testimony relied on to show an earlier use by defendant's predecessor, and we do not find in it sufficient to antedate the commercial use by Mr. Carroll of "Baltimore Club" as a trademark for whisky in April, 1870, which, as we have seen, is clearly established by uncontroverted testimony.

It is contended by defendant that the delay in bringing this suit, which was begun in 1907, constitutes such laches as should require a dismissal of the bill. The firm of Thomas G. Carroll & Son was formed to take over the business of Thomas G. Carroll in 1895. The successor corporation was formed in 1904. Mr. Carroll knew of Messrs. McIlvaine & Baldwin's dealings in so-called "Baltimore Club" whisky in 1882, and it is apparent that McIlvaine & Baldwin have been continuing such dealings ever since. This would seem to be sufficient to disentitle complainant to a decree for an accounting; but the question whether its delay will also disentitle it to injunctive relief calls for a more careful examination of the law and the facts.

The Supreme Court, in *Menendez v. Holt*, 128 U. S. 541, 9 Sup. Ct. 145, 32 L. Ed. 526, held that in that case:

"Delay in bringing suit there was, and such delay as to preclude recovery of damages for prior infringement; but there was neither conduct nor negligence which could be held to destroy the right to prevention of further injury."

It seems impossible to make out from the report how long the delay was in the *Menendez Case*. In its opinion the court says:

"The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has continued so long and under such circumstances as to defeat the right itself. Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, it lasts no longer than the silence from which it springs. It is, in reality, no more than a revocable license."

This broad language is, however, qualified in the next succeeding paragraph:

"At the same time, as it is in the exercise of a discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, a court might hesitate as to the measure of relief, where the use by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand."

The distinction thus indicated is well illustrated by the action of the same court when the group of "*Hunyadi*" cases came before it 12 years later. *Saxlehner v. Eisner*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; *Saxlehner v. Nielsen* (and other cases) 179 U. S. 43 et seq. 21 Sup. Ct. 16, 45 L. Ed. 77. It was shown that the various defendants had for many years gotten up packages closely simulating the shape and color of bottle, the style of capsule, and the collocation of colors, blue and red, with medallions and lettering on the labels, which were distinctively characteristic of the original package which Saxlehner had introduced into this country, as indicating that the contents of the bottle came from his spring of bitter water at Buda-Pesth. Manifestly this simulation was a deliberate scheme to palm off on the public bitter water from other springs as the water of complainant's. Although for 20 years the Saxlehners had done nothing to stop this infringement of their rights, the court held that, nevertheless, they were entitled to injunctive relief against this simulation of their packages. At the same time it refused such relief against the use of the word "*Hunyadi*" to designate the waters of other springs from which defendants drew their supply, and which had been on sale under that name in this country, defendants believing they had a right to use it as a trade-name, for many years.

"These waters," says the court, "found their way to the United States and were put on sale here with the knowledge of the Apollinaris Company (the agent of Saxlehner). There is no evidence that Saxlehner had personal knowledge of these infringements; [but] he was bound to know the law of this country, and to take steps within a reasonable time to vindicate his rights. If he had intended to assert his rights under the laws of this country to the exclusive use of the word '*Hunyadi*,' he was bound to act with reasonable promptness."

In the case at bar the only controversy is as to the exclusive use of the words "Baltimore Club" as a trade-mark for whisky. Except for an instance referred to below, there has never been any resemblance between the labels or wrappings used by the parties.

As was stated before, Carroll was located in Baltimore and McIlvaine in New York. It is therefore quite likely that for a considerable time both might have sold whisky under the name "Baltimore Club," without either knowing what the other was doing. There is positive proof, however, that in 1882 both were advised as to the situation. Harry J. Carroll testified that in that year he went with his father and brother to Mr. McIlvaine's place of business in New York. He was then 18 years of age. His father told him the visit was for the purpose of notifying McIlvaine & Baldwin to discontinue the use of "Baltimore Club," and that he wanted him to listen to the conversation. He did not testify what was said on that occasion, and was not asked to do so. His brother, Charles J. Carroll, aged 21 in 1882, testified to being present at this conversation. He states that his father told Mr. McIlvaine that the whisky he was selling under the name "Baltimore Club" was a brand that belonged to him (Thomas Carroll), and that he would have to discontinue selling it under that brand unless he purchased it from him; that Mr. McIlvaine replied that "he had a large supply on hand, and when his stock was depleted he would purchase from them." They also talked about business, and in a little while the Carrolls left. A Mr. Jones is said to have been present at this conversation; but the complainant's witnesses have not been able to give information sufficient to identify him. As we have seen, the younger Carroll, although he was 18 at the time, and had been brought to New York expressly to listen to the conversation, was not asked to testify to his recollection of it. McIlvaine died 14 years later, and we have not his version of what took place.

The report of the conversation is very meager. The talk about the business, which is not detailed, may very well have included statements by McIlvaine as to the circumstances under which he used the words "Baltimore Club" and the time when he began to sell whisky under that name. Possibly something may have been said which satisfied the elder Carroll that it would be good policy to assent to the suggestion that McIlvaine would buy from him only after he had disposed of his present large supply, and which induced him not to undertake to enforce what he believed to be his rights during his lifetime. Assuming the conversation to be just as Charles Carroll gives it, as we must on this record, it amounts merely to a statement that at some time thereafter McIlvaine would buy "Baltimore Club" whisky from Carroll. But within a year or so it became manifest to Carroll that the other had changed his mind and was not going to buy from the former, but would continue to sell his own.

For nearly 20 years, however, no action was taken to prevent defendant's continued sales of "Baltimore Club." During that time the business in New York continued to increase, presumably through the efforts of defendants to make their goods known, until at the time suit was brought their whisky was kept regularly on hand at a dozen

or more of the most prominent clubs and was carried by the leading grocers in this city and vicinity. This New York market for a whisky known as "Baltimore Club" has been created by defendants and their predecessors. Very little of complainant's whisky has been sold here under that name. It is difficult to escape the impression that complainant intentionally refrained from bringing suit until some time after McIlvaine's death, in the hope that by that time so many persons in this city would have acquired the habit of asking for "Baltimore Club" or "B. C.," as it is sometimes referred to, that when it stopped the use of such name by defendant it would itself find a good market outside of Baltimore, the demands of which it could alone supply.

This impression is strengthened by the following circumstance: The label which defendants have used on their bottles for some years is quite distinctive. It is white, with a red circle in the center, containing the words "McIlvaine & Baldwin, New York," and a monogram, all in red. Below in black are words "Bottle number." Above is a large "B" and a large "C" in red, so arranged as to allow the insertion in very much smaller type of the remaining letters required to spell the words "Baltimore Club"—these smaller letters being printed in black. On each side of the label is a list of clubs where the whisky is used, printed in black. For many years prior to 1907 complainants had used a label totally different, with the coat of arms of Baltimore and a description in white embossed letters on a black ground. A few months before suit was begun there appeared on the New York market bottles of whisky bearing labels most closely simulating defendant's; the red center and the monogram containing the name Thomas Carroll & Son, "Baltimore, Md." To a written request from the defendant to be informed whether this was with or without authority of complainant, its counsel replied that he was about to bring suit to prevent the use of the words "Baltimore Club," and added, in reference to the label in imitation of defendant's, "This phase of the matter will not be discussed in this letter," which perhaps was a wise thing to do.

The matter is not discussed in the brief, being dismissed with the suggestion that "this label has not been brought home to the complainant," and that there is "not a scintilla of evidence that appellant was putting out these labels at the time the suit was brought." It seems highly improbable that any outsider would go to the expense of getting up and printing a Thomas J. Carroll & Son label, imitating defendant's, when the Carroll whisky was sold under labels of its own. But there is much more than a mere inference from the fact that whisky with such imitating labels has been found on the market. One Read, a printer of labels, was called for complainant. On cross-examination he testified that within the last two years—he testified in 1908—Mr. Harry Carroll had shown him a bottle with a label containing a large "B" and "C" in red, from the color scheme and arrangement of which he got up a label for Carroll, which he identifies as similar to the one found on the New York market imitating defendant's. He filled an order for these labels and delivered them to Mr. Harry Carroll; but the order was not as large a one as orders

for the black labels which he also printed. It seems to us that this simulating label is sufficiently brought home to complainant.

We are of the opinion that, under all the circumstances of the case, complainant's delay for nearly 20 years is laches which should disentitle it to an injunction against defendant continuing the business it has been engaged in during that period, and that for that reason the bill should have been dismissed. In making such disposition of the case, however, we are not to be understood as expressing any opinion that defendant is entitled to offer whisky for sale under the trade-name of "Baltimore Club" in the city of Baltimore, where complainant solely has been engaged continuously in selling its own whisky under that name, nor elsewhere than in the locality where defendant's business has heretofore been carried on. The conclusions expressed in this opinion sufficiently indicate that the petition in reference to further proof should be denied.

Decree is affirmed, with costs.

In re FRAZIN et al.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 31.

1. BANKRUPTCY (§ 255*)—PROPERTY PASSING TO TRUSTEE—LEASE.

Under Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), a trustee in bankruptcy takes title to a lease held by the bankrupt only in case he elects to accept it within a reasonable time after his appointment, when the vesting of the title relates back to the date of adjudication. If he does not elect to accept, the lease remains the property of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.*]

2. BANKRUPTCY (§ 255*)—LEASE—WAIVER OF RIGHT OF RE-ENTRY BY LESSOR.

Bankrupts at the time of their bankruptcy occupied premises under a lease which provided that, if it should by operation of law devolve upon or pass to any person other than the lessees, the lessor might at its election re-enter and take possession of the property. Receivers were appointed, who occupied the premises and paid the rent, and the lessor also accepted one month's rent from the trustee. *Held*, that title to the lease did not devolve upon the trustee until some affirmative act of acceptance on his part, and that therefore the previous acceptance of rent by the lessor was not a waiver of its right to re-enter and terminate the lease under its provisions upon the trustee's election to accept it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.*]

Ward, Circuit Judge, dissenting.

Petition to Review an Order of the District Court of the United States for the Southern District of New York.

In the matter of Louis Frazin and Abraham M. Oppenheim, individually and as partners, as Frazin & Oppenheim, bankrupts. On petition of the United Cigar Stores Company to revise an order (174 Fed. 713) granting an injunction. Order reversed.

See, also, 181 Fed. 307.

In 1907 the petitioner leased to the bankrupts certain premises in the city of New York, and this lease was in force at the time of the bankruptcy. The lease contained the following provision:

"If at any time during the term hereby demised, proceedings in bankruptcy shall be instituted by or against the lessee, * * * or if a receiver or trustee shall be appointed of the lessee's property, or if this lease shall by operation of law devolve upon or pass to any person or persons other than the said lessee, then and in each of said cases it shall and may be lawful for the lessor, at the lessor's election, into and upon the said demised premises or property, or any part thereof in the name of the whole to enter the same and to have, hold, possess and enjoy."

Receivers in bankruptcy were appointed in February, 1909, and they continued to occupy the leased premises, paying the stipulated rent, until August, 1909, when a trustee was appointed and took possession.

The lessor accepted one month's rent from the trustee, but the trustee did no affirmative act to accept the lease.

The trustee applied to the referee in bankruptcy for an order enjoining the petitioner from setting up any claim of the right to re-enter upon said premises in the event of the sale or assignment of the leasehold interest by the trustee. The referee denied this application of the trustee; but, upon review, the District Court reversed the order of the referee and enjoined the petitioner from re-entering upon said premises by reason of the breach of any covenant or condition in said lease.

The present petition is for the revision of said order of the District Court.

Stroock & Stroock (S. M. Stroock, Charles Levy, and E. F. Spitz, of counsel), for petitioner.

G. B. Plante, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). It is clear that the lessor, by the acceptance of the rent stipulated in the lease, waived the right to re-enter on account of the bankruptcy or the appointment of the receiver or the trustee. The inquiry then is whether there was devolution of the lease by operation of law and whether the lessor waived the right of re-entry by reason of it.

If the title to the leasehold interest devolved upon the trustee immediately upon his appointment, it is manifest that a breach of the condition took place at that time, and the lessor by thereafter accepting rent from the trustee waived the right to re-enter and was properly enjoined.

On the other hand, if the title to the leasehold interest did not pass to the trustee until after some act of acceptance upon his part, then there was no devolution of title prior to the receipt of the rent from the trustee, and, consequently, no waiver and no ground for the injunction. So the real question in the case is this: When does the title to a lease held by a bankrupt vest in the trustee?

In the very recent case of *In the Matter of Roth & Appel*, 181 Fed. 670, decided by this court in August, 1910, it was said:

"We think the early law as stated in *Ex parte Houghton*, *supra* (1 Low. 554, Fed. Cas. No. 6,725), is the law under the present bankruptcy statute applicable in the case of leases having the usual covenants and conditions. In that case the court said:

"The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession; and, if they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent."

A further examination of the authorities confirms our opinion that the extract from *Ex parte Houghton* correctly states existing law.

The early English bankruptcy statute was construed in the leading case of *Copeland v. Stevens*, 1 B. & Ald. 593, decided in 1818; Lord Ellenborough writing the opinion. The following is the headnote of that case:

"The general assignment of a bankrupt's personal estate under the commission does not vest a term of years in the assignee, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate, rents, etc. And therefore till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy."

The later English statutes provide for the vesting of a bankrupt's property in the trustee and expressly authorize him to disclaim burdensome leases. Under these statutes, it is held that the title to all leases vests in a trustee upon his appointment, and that he is liable upon them unless he disclaim them. But, in view of the changes in the acts, the later decisions can hardly be regarded as materially modifying the law of the earlier English cases or as affecting the American decisions referring to them.

The law as stated in *Ex parte Houghton* is also in accordance with decisions of the Supreme Court of the United States and other courts under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517).

In *Dushane v. Beall*, 161 U. S. 513, 515, 16 Sup. Ct. 637, 638, 40 L. Ed. 791, the Supreme Court said:

"It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefit the estate, and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course."

And in the same case the Supreme Court of Pennsylvania said (149 Pa. 439, 443; 24 Atl. 284, 285); its decision in this respect being unaffected by the reversal in the Supreme Court of the United States:

"It has always been a principle of the bankrupt law that property which from its nature or condition may be a burden rather than a benefit to the estate does not pass to the assignee without a distinct acceptance by him, and that in the absence of such acceptance it remains in the bankrupt."

In *United States Trust Company v. Wabash Railway*, 150 U. S. 289, 14 Sup. Ct. 86, 90, 37 L. Ed. 1085, the Supreme Court also said:

"The general rule applicable to this class of cases is undisputed that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable and undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts."

In *Matter of Otis*, 101 N. Y. 580, 5 N. E. 571, the New York Court of Appeals said:

"It is well settled that a receiver, or an assignee in bankruptcy, or an assignee for the benefit of creditors, if he elects to accept a lease belonging to the debtor, or assignor, becomes by such election assignee of the lease and

personally liable on the covenant to pay rent, of which liability he can only discharge himself by an assignment or surrender. * * * This doctrine proceeds on the ground that, on the election being made, the receiver or assignee becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver or assignee, by virtue of which the latter becomes liable on the covenants running with the land."

As already noted, these decisions were under the act of 1867, but the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), cannot be regarded as essentially different.

The following is the relevant provision of the act of 1867:

"All property * * * shall in virtue of the adjudication of bankruptcy and the appointment of his assignee, and subject to the exceptions stated in the preceding section, be at once vested in such assignee."

The act of 1898 (section 70) provides:

"The trustee of the estate of a bankrupt upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

A provision that property shall vest in a trustee as of the date of adjudication is not very different from a provision that by virtue of the adjudication and the appointment of an assignee all property shall at once vest in him. The only distinction would seem to be that if, under the act of 1867, the adjudication preceded the appointment of the trustee, the passing of title might not relate back to the date of adjudication; but such a distinction is of no importance in this case.

That the same principles are applicable under the act of 1898 as under the act of 1867 is held by the authorities. Thus in *Re Ells* (D. C.) 98 Fed. 967, the court said:

"I can find nothing in the act of 1898 to produce a result different from that of the act of 1867. Had there been no clause giving the lessor the right to re-enter, the trustee in bankruptcy would have had a reasonable time to elect whether to assume or to refuse the lease. If he had assumed it, the bankruptcy would have operated like any other assignment, and would have released the bankrupt from all liability, except upon those of his covenants not already broken which would have remained binding upon him after any other assignment. If the trustee had refused to take the lease, the bankrupt would have remained tenant as before."

And in *Watson v. Merrill*, 136 Fed. 359, 363, 69 C. C. A. 185, 189, 69 L. R. A. 719, the Circuit Court of Appeals of the Eighth Circuit said, with respect to the act of 1898:

"An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt. * * * Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these."

Now, if the title to a lease passes *nolens volens* to the trustee immediately upon his appointment, he has not the election which the Supreme Court says that he has of accepting it or not. His only option is to retain it or convey it back to the bankrupt, which is a very different thing. Moreover, if the bankrupt be divested of his interest in the leasehold estate, and it be vested in the trustee immediately upon his appointment, it is difficult to see upon what theory he

can escape its obligations pending its retransfer. And if reconveyance be necessary, upon what principle can the bankrupt be compelled to accept it? In our opinion, upon principle and authority, a trustee, having the option to assume or reject a lease, takes title to such lease only in case he elect to accept it. If he elect to accept it, then, by virtue of the provision of the bankruptcy act already quoted, the vesting of the title relates back to the date of adjudication. But, if the trustee do not elect to accept the lease, it remains the property of the bankrupt.

It is said, however, that this conclusion is at variance with the express provision of the bankruptcy act that all the estate of the bankrupt shall vest in the trustee as of the date of the adjudication; that a leasehold interest is property and must necessarily pass with all other property. In our opinion, however, the provisions of the bankruptcy act must be read in view of the principle stated in many decisions and expressly recognized in the English bankruptcy statutes that there is a distinction between property which may be burdensome to an estate and that which is manifestly beneficial to it. The latter, of course, passes upon the adjudication. The former passes only when accepted by the trustee; but, when accepted, the passing of title relates back to the time of the adjudication. If there be no acceptance, however, the title to a burdensome lease never passes. The property which may be said to pass immediately to the trustee in every case is not the lease itself, but the option of accepting it.

It follows as a corollary to these conclusions that, prior to the petition upon which the order in question was made, there had been no devolution of the title to the lease, and, consequently, that the petitioner was erroneously enjoined from enforcing the forfeiture provided for in the lease in case of such devolution.

The order of the District Court is reversed, with costs.

WARD, Circuit Judge (dissenting). I think this case should be affirmed. We ought not to say, in the face of the express provisions of the bankruptcy act, that the lease did not vest in the trustee. Of course the trustee has by the decisions of our courts the same right to disclaim that is expressly given by the English statute. Upon disclaimer in either case the title would re-vest in the bankrupt without any formal conveyance. All this was held as to the act of 1867 in *Sessions v. Romadka*, 145 U. S. 29, 39, 12 Sup. Ct. 799, 36 L. Ed. 609. No doubt an option is property, but the option to accept or disclaim the lease never was the property of the bankrupt and could not pass as such to his trustee.

UNITED STATES v. AH FOOK et al.

(Circuit Court of Appeals, Ninth Circuit. Nov. 22, 1910.)

No. 1,829.

1. ALIENS (§ 25*)—CHINESE EXCLUSION ACT—CHINESE SEAMEN.

The Chinese exclusion acts do not apply to Chinese seamen serving on board vessels touching at American ports while on a voyage to a foreign port; such seamen being authorized to land on giving bond to depart within 30 days as required by commerce and labor regulation rule 32.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 79; Dec. Dig. § 25.*]

2. BAIL (§ 42*)—CHINESE CRIMINALS—VALIDITY OF BAIL BOND.

A Chinese seaman being authorized to land in the United States on giving bond to depart within 30 days, as required by commerce and labor rule 32, a bail bond given by such seaman, on being arrested in the United States for violating the customs revenue law, was valid.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 42.*]

Appeal from and Error to the District Court of the United States for the Northern Division of the Western District of Washington.

Action by the United States and others against Ah Fook and others on a bail bond. From an order declaring the bond void ab initio and releasing the sureties, the United States brings error and appeals. Reversed.

Elmer E. Todd, U. S. Atty., and Charles T. Hutson, Asst. U. S. Atty.

Will H. Thompson, Fred H. Lysons, and Miller & Lysons, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal and writ of error brought to review an order entered January 17, 1910, in the United States District Court for the Western District of Washington releasing Chin Kee and Gon Quay from the bail bond of one Ah Fook taken by the United States commissioner in that district. The bond was in the form of a recognizance. It was dated December 31, 1907; was filed in the District Court on January 8, 1908; and was in the sum of \$750. It was conditioned:

"That if the said Ah Fook shall personally appear before the District Court of the United States in and for the district aforesaid at Seattle, Washington, on the 5th day of the present or any future term thereof, and then and there answer the charge of having, on or about the 23d day of December, 1907, within said district, in violation of section 3082 of the Revised Statutes of the United States, unlawfully brought into the United States goods of foreign growth and manufacture, to wit, about 100 yards of silk manufactured in China on which the duty imposed by law had not been paid, he, the said Ah Fook, well knowing that the said duty had not been paid, and then and there abide the judgment of said court, and not depart without leave thereof, then the recognizance to be void; otherwise to remain in full force and virtue."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 183 F.—3

It appears that Ah Fook was a seaman on board the steamship "Shawmut," plying between the ports of Hong Kong, China, and Seattle, Wash., and while said vessel was in the port of Seattle on December 23, 1907, he was arrested upon a warrant issued by the United States commissioner upon a complaint charging Ah Fook with the crime of smuggling into the United States silk goods of Chinese manufacture. Upon the hearing before the commissioner, Ah Fook was held to bail in the sum of \$750, and thereupon Ah Fook, with Chin Kee and Gon Quay, entered into the recognizance heretofore described, and thereupon Ah Fook was released from arrest. On June 2, 1908, the grand jury for the Western district of Washington returned an indictment against Ah Fook charging him with the crime of smuggling, as was charged in the complaint filed before the commissioner. On the 16th day of February, 1909, Ah Fook was called for arraignment and, failing to respond, the United States attorney moved the court for an order forfeiting the bail. Thereupon an attorney appeared and informed the court that he had been advised that Ah Fook was dead, and moved the court for an order of reference to take the testimony as to the fact. The order of reference was made, but no testimony appears to have been taken as further investigation disclosed the fact, as appears by the affidavit of Chin Kee, one of the bondsmen, that Ah Fook, when released from arrest upon the warrant issued by the commissioner, resumed his place as a seaman on the steamship "Shawmut" for the return voyage to Hong Kong. Upon the arrival of the vessel in Hong Kong, the master of the vessel discharged Ah Fook and canceled his articles of employment and refused to return him to the port of Seattle either as a seaman or a passenger. Negotiations were thereupon entered into with other transportation companies for the purpose of returning Ah Fook to Seattle, resulting in an agreement on the part of one company to bring him to Seattle as a passenger on condition that arrangements be made with the immigration authorities which would enable them to land him at that port. The matter was taken up with the officers of immigration at Seattle and through them with the Secretary of Commerce and Labor upon an application that Ah Fook be permitted to return and land in this country. This permission was refused except upon certain specified conditions. The communication informing the bondsmen of these conditions was as follows:

"Seattle, November 6, 1908.

"Fred H. Lysons, Attorney at Law, Seattle, Washington—Sir: Referring to recent correspondence in the matter of the application of the bondsmen of one Ah Fook, a member of the crew of the S/S 'Shawmut' December 14th last for permission to return to the United States in order to stand trial for smuggling silks, you are advised that we are in receipt of a communication from the department in which it is held that Ah Fook may return to the United States only as a seaman, and if he should do so he may be permitted to land under bond as in the case of other Chinese seamen. The bondsmen interested in securing the attendance in court should furnish such bond conditioned for his departure from this country at the termination of his trial or of his sentence, if convicted, without cost to the government.

"Respectfully,

John H. Sargent, Inspector in Charge.
"H. A. M."

The conditions upon which Ah Fook was to be allowed to return and land in the United States were, therefore: (1) He should be returned to the United States as a seaman only. (2) That he should furnish a bond as a Chinese seaman before being permitted to land. (3) That the bond so furnished should be conditioned for the departure of Ah Fook from this country at the termination of his trial, or of his sentence if convicted. (4) That such departure should be without cost to the government.

These conditions were imposed by the Department of Commerce and Labor by reason of the terms of the Chinese exclusion acts excluding Chinese laborers from the United States, and the regulations of the Department of Commerce and Labor made and prescribed under the authority of such acts.

The court below held, that as Ah Fook was a Chinese seaman, he was a laborer, and therefore of a class of aliens absolutely prohibited from entering the United States and could not lawfully be at large on bail, and that the bond for his release was void ab initio. It was, accordingly, ordered that the sureties on the bail bond should be released from liability.

It is contended on the part of the appellant that, although Ah Fook was a Chinese person, he was not a laborer within the meaning of the Chinese exclusion acts, and therefore not a member of a class absolutely prohibited from entering the United States; that he could properly be at large in the United States on bail; and that, being on bail and absent from the United States, the conditions imposed by the government for his return in accordance with the stipulated terms of his bail did not justify the court in releasing the sureties from the bail bond.

It has been held that the Chinese exclusion acts were intended to exclude Chinese laborers who would come into the United States with the intention of laboring here and entering into competition with the labor of this country, and did not apply to Chinese seamen serving on board vessels touching at an American port while on the voyage to a foreign port. In *re Moncan* (C. C.) 14 Fed. 44. It has also been held that Chinese seamen landing temporarily for no other purpose than to reship so soon as shipment can be obtained in the ordinary pursuit of their vocation on the high seas were not within the act. In *re Ah Kee* (D. C.) 22 Fed. 519; In *re Jam* (D. C.) 101 Fed. 989. In the last two cases, to guard against abuses the court required that such persons should be required to give bond with surety in the sum of \$500 to the collector to ship within 30 days and to produce to the collector a certificate of the shipping commissioner to that effect. The Attorney General of the United States, in an opinion dated September 10, 1901 (22 Opinions of Atty. Gen. 521, 523), and furnished to the Secretary of the Treasury, refers approvingly to the decision on this question by Judge Toulmin in *United States v. Burke* (C. C.) 99 Fed. 895, 898, where the court said:

"My opinion is that these statutes (immigration statutes) do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports, and that they do not, in spirit or in letter, apply to seamen engaged in their calling, whose home is the sea, and who are here to-day and gone to-morrow;

who come on a vessel into the United States with no purpose to reside therein, but with the intention when they come of leaving again on that or some other vessel for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious consequences to commerce."

In accordance with these opinions, the Commissioner of Immigration, with the approval of the Secretary of Commerce and Labor, has provided in regulations approved February 26, 1907, for the temporary admission of Chinese seamen, as follows:

"Rule. 32. To prevent violations of law by Chinese seamen discharged or granted shore leave at ports of the United States, bond with approved security in the penalty of \$500 for each seaman shall be exacted for his departure from and out of the United States within thirty days."

Section 18 of the immigration act of March 3, 1903 (32 Stat. 1213, 1217, c. 1012), makes it the duty of the owners, officers, and agents of any vessel bringing an alien into the United States to adopt due precautions to prevent the landing of any such alien from any such vessel at any time or place other than that designated by the immigration officers, and punishes him if he lands, or permits to land, any alien at any other time or place. In *Taylor v. United States*, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130, the Supreme Court had before it the question whether that section applied to the ordinary case of a sailor deserting from the vessel while on shore leave. The court held that it did not. The court said, at page 124 of 207 U. S., at page 54 of 28 Sup. Ct. (52 L. Ed. 130):

"The phrase which qualifies the whole section is 'bringing an alien to the United States.' It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States,' taken literally and nicely, means, as a similar phrase in section 8 plainly means, transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport. So again, literally, the later words 'to land' mean to go ashore. To avoid certain inconveniences the government and the courts below say that sailors do not land unless they permanently leave the ship. * * * 'Landing from such vessel' takes place and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice."

Under the statute as thus construed by the courts and applied in practice by the Executive Department having charge of its administration, we see no legal objection to an alien seaman on shore leave having been arrested for a violation of the customs revenue law giving valid bail upon the charge and securing his release from custody. If the accused demands a prompt hearing as he is entitled to, there is no reason why his guilt or innocence of the charge made against him should not be judicially determined within the thirty days provided by the regulations as the limit of his stay in the country. The warrant of arrest in this case commanded the United States marshal to apprehend the said Ah Fook wherever found in his district. The return of the marshal is that he executed the warrant by arresting Ah

Fook at Seattle, Wash. It does not appear that at the time of his arrest Ah Fook was unlawfully at large under the immigration laws. On the contrary, the presumption is that he was lawfully in Seattle and competent to bind himself and be bound by others to respond to the charge that he had violated a law of the United States. We are of opinion, therefore, that the bail bond was not void, either ab initio, or at all, by reason of his status under the immigration laws. What defense the sureties might make to an action on the bond we are not called upon to decide. Whether they could set up the action of the Department of Commerce and Labor in imposing conditions in returning Ah Fook to this country to meet the charge against him is a question not involved in the validity of the order before the court.

For the reasons stated, we think the judgment of the court in entering the order releasing the sureties of the bail bond should be reversed, and it is so ordered.

FARMERS' & MERCHANTS' BANK OF VANDALIA, ILL., v. MAINES.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1910. On Rehearing, November 9, 1910.)

No. 2,001.

1. TRIAL (§ 177*)—DIRECTION OF VERDICT—REQUEST FOR PEREMPTORY INSTRUCTIONS—EFFECT.

Where, at the close of all the evidence, in addition to requests for special instructions touching disputed facts in issue, both sides presented motions for a directed verdict, the court erred in treating the motions as a joint consent to submit the facts to the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

2. SHERIFFS AND CONSTABLES (§ 139*)—OFFICIAL DUTY—BREACH—DAMAGES.

In an action against a sheriff for breach of duty consisting of mere neglect, his liability is restricted to actual damages. Where the losses were capable of estimation, the prima facie measure of damages, to wit, the amount remaining due on the writ, is only applied where there is some proof that the debtor possessed property subject to levy of a value substantially equivalent to the judgment at the time of the officer's default.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 306; Dec. Dig. § 139.*]

3. SHERIFFS AND CONSTABLES (§ 138*)—DEFAULT—EVIDENCE.

Where, in an action against a sheriff for failure to levy sufficient property to satisfy the debt, plaintiff showed that the debtor possessed at the time of the levy other property than that levied on, but there was no proof that such omitted property was substantially sufficient to satisfy the balance due, the court could not indulge a presumption that it was of such value, in order to justify plaintiff's recovery for the officer's default of an amount equal to such balance.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 290; Dec. Dig. § 138.*]

4. SHERIFFS AND CONSTABLES (§ 139*)—INSUFFICIENT LEVY—NOMINAL DAMAGES.

Where, in an action against a sheriff for an insufficient levy, there was no proof as to the value of the omitted goods, plaintiff could only recover nominal damages.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 300; Dec. Dig. § 139.*]

On Rehearing.

5. SHERIFFS AND CONSTABLES (§ 138*)—DEFAULT—EVIDENCE.

Where, in an action against a sheriff for failure to levy on sufficient property to satisfy the debt, plaintiff claimed that sufficient property remained in the debtor's residence subject to levy, which, if levied on, would have made the levy sufficient, evidence that shortly after the levy the debtor executed a chattel mortgage on property in her residence other than that levied on to secure a loan of \$10,000, in connection with evidence that she did not remember purchasing any of such property from the time of the levy until the date of the mortgage and had moved nothing away, was admissible as some evidence of the value of the personal property remaining on which a levy might have been made.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 290-296; Dec. Dig. § 138.*]

6. SHERIFFS AND CONSTABLES (§ 138*)—INSUFFICIENT LEVY—EVIDENCE.

In an action against a sheriff for an insufficient levy on furniture and household articles, made in December, 1902, evidence that certain witnesses had seen the articles of household furniture in the debtor's house prior to the levy in October was admissible, since, by comparing the articles with those named in the inventory and those offered at the sheriff's sale, it might be determined whether they were seized or not; the debtor having testified that up to the time of the levy she had moved nothing away from the place.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 138.*]

7. SHERIFFS AND CONSTABLES (§ 138*)—DEFAULT—INSUFFICIENT LEVY—VALUE OF UNSEIZED PROPERTY.

In an action against a sheriff for an insufficient levy, it does not require much proof of the existence of leviable and unseized property of a value substantially equivalent to the claim in suit to falsify the sheriff's return, and to cast on him the burden of showing why he should not be charged with the amount due on the claim; very slight evidence being sufficient to shift the burden of proof.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 290-296; Dec. Dig. § 138.*]

8. SHERIFFS AND CONSTABLES (§ 140*)—DEFAULT—INSUFFICIENT LEVY—EXISTENCE OF LEVIABLE PROPERTY—QUESTION FOR JURY.

In an action against a sheriff for an insufficient levy, evidence of the existence of leviable property from which the balance of plaintiff's judgment could have been made, but for the sheriff's default, *held* for the jury.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 140.*]

9. SHERIFFS AND CONSTABLES (§ 138*)—DEFAULT—INSUFFICIENT LEVY—DISSOLUTION OF ATTACHMENT—EVIDENCE.

Where, in an action against a sheriff for an insufficient attachment levy, the only acts of negligence of the officer complained of were consummated while the attachment was admittedly in force and in process of execution, the subsequent dissolution thereof was irrelevant.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 138.*]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action by the Farmers' & Merchants' Bank of Vandalia, Ill., against Harrison W. Maines. Judgment for defendant, and plaintiff brings error. Affirmed.

B. B. Selling and J. A. Muir, for plaintiff in error.

Joseph Walsh, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge. This suit was commenced February 14, 1905, by plaintiff in error against defendant in error, to recover damages for alleged neglect of Maines, as sheriff, fully to execute a writ of attachment. The complaint, in substance, is that there were within his bailiwick sufficient goods and chattels of one of the attachment debtors, Elizabeth A. Board, subject to attachment to satisfy the debt described in the affidavit accompanying the writ, but that he levied only on part of them, to plaintiff's damage in the sum of \$10,000.

The writ was issued by the Circuit Court of St. Clair County, Mich., containing notice to James L. Board and Elizabeth A. Board of the commencement of a suit in that court by the Farmers' & Merchants' Bank of Vandalia, and a command that they enter their appearances within a time specified, stating the damages claimed, and directing return of summons before January 12, 1903; and commanding the sheriff on or before the return day—

"to attach so much of the lands, tenements, chattels, moneys, and effects of the said defendants James L. Board and Elizabeth A. Board not exempt from execution, wheresoever the same may be found within said county, as will be sufficient to satisfy the demand of said plaintiff and costs of writ,"

—and to make inventory thereof, and serve certified copy of the writ and inventory upon defendants. The ground of the attachment was the alleged nonresidence of the defendants.

There were several other writs of attachment sued out by other creditors of the Boards, under which levies were made upon four pieces of real estate at Port Huron, including the Board summer residence and what was called the barn property connected therewith. Levies were also made under the writ now in question upon all this real estate. It is not, however, important to consider the levies upon the real estate, further than to say we are satisfied from the evidence that, owing to the nature of the titles under which some of the property was held, and of prior and superior rights in other parcels of persons other than the Boards, there was no interest of any value in Elizabeth A. Board in any of the real estate at the time of the issue of the writ in question; and there is evidence that the sheriff was seasonably notified, in substance, that Mrs. Board had no interest of value in the real estate. We thus speak of Elizabeth A. Board, because of bankruptcy proceedings commenced against her husband. We shall speak of those proceedings again, though there are several questions arising out of them that will not need consideration. Suffice it to say now that, when the case is stripped of matters immaterial to the present decision, it will

be found that the liability of the defendant must be tested by his conduct in respect of the writ so far as it was directed against chattel property belonging to Elizabeth A. Board.

There is evidence tending to show that on the date of the writ, December 13, 1902, the sheriff was directed by counsel for plaintiff to go at once to the Board home, and "take possession of everything in it; seize all the articles of furniture," etc. He was also told that all the articles belonged to Mrs. Board, and was at the same time admonished of Board's financial embarrassment, and of fears that he would be put into bankruptcy. The sheriff sent a deputy with the writ to the Board home at once, and either he or his deputy telephoned to the bank's attorney within a day or two that there were sufficient goods in the house to cover the claim. Part of the goods were seized and appraised; but, although the appraisers chosen were suggested by the bank's attorney, the latter seriously objected to certain valuations which the appraisers made of some of the chattel property. This resulted in further directions from the attorney to seize more of the goods and chattels in the Board home.

It appears, also, that the sheriff requested the bank's attorney to accompany him to the residence, but upon arrival there the attorney was, at the instance of Mrs. Board and through acquiescence of the sheriff, prevented from entering the house, or from personally inspecting the goods taken and appraised, or from pointing out further goods for seizure. The bank's attorney then notified the sheriff, both orally and in writing, that his client would hold the sheriff responsible for any failure to levy upon goods sufficient to satisfy its claim. All this culminated in a statement by the sheriff, in substance, that, if the bank would furnish an additional bond of \$10,000, he would seize everything in the house. The bond was given on December 19th, and additional articles in the house were on that day seized and appraised. On January 13, 1903, the sheriff made return of the writ of attachment, showing that he had seized and attached property of the defendants, James L. Board and Elizabeth A. Board, described in his certificate and annexed inventory; that on December 31, 1902, he served a copy of the writ of attachment and a copy of the inventory and appraisement upon Elizabeth A. Board, by delivering the same to her personally, but there was nothing purporting to show that all of the chattels in the house were seized or inventoried. December 24, 1902, five days after the sheriff had completed the only proceedings he ever took under the writ, save only to make his return, an order was issued by the United States District Court for the Eastern District of Michigan enjoining the bank and Maines from taking any further proceedings in the suit in the state court against the property attached and taken possession of as that of James L. Board and Elizabeth A. Board, and from selling or otherwise converting any property so attached or taken possession of, and requiring Maines from the time of the service of the order to hold and preserve the property in statu quo until the further order of the court. It appears that the proceeding in bankruptcy against James L. Board, upon which the injunction order was based, was instituted in the United States District Court for the Northern District of Illinois against James L. Board

alone. The declaration in the case in the state court bears indorsement of having been filed January 12, 1903, and is in the usual form upon the common counts in assumpsit, containing a notice that on the trial plaintiff under the money counts would give in evidence certain promissory notes described, which were alleged to have been made by James L. Board to his own order, and indorsed by himself and his wife, Elizabeth A. Board. James L. Board and his wife each filed in the cause a plea of the general issue. October 1, 1903, an order of severance was entered in the cause pending in the state court, directing that the—"action be severed as to said defendant James L. Board; that all proceedings herein as to said James L. Board be stayed until the further order of this court, and that plaintiff may proceed to trial as to the defendant Elizabeth A. Board, in accordance with the rules and practice of this court."

On October 24, 1903, more than a year before the present action was commenced, the case in the state court was tried against Elizabeth A. Board, resulting in a judgment against her for the sum of \$10,656.23 and costs. On February 11, 1904, under a writ of execution issued upon this judgment, the goods of Elizabeth A. Board, which had been seized in attachment, as aforesaid, were sold for \$2,733.85.

At the close of the evidence in the trial of the present case, in addition to requests for special instructions touching disputed facts in issue, each side presented, in effect, a motion for a directed verdict. The learned trial judge understood that he was asked to find the facts and announce his judgment thereon, instead of submitting the case under instructions to the jury. The court found in favor of the defendant, except only as to certain articles which had been erroneously set off by the sheriff to the defendant, Mrs. Board. The court thereupon instructed the jury to return a verdict for the value of those articles, to wit, \$250, with interest. It is clear to our minds that a misunderstanding arose between court and counsel for plaintiff upon the requests presented relative to controverted facts and a directed verdict. Indeed, in the course of his opinion the judge mentioned the fact "that there is considerable conflict of testimony in this case," and again he said:

"Nor is there any presumption that the debtor has other property than that seized. But the plaintiff, as I have said, must show such property and its value. And that he may do so, and that the prima facie presumption, where he has failed to make the amount of the writ, that he should respond for it, is qualified by the consensus of authority that it is open to him to show that there was not such other property, and in ordinary cases this would be a question for the jury; but, as I have said, the counsel having waived that by each making a motion to direct a verdict, it is my duty in this case to direct a verdict for the plaintiff in the sum of \$250, with interest. * * *

Under the settled law, we think it was error to treat the motions for peremptory instructions as a joint consent to submission of the facts to the court. *Minahan v. Grand Trunk Ry. Co.*, 138 Fed. 37, 41, 70 C. C. A. 463; *Empire State Cattle Co. v. Atchison Ry. Co.*, 210 U. S. 1, 8, 28 Sup. Ct. 607, 52 L. Ed. 931. It is contended by defendant, however, that this error is not prejudicial, because at most plaintiff offered evidence only to show that there were articles in the Board home not included in the seizure, but not to show their value. Indeed,

the main issue seems to have been reduced to the question: Upon which of the parties, plaintiff or defendant, the burden of proving value of the property not taken under the attachment rested. Neither side offered evidence to show such value. The theory of the plaintiff is that, in this state of the evidence, its injury is to be measured *prima facie* by the uncollected portion of its judgment, and that, the defendant having failed to prove value less than that in mitigation, the plaintiff is entitled to judgment for such uncollected portion. Counsel for plaintiff rely upon that class of familiar decisions which hold that where a sheriff is negligent in executing or making return upon a writ, his acts are presumed to have so interfered with plaintiff's right of collection as to cause a loss of the entire claim upon which the writ is based. Counsel for plaintiff deny application of the ordinary distinction made between writs of final process and of mesne process; and since plaintiff's claim in the attachment suit was reduced to judgment prior to the commencement of the present action, we shall, for the purposes of this decision, treat plaintiff's right as though it had arisen under a writ of execution. *Springett v. Colerick*, 67 Mich. 362, 34 N. W. 683.

There are several discriminating features of the decisions relied on which require attention. One is found in cases where the neglect of the officer related to a subject in which the damages were not susceptible of ascertainment, such as negligent permission of a person imprisoned for debt to escape. Another appears in cases relating to property and where the damages were capable of estimate, and the officers received the writs, but failed altogether either to execute them or to make returns upon them, or failed in both respects. Still another arises in cases where the damages were ascertainable, and the neglect of the officers consisted in making only partial levies, but making due returns so far as the writs were executed. As regards the necessity to place the officer in default, it is clear that different allegations and proofs would be required according as a given case would fall under one or another of these classes of cases. Yet the cases are cited indifferently in support of the claim that the present case is controlled by the *prima facie* rule of damages before stated; and it must be conceded that, as respects at least the first and second classes alluded to, there are many decisions in which the rule is applied indifferently. The truth is, the cases are not harmonious (*Dow v. Humbert*, 91 U. S. 294, 299, 23 L. Ed. 368), and so much confusion has arisen as in many instances to induce the statement that each case must depend upon its own particular circumstances.

But there is one principle that must be said to have found expression in all of the cases, where it could be applied with any degree of certainty. It is that, in cases of mere neglect of the officer, his liability shall in the end be restricted to actual damages. Further, we think enough can be gleaned from the decisions to justify the statement that in a majority of instances, where the losses were capable of estimation, the *prima facie* measure of damages in question was declared only where there was some proof on the part of the plaintiff that the debtor was possessed of property which was subject to levy, and of value sub-

stantially equivalent to the judgment at the time of the officer's default; and, although the reports of the cases in which the rule is announced frequently fail to show whether such proof was offered under corresponding allegations or not, yet it is to be presumed that it was. Indeed, it is difficult to see how in any case involving charges of mere neglect, where return has actually been made, proof of falsity of return could be shown except by allegations and proof of possession of property subject to levy, as stated. To illustrate: In *Magne v. Seymour*, 5 Wend. (N. Y.) 309, the action was on the case for a false return nulla bona on an execution for \$510. A receipt was offered in evidence showing that the sheriff had previous to his return levied on property in possession of defendant in execution, and the testimony of a witness was presented showing that he had seen articles similar to those mentioned in the receipt in the possession of the debtor, and that the value of merchantable property of that description would exceed \$500. In the course of the opinion, Savage, C. J., said:

"It is contended in this case that the return verifies itself. It is true that the plaintiff must falsify the return, and that must be done by sufficient testimony. Had there been in this case a bare return on the execution, without any evidence of a levy having been made, the plaintiff would have been bound to falsify the return. Suppose he had produced a witness who had testified that the sheriff had in fact levied on sufficient property in possession of the defendant in the execution, and then rested; it seems to me that the burden of proving the property out of Barrington would have been thrown upon the sheriff. * * * The proof of the value of the goods was certainly defective. It merely proved that such property as was levied on, if merchantable, was of a certain value; but enough, I think, was shown to prove that it was of some value, and that plaintiff would, at all events, be entitled to recover nominal damages."

The learned Chief Justice said further that *prima facie* evidence on the part of plaintiff of the falsity of the return is sufficient in the first instance. That decision was approved by Justice Nelson in *Chapman v. Smith*, 16 How. 123, 144, 14 L. Ed. 868. In *Stevens v. Rowe*, 3 Denio (N. Y.) 327, 334, the recovery sought was for alleged neglect of the sheriff under a writ of execution. It was alleged in one count of the declaration that "defendants in the execution had goods and chattels whereof the sheriff might and ought to have made the money." At the trial the judgment and execution were proved. It was also shown that the execution was placed in the hands of the sheriff, and "plaintiffs also gave evidence that the defendants in the execution had personal property from which the sum might have been levied and the money made." Beardsley, J., in the course of the opinion said:

"*Prima facie* the sheriff is liable for the full amount of the execution debt, as it is presumed to have been lost by his neglect. This, in my estimation, is not a very violent presumption, but still may be just in regard to an officer who is in default. But when it is shown that the debt has not been lost, there is no room for presumption, and the *prima facie* case no longer exists."

In *Adams v. Spangler* (C. C.) 17 Fed. 133, the action was to recover for alleged neglect of a sheriff in making levy under a writ of

attachment. McCrary, J., sustained the charge of the trial court in which the jury had been instructed that, if they found for the plaintiff:

"They were bound to find for the difference between the amount of his judgment and the amount realized upon the property which was seized under the attachment; it being a conceded fact that there was sufficient property in the store at the time the levy was made, if it had been taken upon the writ, to pay the entire claim."

See, also, *Taylor v. Wimer*, 30 Mo. 126, 129; *Bradford v. McLellan*, 23 Me. 302, 303; *Willard v. Whitney*, 49 Me. 235, 237, 241; *Commonwealth v. Contner*, 18 Pa. 439, 444-446, per Black, C. J.; *Bank of Rome v. Curtiss, Sheriff*, 1 Hill, 275, 276, per Cowen, J.; *Gilbert v. Watts-De Golyer Co.*, 66 Ill. App. 625, 628, 630; *Bonnell v. Bowman*, 53 Ill. 460, 461; *Sec. Nat. Bank v. Gilbert*, 174 Ill. 485, 486, 494, 51 N. E. 584, 66 Am. St. Rep. 306; *Dunphy v. Whipple*, 25 Mich. 10, 13, per Cooley, J.; *Springett v. Colerick*, 67 Mich. 362, 364, 34 N. W. 683. In *Lafin v. Willard*, 16 Pick. (Mass.) 64, 67, 26 Am. Dec. 629, and *Lawrence v. Rice*, 12 Metc. (Mass.) 535, 541, per Shaw, C. J., it was held that plaintiff, having failed to prove damages, was entitled only to nominal damages. It must be conceded that in cases like most of the foregoing, the prima facie measure of damages as claimed by plaintiff will ordinarily be applied. But surely some inference is to be drawn from these cases and others of their class of a necessity for allegation and some proof of leviable property of a debtor sufficient to satisfy the claim. What probative relation can be said to exist in such a case between the face of a judgment and the amount of a loss thereon, alleged to have arisen from neglect of a sheriff, except through some evidence of property of equivalent value which he has failed to seize?

Plaintiff in its declaration alleged that there were sufficient goods of Mrs. Board subject to the writ of attachment to satisfy the debt described in the affidavit. But we need not repeat that it made no pretense of offering proof in support of the portion of the allegation that the goods were sufficient to satisfy the claim. If the allegation and proof had been that the goods were of a value equal to only a small percentage of the uncollected balance of the judgment, we apprehend that it would hardly be claimed that the prima facie measure of damages was equal to the face of this balance. If, then, the articles in dispute in this case cannot by comparison with the articles in the inventory and the price they brought on sale be said to be worth anything like the unpaid balance of plaintiff's judgment, can it be that a court must indulge, or suffer a jury to indulge, a presumption, and so allow recovery upon the hypothesis that the articles were worth the balance due? We think not. No case for damages susceptible of proof has been cited, nor have we discovered any, which holds any such doctrine. The doctrine could serve no good purpose, and would contradict the rule limiting recovery to the actual damages. It is to be observed in passing that this conclusion is quite distinguishable from the holding of this court in *Baltimore & O. R. Co. v. Weedon*, 78 Fed. 584, 591, 24 C. C. A. 249, 257, for there the court had under consideration damages which were not capable of definite ascertainment, and still the dis-

tinguished judge announcing the opinion said of the rule of damages now urged that:

"It can hardly be adopted by a court, because it would seem to be judicial legislation, fixing a penalty for default, and not the assessment of damages according to the reason or analogy of damages in like cases."

We are thus brought to a consideration of the evidence tending to show failure on the part of the sheriff under the writ of attachment to seize the property in dispute of Mrs. Board, and of the effect of the evidence upon plaintiff's right at the time of its submission to the court of a motion for judgment to recover of defendant the balance due under its judgment against Mrs. Board, and also of its right at that time to recover any sum whatever on account of defendant's neglect of duty. Mrs. Board admitted in her testimony that she owned everything in the house, except such articles as belonged to her two sisters. It is not claimed that all of Mrs. Board's goods were taken, but it is said that all of them of any material value were taken. Through testimony of a Mrs. Robeson, a teacher and visitor in the house shortly prior to the attachment, and through Mrs. Board herself, we think it is made reasonably certain that there were in the house from 30 to 40 articles of various kinds, some having certainly more than nominal value, which do not appear in the inventory made under direction of the sheriff. Mr. Ashcraft, one of the counsel for plaintiff, who visited the house to make a demand on the day of the attachment, saw some articles such as furniture, rugs, curtains, etc., in the library which are not mentioned in the inventory. While the articles so omitted consisted of household furniture and other articles of that character, yet no such description was given of them as to convey any reasonable idea of their condition, their original cost, or their real worth. We think it is fair to say, however, after comparison of the omitted articles with those shown in the inventory, in connection with the sum which the inventoried articles brought on sale, that the articles not seized could not have been worth more than a small percentage of the unpaid balance due on the judgment against Mrs. Board. We therefore cannot perceive any ground upon which plaintiff was entitled at most to recover more than nominal damages. We do not overlook the fact so earnestly pressed that plaintiff's attorney was excluded from the Board home at the time the sheriff was engaged in executing the writ; but no act of fraud is charged or proved against the sheriff. It was quite as feasible for plaintiff in the first instance to offer evidence of value of the articles omitted, as it was to prove their identity and omission. The ultimate question then is not distinguishable from the one which arises in any other case where the damages claimed are susceptible of estimate and proof, and nothing more than the bare right of recovery is shown. No sufficient reason can be assigned for leaving the jury in such a case without any intelligible basis upon which to estimate damages, or the court without definite means of correcting the verdict in the event of an allowance of excessive damages. *Pennsylvania Co. v. Scofield*, 121 Fed. 814, 816, 58 C. C. A. 176.

In *Harrow v. St. Paul & Duluth R. Co.*, 43 Minn. 71, 44 N. W. 881, the action was to recover for negligent killing of a horse, and its size,

weight, age, and qualities were shown without any proof of value. The cause was reversed for error of the court below in permitting the jury to estimate the value on such evidence. See opinion and citations at page 72 of 43 Minn., and page 881 of 44 N. W.

In *Bell v. Ober & Sons*, 96 Ga. 214, 23 S. E. 7, a question arose concerning the value of certain cotton claimed to have been converted by an agent to his own use. The court refused to allow a verdict and judgment to stand because the evidence failed to show value of the cotton, holding that (page 219 of 96 Ga., and page 11 of 23 S. E.) "the jury had no legal basis upon which to calculate the amount of defendant's liability."

In *Thomas China Co. v. C. W. Raymond Co.*, 135 Fed. 25, 30, 67 C. C. A. 629, 634, a number of questions arose, among which was one for damages claimed by defendant upon the ground that certain machinery was not shipped within an agreed time, which was within 90 days "as required." The machinery was called for in July, but was not shipped until some time in October following. The court instructed the jury that this provision meant "as required" by the needs of the purchaser, and not as called for by him. Judge Severens, in announcing the opinion, said:

"We more than doubt whether this is the proper construction of that term of the contract, but, as no competent evidence was given of the damages resulting from its nondelivery, the defendant was not entitled to recover any, and the error of the court proves harmless. * * * Counsel for defendant insists that it was entitled at least to nominal damages. But such a recovery would establish no right surviving the purposes of the suit—as, for instance, a right pertaining to the title to property—or determine a question of costs, and the claim to damages falls under the maxim, 'De minimis non curat lex.' *Haven v. Beidler Co.*, 40 Mich. 286; *Lewis v. Flint & P. M. R. Co.*, 56 Mich. 638 [23 N. W. 469]."

Despite any error, then, that was committed by the court below, as before pointed out, we see no escape from the rule that this court is not "concluded by the reasons stated by the trial judge for his action in a motion for a peremptory instruction at the close of the evidence." As said by the present Mr. Justice Lurton in *Louisville & N. R. Co. v. Womack*, 173 Fed. 752, 759, 97 C. C. A. 559, 566: "If the ruling was right upon any ground, it would be folly to reverse." In truth, it was frankly stated by counsel for plaintiff that, unless the *prima facie* rule of damages for the unpaid balance of its judgment against Mrs. Board could be applied, the plaintiff had no cause for complaint. Furthermore, the case falls under the rule laid down in paragraph 6 of the opinion in *Thomas China Co. v. C. W. Raymond Co.*, supra.

The judgment below will be affirmed, with costs.

On Rehearing.

Upon a rehearing of this cause, our attention was called to the exclusion of a certain chattel mortgage offered in evidence at the trial below, which we think should have been admitted. While the ruling was made the subject of one of the many (143) assignments of error presented in the record, yet no allusion was made to it in any of the original briefs, and thus we overlooked its importance. Indeed, as appears in the original opinion, the case was so presented at the first

hearing as to impress us with the belief that the unseized property was plainly and materially less in value than the uncollected portion of the judgment, and for that reason we did not think that a judgment could be rightfully imposed for the unpaid balance. But, in view of what we shall now point out, we believe that we fell into error for which our judgment of affirmance must be reversed.

The plaintiff offered in evidence a chattel mortgage purporting to have been given on February 19, 1903, by Elizabeth A. Board to M. Atkinson, containing these words:

"Witnesseth, that the mortgage for \$10,000 * * * paid by the mortgagee * * * has granted," etc., "unto the mortgagee," etc., "all and singular, the goods and chattels particularly mentioned * * * in schedule marked A, all of which goods," etc., "now are the property of said mortgagor and situated upon the premises known as No. 1103 Pine Grove avenue in the city of Port Huron. Provided the mortgagor shall not repay the mortgagee within five days."

Then follows the statement:

"The usual provisions for sale on default, insurance, partial payments and costs accompany."

The instrument was filed February 20, 1903. All that appears in the record respecting the schedule of goods and chattels so mortgaged is that "it contains a list of household goods by general terms, as 'beds, glassware.'" The instrument was ruled out, and exception reserved.

We understand that the goods and chattels mentioned and scheduled in the mortgage were at its date situated in the house in which the goods and chattels were seized under the writ of attachment in question. Was the mortgage admissible? On its face it represents an independent transaction had between strangers to the present suit; but if the transaction in truth was a present loan of \$10,000, it necessarily disclosed an estimate of value on the part of the lender and also of the owner, plaintiff's judgment debtor herself, upon the articles mortgaged in excess of the uncollected portion of the judgment. It is consistent with such a loan, though it is open to explanation. It must be borne in mind that we are not concerned with the weight, but with the admissibility, of the instrument as evidence, because it will be remembered from the former opinion that through a misconception the cause was taken from the jury and determined by the court.

If the instrument had represented a sale, instead of a mortgage, of the goods and chattels, we think it would have been admissible as some evidence of the value of the articles at the time of the sale. *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 196, 31 N. E. 1032, per Peckham, J.; *Norton v. Willis*, 73 Me. 508; *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645; *Raymond Syndicate v. Guttentag*, 177 Mass. 562, 59 N. E. 446; *Matter of Johnston et al.*, 144 N. Y. 563, 565, 39 N. E. 643; *Peter v. Thickstun*, 51 Mich. 589, 593, 17 N. W. 68; *Cliquot's Champagne*, 70 U. S. 114, 141, 18 L. Ed. 116; *Roberts v. Dunn*, 71 Ill. 46, 50; *M. & C. C. of Balto. v. Smith, etc., Co.*, 80 Md. 458, 31 Atl. 423. The theory, as we understand it, of the admissibility of sales, is that they represent actual transactions had in good faith between

parties having opposing interests respecting price, and that the transfer of title and payment of money under such circumstances are facts upon which values are generally based. What will property bring at voluntary sale or on lease, is one of the best recognized tests of value. It is common knowledge that loans made in good faith upon pledges of property are based upon these tests of value, yet for purposes of safety value is more or less discounted. We therefore hold this instrument to be admissible, in connection, however, with other evidence to which we shall now refer.

Testimony was offered by the plaintiff, which was in part received and in part excluded in the trial court, concerning household articles claimed not to have been seized under the attachment. For instance, testimony was received which tended to show that certain articles were seen in the house prior to the levy in December, and were also seen there after removal was made of articles seized. But it was sought to show by witnesses that they had seen certain articles of household furniture and furnishings in the house prior to the levy—in October. The proffers so made were excluded, because the witnesses could not say that they had seen the same articles in the house after the seizure and removal thereunder had been completed. Such proffers, considered alone, would, of course, be immaterial; but there might be means of comparing the articles with those named in the inventory, and also with those offered at the sheriff's sale, and so of aiding the inquiry whether the articles were seized or not. Again, Mrs. Board testified that:

"Up to the time this levy was made I did not move anything away from this place."

She was asked whether she had purchased any articles between the date of the levy (December 13th) and the date of the mortgage (February 19th); the question and answer being:

"Had you bought any additional curtains, stoves, chairs, carpets, rugs, tables, desks, bed room sets, pictures, books, music cabinet, bric-a-brac, kitchen ware, table linen, silverware, glassware or any or either of them, after the sheriff came there and before this mortgage was made or signed by you on February 19, 1903, and if so what did you buy? A. I do not remember."

We are unable to perceive why testimony was not admissible which tended to show possession of household articles in Mrs. Board as early as October and later until the date of the attachment, in connection with the inventory, or with testimony to the effect that those articles were not offered at the execution sale, or in connection with any other evidence directly tending to show that the articles had not in fact been seized. It may be safely presumed under such proofs that the possession shown to have been in Mrs. Board in October continued in her until the date of the mortgage, unless they were seized and sold. It is common experience that articles of this character are not the subjects of frequent change, especially during the season and period of time in question. The principle controlling the application of such presumptions and those of kindred character are sufficiently explained for our present purposes in *Bethel v. Linn*, 63 Mich. 464, 474, 30 N. W. 84; *Sanford v. Millikin*, 144 Mich. 311, 312, 107 N. W. 884; *Rob-*

son v. Rawlings, 79 Ga. 354, 356, 7 S. E. 212; Scammon v. Scammon, 28 N. H. 419, 433; Wilkins v. Earle, 44 N. Y. 172, 191, 4 Am. Rep. 655; 1 Wigmore on Ev. § 437.

This is but giving a prospective effect to a proved condition which in its nature is continuous; but in view of the use permitted to be made of the mortgage it is suggestive of a distinction that prevails when it is sought to accord to a proved fact a retrospective operation. This court had occasion in the recent case of *W. F. Corbin & Co. v. United States*, 181 Fed. 296, 104 C. C. A. 278, to apply the rule that proof of the existence of a given condition raised no presumption of its previous existence; and from the cases there cited, this language of Bigelow, J., in *Inhabitants of Hingham v. Inhabitants of South Scituate*, 7 Gray (Mass.) 229, 232, was quoted:

"The law presumes that a fact, continuous in its nature and character, like domicile, possession or seisin, when once established by proof, continues, and, in the absence of evidence to the contrary, legally infers therefrom its subsequent existence. But we know of no rule of law which permits us to reason in an inverse order, and to draw from proof of the existence of present facts any inference or presumption that the same facts existed many years previously."

We do not, however, think that the rule touching retrospective operation has any application here. We may now further explain why we regard the mortgage with its accompanying schedule as admissible. When the testimony is considered which would tend to show possession and a presumed continuance of possession in connection with the testimony of Mrs. Board showing that there was nothing removed by her before the levy, and that she could not remember having purchased any household effects between that time and the date of the mortgage, it is not too much to say that all these items of evidence tend in some degree to show that there must have been goods and chattels in the house at the time of the attachment and not taken under it which were at least *prima facie* equal in value to the unsatisfied portion of plaintiff's judgment. Under the decisions before cited on the subject of sales, we think the mortgage was not too remote in point of time, in the absence of proof of change in value meanwhile. It is not meant by this to intimate anything touching the weight of such evidence beyond its *prima facie* effect.

It appears, both from the language of the first opinion and from decisions there cited, that it does not in any case of this kind require much proof of the existence of leviable and unseized property of a value substantially equivalent to the claim in suit to falsify the return of a sheriff, and to cast upon him the burden of showing why he should not be charged with the amount due on the claim. Touching the amount of evidence required of the plaintiff, it is said in 2 Greenleaf on Ev. (16th Ed.) § 584, respecting liability for not serving mesne process:

"Some evidence must also be given of the officer's ability to execute the process; such as that he knew, or ought to have known, * * * that goods, which he might and ought to have attached, were in the debtor's possession. The averment of neglect of official duty, though negative, it seems ought to be supported by some proof on the part of the plaintiff, since a breach of duty is not presumed; but, from the nature of the case, very slight evidence will be

sufficient to devolve on the defendant the burden of proving that his duty has been performed."

The duty of the sheriff receiving the present writ of attachment is prescribed by statute:

"Such writ shall command the sheriff * * * to attach so much of the lands, tenements, goods, chattels, moneys and effects of the defendant not exempt from execution, wheresoever the same may be found within the county, as will be sufficient to satisfy the plaintiff's demand, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in such attachment. * * *" 3 Comp. Laws 1897, § 10,559.

As pointed out in our first opinion, the defendant demanded an additional bond of indemnity and promised that if it were given he would seize everything in the house. We scarcely need repeat that the bond was given, and that his return showed the seizure of certain specified property, but not that all of the chattels then in the house were seized. Yet the statutory duty resting upon the sheriff was to attach so much of the property as would be "sufficient to satisfy the plaintiff's demand." Strictly speaking, this is not an action for false return, but is rather for failure and neglect to perform the duty imposed by the statute. Conceding that, in the absence of evidence to the contrary, the ordinary presumption of performance of official duty would prevail, still the evidence received, including admissible evidence rejected and considered in this opinion, would overcome such presumption and cast upon the sheriff the burden of explaining, if he could, why he did not levy upon property sufficient to satisfy the claim.

It thus becomes unnecessary to pass upon the question, urged by counsel for plaintiff at the last hearing, that it was not incumbent upon plaintiff either to allege or to offer proof of any character that there were goods and chattels belonging to the debtor and situated in her home sufficient to satisfy the balance due on the judgment; nor, under the present aspect of the case, was it in fact necessary in the former opinion to determine upon whom the burden of proof is cast under such an allegation, but in the absence of any evidence whatever of value. In short, under the peculiar circumstances of this case, we think that both of these questions should in this court be regarded as open.

The contention that the attachment lien was dissolved by the order of severance made in the action pending in the state court needs but little attention. As it seems to us, the cases cited in support of the claim are not apposite. Defendant admits that the action was based on "a promissory note joint and several in its nature." No question is made concerning the regularity of the proceedings had in the state court. Whether all of the proceedings taken in the case in that court are embraced in the present record does not appear. Both the statute law and the decisions of the state of Michigan are liberal concerning questions of practice, and in working out just ends. Section 10,065, 3 Comp. Laws Mich. 1897; *Reading v. Beardsley*, 41 Mich. 123, 1 N. W. 965, per Graves, J.

There are also some dates of transactions in the case in the state court, which are to be observed. The writ of attachment was issued December 13, 1902, and on the 19th of that month the sheriff com-

pleted the only proceedings ever taken by him under the writ, save only to make service and his return. It was not until the 24th of the month that the order of the court below was issued enjoining the bank and the sheriff from taking further proceedings in the suit pending in the state court. It has not been suggested that the sheriff could not have seized all of the property in the residence on the 19th, much less that he could not have done so prior to the 24th of the month. Further, the order of severance was made by the state court much later, October 1, 1903.

It should be recalled, too, that the only property levied upon was that of Mrs. Board, and the only property not levied upon, of which complaint is made, also belonged to her. It is not claimed that property belonging only to one of the defendants could not be attached under the writ. The judgment of the state court was against Mrs. Board alone. Why, in any event, should the sheriff be heard to complain of such matters? Plainly the only acts of negligence, if any were committed by the sheriff, which are of any concern in the present action, were consummated while the attachment was admittedly in force and in process of execution. What relevance, then, has the question of dissolution of the attachment to the present controversy? No recovery is sought in this action in virtue of any attachment lien. The recovery claimed is for failure to obtain such a lien. Furthermore, the order of injunction must have been treated as not affecting Mrs. Board's property; for the order was issued in the bankruptcy proceeding pending against the husband alone. The bankruptcy act does not purport to affect the property of the wife. In *re Hays* (6th Cir-cuit) 181 Fed. 674, 676, 104 C. C. A. 656.

In view of certain evidence offered by defendant tending to show that no articles of real value were omitted from the attachment, the case was one for submission to the jury under appropriate instructions; and the judgment of affirmance of this court and the judgment of the court below are reversed, with costs, and a new trial is awarded.

MONTANA MINING CO., Limited, v. ST. LOUIS MIN. & MILL. CO. OF
MONTANA.

(Circuit Court of Appeals, Ninth Circuit. October 24, 1910.)

No. 1,809.

1. BOUNDARIES (§ 40*)—ASCERTAINMENT AND ESTABLISHMENT—QUESTIONS FOR JURY.

Where there is ambiguity in the description as contained in a deed, and the court is compelled to resort to extrinsic evidence to identify and fix the lines of the survey on the ground, such identification is a question of fact for the jury.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196-204; Dec. Dig. § 40.*]

2. BOUNDARIES (§ 9*)—ASCERTAINMENT AND ESTABLISHMENT—EVIDENCE.

Where there is uncertainty in the specific description in a deed, the quantity named may be of decisive weight in determining the true boundary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 84; Dec. Dig. § 9.*]

3. BOUNDARIES (§ 6*)—DESCRIPTION IN FIELD NOTES—COURSES AND DISTANCES—LOCATION OF CORNERS.

The beginning corner of a survey does not control more than any other corner well ascertained, nor is it obligatory in tracing the survey to follow the calls in the field notes for courses and distances in the order there recorded; but where beginning at such initial corner, and following the calls for courses and distances, the other fixed corners must be ignored, and the result is a material variance in quantity, while by beginning at some other known point and reversing the calls and tracing the lines the other way the conditions are more nearly met, and the quantity corresponds practically with that called for, such course should be followed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 52; Dec. Dig. § 6.*]

4. BOUNDARIES (§ 48*)—ASCERTAINMENT AND ESTABLISHMENT—RECOGNITION AND ACQUIESCENCE.

Where there was a controversy for many years between the owners of adjoining mining claims as to the ownership of a vein in a strip originally in dispute but afterward conveyed by one to the other in compromise, but no controversy with respect to the boundary line of such strip, the acquiescence of both parties in the dividing line as marked and its acceptance by the grantee of the strip as conforming to the compromise agreement estops such grantee after the lapse of years from denying its correctness and claiming different or further ground.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

5. PLEADING (§ 122*)—ISSUES.

In an action by the owner of a mining claim against the owner of an adjoining claim to determine plaintiff's extralateral rights, where the complaint alleged priority of discovery and location of plaintiff's claim, and the answer admitted priority of plaintiff's notice of location and of its patent and attached copies of the location notices of each party, which showed plaintiff's discovery to have been prior, a mere denial of plaintiff's allegation on information and belief did not raise an issue as to the question of priority.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249-252; Dec. Dig. § 122.*]

6. EVIDENCE (§ 142*)—VALUE OF ORE CONVERTED.

In an action against a mining company to recover for ore mined, removed, and disposed of by defendant from a vein owned by plaintiff, evidence of the value of similar ore taken from the same vein near by is admissible on the part of plaintiff to establish the value of that converted by defendant; it being presumably within the power of defendant to show the actual value of that taken if that shown by such evidence is excessive.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. § 142.*]

7. TROVER AND CONVERSION (§ 53*)—ACTION FOR TRESPASS AND CONVERSION OF ORE—RIGHT TO INTEREST.

An action to recover the value of ore alleged to have been mined from a vein owned by plaintiff and converted by defendant is the same in legal effect as an action for conversion of personal property, and under Rev. Codes Mont. §§ 6068, 6071, providing that the measure of damages for breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby, and that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of its conversion with the interest from that time, the plaintiff in such action is entitled to interest on the value of the ore converted as matter of law.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 254; Dec. Dig. § 53.*]

In Error to the Circuit Court of the United States for the District of Montana.

Action by the St. Louis Mining & Milling Company of Montana against the Montana Mining Company, Limited. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 148 Fed. 450.

This controversy has been before the courts in one form or another for a number of years. As the litigation has proceeded, the facts have been stated by the courts and will be found in the reported cases to which reference will be made. A restatement of the principal features of the controversy will, however, be necessary to a clear understanding of the present issues as they are now presented to this court.

The St. Louis quartz lode mining claim was located on the 28th of September, 1878, by Charles Mayger in Lewis and Clark county, Montana Territory. The notice of location declared that the locator "had discovered a vein or lode within the limits of the claim located." The adjoining Nine Hour quartz lode mining claim was located on the 26th day of July, 1880, by William Robinson and James Huggins. The declaratory statement declared that the lode had been discovered and located on the 26th day of July, 1880. The declaratory statement and notice of location of the St. Louis mining claim described a claim on the St. Louis lode 600 feet in width and 1,500 feet in length along the lode or vein. The declaratory statement and notice of location of the Nine Hour claim described a location on the Nine Hour lode 600 feet in width and 1,500 feet in length along the lode or vein. The general direction of these two veins was northwest and southeast. The Nine Hour claim was on the south and east of the St. Louis claim. At the southeast corner of the St. Louis claim there was a conflict in the location or surveys of the two claims. The surface area involved in this conflict was small, but the extralateral rights of the St. Louis company in a vein apexing within the St. Louis claim and dipping under the surface of the area in conflict has been the bone of contention in all this extraordinary litigation.

When Mayger made application for a patent for the St. Louis claim, adverse proceedings were commenced by Robinson and Huggins against Mayger in the District Court of the Third Judicial District of Montana to determine the right of possession to the ground in conflict. Before the case was tried, the parties reached an agreement by way of a compromise, and to carry this compromise into effect Mayger, on March 7, 1884, executed a bond to Robinson and his associates in which Mayger agreed to proceed at once and procure as soon as practicable a patent for the St. Louis claim and then to execute and deliver to Robinson and his associates a good and sufficient deed of conveyance of the compromise ground, which was particularly described in the bond as follows:

"Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners 2 and 3, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode claim, between corners 2 and 3 thereof, 226 feet, to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south 20 degrees 28 minutes west along said boundary, between corners 1 and 2, 60.5 feet, to corner No. 2 of the St. Louis lode; 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis lode between corners three and four, thirty feet, to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode between corners two and three, 230 feet, to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained."

As the eastern and western side lines of this compromise ground, as here described, were parallel lines and 30 feet apart, the ground has been referred to in the proceedings as the "30-foot strip," or "compromise ground."

Mayger proceeded to obtain a patent for the St. Louis claim, including the

compromise ground, as did also Robinson and his associates a patent to the Nine Hour claim, omitting the compromise ground. A patent to the St. Louis claim, including the compromise ground, was issued to Charles F. Mayger by the United States on the 22d day of July, 1887; and a patent to the Nine Hour claim, omitting the compromise ground, was issued to Robinson and his associates by the United States on the 4th day of June, 1888. Thereafter the plaintiff in error acquired the interest of Robinson and his associates, and the defendant in error the interest of Mayger. Hereafter the plaintiff in error will be referred to as the "Montana Company," and the defendant in error as the "St. Louis Company." The Montana Company demanded a conveyance of the compromise ground in accordance with the terms of the bond executed by Mayger, which being refused, suit was brought in the district court of the state (hereinafter referred to as the "specific performance case"), which rendered a decree in its favor. That decree having been affirmed by the Supreme Court of the state of Montana (20 Mont. 394, 51 Pac. 824), the St. Louis Company sued out a writ of error to the Supreme Court of the United States, and on October 31, 1898, that court affirmed the judgment of the Supreme Court of Montana (171 U. S. 650, 19 Sup. Ct. 61, 43 L. Ed. 320). In pursuance of the decree, the St. Louis Company on July 1, 1895, executed and delivered to the Montana Company a deed for the tract described in the bond, giving its boundaries "including an area of about 12,844.5 feet, together with all the mineral therein contained, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances."

After the compromise agreement had been entered into, it was discovered that beneath the surface of the compromise ground there was a large body of ore which, it was claimed by the St. Louis Company, belonged to a vein apexing in the territory of the St. Louis claim. This was not the discovery vein upon which the location of the St. Louis lode was based, but was a secondary vein referred to in the proceedings as the "Nine Hour" or "Drum Lummon" vein or lode. This latter vein apexing for a certain distance in the St. Louis claim dipped to the east under the compromise ground and underneath the Nine Hour lode claim to the east of the compromise ground. The Montana Company had been mining ore from beneath the Nine Hour lode claim prior to 1893, but during that year began sinking a shaft upon the compromise ground. On September 16, 1893, the original complaint was filed in this action by the St. Louis Company against the Montana Company, and several individual defendants, claiming to recover \$200,000 damages sustained by the trespass of the Montana Company in removing ore from so much of the Drum Lummon vein as had its apex in the St. Louis lode claim. In the original complaint the St. Louis Company alleged itself to be the owner of the entire St. Louis lode claim as patented. In the answer of the Montana Company it denied that the St. Louis Company was the owner of so much of the premises described in the complaint as were embraced in the compromise ground, which ground was described as in the bond for a deed executed by Mayger on March 7, 1884. It was alleged that prior to March 7, 1884, the said ground was a part of the Nine Hour lode mining claim, then the property of the predecessors in interest of the Montana Company, and that at the time of filing the answer the Montana Company was the owner of the ground and in the actual possession thereof and entitled to all the minerals therein contained. Proceedings were thereupon stayed in the present action, it being an action at law in the federal court, and suit was brought by the Montana Company against the St. Louis Company, as heretofore stated, for the specific performance of the agreement contained in the bond for a deed. The action, as has also been stated, resulted in a judgment in favor of the Montana Company for the specific performance of the terms of the bond providing for the execution of a deed for the conveyance of the compromise ground to the Montana Company.

On November 21, 1898, three weeks after the decision of the Supreme Court of the United States in the specific performance case, the St. Louis Company filed an amended and supplemental complaint in the present action, which omitted the individual defendants, and sought recovery from the Montana Company alone for the ore which it was alleged had been removed from the Drum Lummon vein apexing inside the surface location of the St. Louis claim. The damages sought to be recovered were fixed at the sum of \$200,000, the amount mentioned in the original complaint. The purpose of the amended and supplemental complaint was to enforce the alleged extralateral rights of the St. Louis Company to any and all ores found in the Drum Lummon vein apexing in the St. Louis claim and dipping under the surface of the compromise ground and the Nine Hour claim. After issue had been joined upon this amended complaint, and, on June 26, 1899, the second amended and supplemental complaint was filed against the Montana Company alone, asking for the same relief, but alleging that since the filing of the original complaint the Montana Company had extracted ore of the value of \$400,000, and a judgment was demanded for \$600,000. To this second amended and supplemental complaint an answer was filed setting up the bond and deed heretofore referred to and pleading that by the terms of the bond and deed the St. Louis Company was estopped from claiming any part of the compromise ground or any mineral contained therein. Upon the trial of the case the court in its ruling upon the admission of testimony and in its instructions to the jury sustained the claim of the St. Louis Company to extralateral rights in the Drum Lummon vein in the compromise ground and under the Nine Hour claim to the extent that such vein apexed wholly within the St. Louis claim, but denied the claim to extralateral rights for so much of the vein which, crossing the side line of the St. Louis claim, apexed partly in the St. Louis claim and partly in the compromise ground. Under these rulings judgment was rendered in favor of the St. Louis Company for \$23,209.

To review this judgment the Montana Company prosecuted a writ of error to this court on the ground that the St. Louis Company had no extralateral rights in the compromise ground. On the 14th day of May, 1900, the judgment of the Circuit Court for the District of Montana was affirmed. 42 C. C. A. 415, 102 Fed. 430. In the meantime the St. Louis Company had taken out a cross-writ of error to this court on the ground that it had extralateral rights in the compromise ground not only for so much of the Drum Lummon vein as apexed wholly within the St. Louis claim, but also for so much of the vein as by reason of its width apexed partly in the St. Louis claim and partly in the compromise ground. This court held that where a vein crosses a common side line between two mining claims at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, the rights of the parties would be determined by the priority of the location and the entire vein considered as apexing upon the senior location until it had wholly passed beyond its side line. As the St. Louis claim appeared to be the prior location, this holding required a reversal of the judgment of the court below, which was directed accordingly, and the case remanded for a new trial as to the recovery sought for the conversion and value of the ores alleged to have been extracted from so much of the vein as apexed partly in the St. Louis claim and partly in the compromise ground; evidence as to the conversion of such ores having been excluded by the Circuit Court from the consideration of the jury. 44 C. C. A. 120, 104 Fed. 664, 56 L. R. A. 725. The Montana Company by separate writs of error then sought to have these two judgments reviewed in the Supreme Court of the United States, which latter court, on motion to dismiss and affirm, held that the judgment of the Circuit Court was entirely set aside by the second decision of this court, and therefore dismissed both cases on the ground that there was no final judgment. 186 U. S. 24, 22 Sup. Ct. 744, 46 L. Ed. 1039. Thereupon, on the filing of the mandate of this court, an order was entered setting aside the judgment in toto and ordering a new trial, which new trial was had on May 31, 1905, and resulted in a judgment in favor of the St. Louis Company for \$195,000, which judgment was affirmed by this court. 147 Fed. 897, 78 C. C. A. 33.

To review this latter judgment the Montana Company sued out a writ of error to the Supreme Court of the United States and also made application

for a writ of certiorari. The latter writ was allowed, and upon the hearing of the case the judgment of this court was reversed and the case remanded to the Circuit Court, with instructions to grant a new trial. *Montana Mining Co. v. St. Louis Mining Co.*, 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444. In its opinion the Supreme Court dissented from the decision of this court (*Montana Min. Co. v. St. Louis Min. Co.*, 102 Fed. 430, 42 C. C. A. 415), upholding the extralateral rights of the St. Louis company in the compromise ground, and held that by the terms of the bond describing the ground and adding "together with all the dips, spurs, angles," * * * something more was intended and accomplished than the mere establishment of a surface boundary line." What this "something more" was is indicated by the reference of the court to the extralateral rights of mining claims and the conclusion reached by the court that the words used in the bond and deed under consideration were sufficient not only to convey the ground described, but to pass the extralateral rights of the St. Louis Company in the compromise ground. In support of this conclusion the court said:

"To the suggestion that giving this construction to the bond and conveyance in effect the granting of a section of a vein of mineral, the answer is that there is nothing impracticable or unnatural in such a conveyance. It does not operate to transfer the vein in toto, but simply carves out from the vein the section between the vertical side lines of the ground and transfers that to the grantee. The title to the balance of the vein remains undisturbed.

"To the further suggestion that the owner of the apex might be left with a body of ore on the descending vein beyond the further side line of the compromise ground which he could not reach, the answer is that this assumes as a fact that which may not be a fact. The owner of the apex may be the owner of other ground by which access can be obtained to the descending vein, and it also is a question worthy of consideration whether granting a section out from a descending vein does not imply a right reserved in the grantor to pass through the territory of the section conveyed in order to reach the further portion of the vein."

Upon the filing of the mandate of the Supreme Court in the Circuit Court, the St. Louis Company obtained leave and filed its third amended and supplemental complaint. In this complaint the ownership of the Nine Hour claim by the Montana Company, the description of the vein underneath the Nine Hour claim from which it was charged the Montana Company had extracted ore, and the ownership of the ore by the St. Louis Company were alleged as follows:

"That the said defendant is and was the owner of what is known and designated as the Nine Hour quartz lode mining claim, situate and being east of the said St. Louis lode mining claim and of the thirty-foot strip, or compromise ground aforesaid, and that the discovery, location, and recordation of said St. Louis quartz lode mining claim and the United States patent therefor was made prior to the discovery, location, and recordation of the said Nine Hour lode mining claim.

"That within the said St. Louis lode mining claim, as the same was patented, is the apex of a vein which has such a dip or so far departs from a perpendicular in its descent into the earth as that it passes underneath the surface of the said Nine Hour lode mining claim; the whole of its apex being within the said St. Louis lode mining claim and outside of the said compromise strip, from a point on the east boundary line of said claim 503 feet distant from corner No. 1, being the northeast corner thereof, to a point on the west boundary line of said compromise strip 108 feet distant from the point of the intersection of said line with the east boundary line of said claim where the hanging wall of said vein crosses said west boundary line of said strip, from which point where the said hanging wall so crosses said west boundary line of said strip to a point at least 25 feet distant, a portion of the apex of said vein is within the St. Louis lode mining claim exclusive of such strip, from which last-mentioned point the said vein pursues such a course as that a portion of its apex, including the foot wall thereof, is either within the said

compromise strip or the said St. Louis lode mining claim, exclusive of such strip, until such vein passes beyond the south end line of the said St. Louis lode mining claim."

It was further alleged:

"That notwithstanding the right of said plaintiff in the premises, said defendant, on or about the 30th day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels, and underground workings, entered into and upon that portion of the vein, lode, or lead, the apex of which is between said point 503 feet distant from said corner No. 1, and situate and being to the east of the east boundary line of said St. Louis lode mining claim, as patented, and beneath the surface of said Nine Hour claim, and commenced extracting quartz, rock, and ore therefrom and removing and converting the same to its own use and benefit, and since said time has extracted quartz, rock, and ore and removed and converted the same to its own use and benefit, of the value of \$500,000, on account of which this plaintiff has been damaged in said sum, a large part of which quartz, rock, and ore, of the value of many thousands of dollars, was by said defendant so removed from that portion of said vein the whole or a part of the apex of which is within the St. Louis lode mining claim exclusive of said compromise strip."

To this third amended and supplemental complaint the Montana Company filed its answer, in which it was admitted that it was the owner of the Nine Hour claim; admitted that the dates of the discovery, location, and of the recording of the notice of location of the St. Louis claim were each and every one prior to the dates of the discovery, location, and of the recording of the location notice of the Nine Hour claim; and that a patent was issued to the St. Louis Company prior in date to the patent issued for the Nine Hour claim, but denied that the St. Louis claim at the time of its discovery and location embraced the compromise ground, or any of its veins therein. It was averred that the ground embraced within the area described as the compromise ground and within the area in conflict between the St. Louis claim and the Nine Hour claim was first segregated from the public domain by the locators of the Nine Hour claim; and that as to all veins apexing within the said area of conflict the Nine Hour claim was senior and prior to the St. Louis claim.

It was alleged that the vein described in the third amended and supplemental complaint (Drum Lummon vein) from which it was charged ore had been extracted by the Montana Company, and for which damages were claimed by the St. Louis Company, was not the discovery vein, and at the time of the location of the St. Louis vein was wholly unknown to the locators of that claim, and upon the line of said claim as patented this vein did in fact enter and depart from the same side line and not through either or both end lines; and because thereof it was alleged that the St. Louis Company never had, and did not then have, or own, any extralateral rights therein, or in the ores thereof lying eastward of a plane drawn vertically downward along said patented east line (independent of the conveyance of the compromise ground) and never did and did not then own any extralateral rights therein eastward of the west line of the compromise ground.

For a further and separate answer it was alleged, among other things, that the St. Louis claim was located on the 28th day of September, 1878, by the predecessor in interest of the St. Louis Company. A copy of the notice of location and declaratory statement of discovery was attached and made a part of the answer and marked "Exhibit A."

It was alleged that the Nine Hour claim was located on the 26th day of July, 1880, by the predecessors in interest of the Montana Company. A copy of their notice of location and declaratory statement of discovery was attached and made a part of the answer and marked "Exhibit B."

It was alleged that on or about the 16th day of August, 1881, the owner of the St. Louis claim caused the same to be surveyed with the view to obtaining a patent therefor from the government of the United States, and that, in causing the survey to be made, Charles F. Mayger, the then owner of the St. Louis claim, wrongfully extended and caused to be extended the easterly boundary line of the St. Louis claim so as to cover and embrace a portion of the ground which had theretofore been segregated from the public domain by the locators of the Nine Hour claim. The answer then recites the proceedings in the Land

Office by Mayger in his application for a patent for the St. Louis claim; the filing of an adverse claim to the ground in conflict by William Robinson and James Huggins, the owners of the Nine Hour claim; the commencement of an action by Robinson and his associates in the state court to determine the rights of the respective parties to the ground in conflict, and while this was pending the entering into an agreement by the parties to the controversy whereby the action was settled and compromised; the execution of a bond by Mayger to Robinson and his associates pursuant to the compromise agreement, wherein the former agreed in consideration of the withdrawal of the adverse claim to proceed to obtain a patent for the St. Louis claim, and when such patent was obtained to execute and deliver to Robinson and his associates or their heirs and assigns a good and sufficient deed to the premises mentioned and described in the bond (the compromise ground).

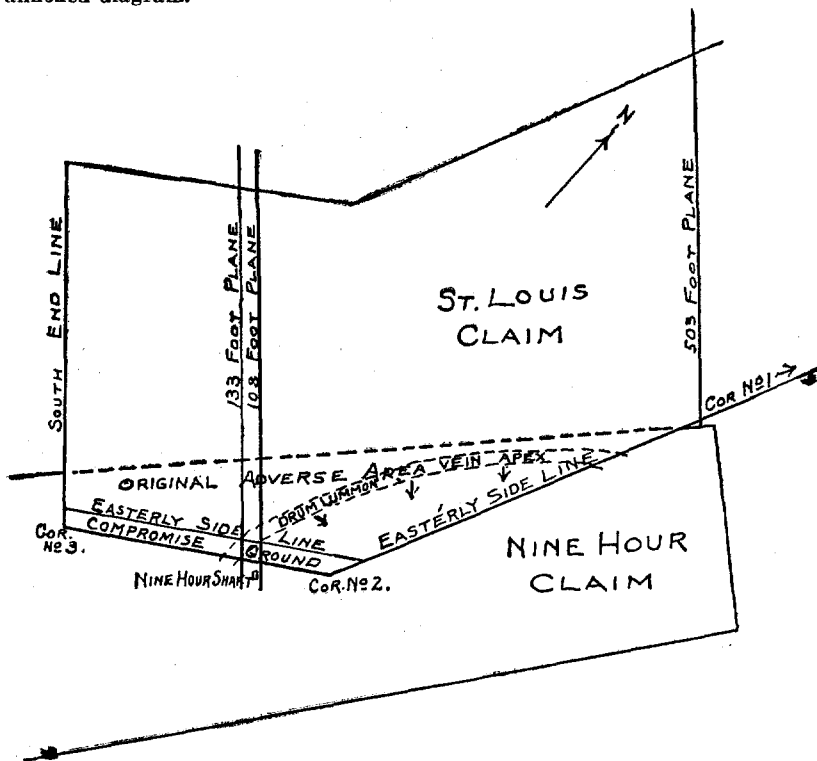
The answer alleges the issuance of a patent on July 22, 1887, to Mayger for the St. Louis claim as surveyed, including the area in conflict, and the issuance of a patent on June 4, 1888, to Robinson and his associates for the Nine Hour claim, excluding the area in conflict; the refusal of Mayger to execute a deed to Robinson and his associates for the compromise ground; the commencement of an action in the state court by the Montana Company (which by mesne conveyances had succeeded to the ownership of the Nine Hour claim), against Charles Mayger and the St. Louis Company to compel the defendants to comply with the terms of Mayger's bond and to compel the execution of a deed by Mayger and the St. Louis Company for the compromise ground as called for in the bond; the entry of a judgment in the case in favor of the Montana Company; and the execution of a deed by the St. Louis Company to the Montana Company for the compromise ground in accordance with the terms of the bond and the judgment.

In this answer reference is made to an allegation contained in the third amended and supplemental complaint that the hanging wall of the vein from which the ores, for which recovery is sought, are alleged to have been extracted, crossed the west boundary line of the compromise strip at a point 108 feet distant from the point of intersection of the compromise strip with the eastern boundary line of the St. Louis claim, and the foot wall crossed at a point at least 25 feet further south. With respect to this allegation, the answer denies that the said vein crosses the west line of the said compromise strip at said point; but alleges that the west line of the compromise strip, according to the calls of the compromise agreement and deed, should be located parallel to the boundary line of the St. Louis claim through a point distant 50 feet from the center of the discovery shaft of the Nine Hour claim, which point is ascertained by drawing a line 50 feet in length from the discovery shaft at right angles to the boundary line of the St. Louis claim between corners 2 and 3; that, when the west line of the compromise strip is located upon the ground in accordance with the call for the same in the deed, the point of departure of the vein from the St. Louis claim into the compromise ground will be found not to exceed 90 feet from the point of intersection between the west boundary line of the compromise ground and the east boundary line of the St. Louis claim, at which point of departure into the compromise ground the southerly plane bounding the rights of the St. Louis Company, if any, in veins apexing wholly within the St. Louis claim, should be drawn; that no ores had been extracted from beneath the surface of the Nine Hour claim north of the plane so drawn through the last-described point of departure, but all of the ores which had been extracted by the Montana Company, either beneath the compromise ground or beneath the Nine Hour claim, had been extracted at points south of said plane; that no ores had been extracted by the Montana Company from veins having their tops or apexes entirely within the St. Louis claim, exclusive of the compromise ground, as the same is called for in the deed.

The Montana Company by a cross-complaint and by way of a counterclaim alleged that it was the owner of the compromise ground and of the ores and precious metals contained therein, and in any and all veins throughout their entire depth, the apexes of which were within the Nine Hour claim and the compromise ground, at all points to the eastward of a vertical plane drawn downward along the west side line of the compromise ground as in the answer

described; that, notwithstanding the rights of the Montana Company, the St. Louis Company on or about June 30, 1893, and since said date had knowingly and wrongfully entered through underground workings of its own making into the portion of said vein owned by the Montana Company and extracted ores therefrom, and removed and converted the same to its own use and benefit in the value of \$156,000, for which sum the Montana Company demanded damage.

The boundary lines of the St. Louis and Nine Hour claims involved in this controversy, the original area in conflict, the compromise ground, and the general course of the Drum Lummon vein are shown approximately on the annexed diagram.



Issues were joined by the filing of a replication by the St. Louis Company, and the case came on for trial before a court and a jury. At the conclusion of the testimony on behalf of the Montana Company, the St. Louis Company by leave of court amended its third amended and supplemental complaint and replication by withdrawing the allegation that the 32-foot strip or compromise ground was a part of the St. Louis claim, and substituting in lieu thereof an allegation contained in the former pleading that the compromise ground was and always had been a part of the Nine Hour claim. The complaint was further amended by an allegation that the apex of the vein in controversy passed entirely into the compromise ground at the point designated as the 268.6-foot plane, which point was 268.6 feet from the intersection of the west boundary of the compromise ground with the east side line of the St. Louis claim, between corners 1 and 2. The complaint as thus amended differed from the former complaint in the disclaimer of the St. Louis Company of any ore beneath the compromise ground, but insisting, as before, upon its extralateral rights to the ores in the Drum Lummon vein underneath the Nine Hour claim to the

east of the compromise ground. The amended complaint also differed from the former complaint in fixing the crossing of the foot wall of the Drum Lummon vein at the 268.6-foot plane instead of the 133-foot plane. As the jury found that all the ore for which a recovery was had by the St. Louis Company was extracted from that part of the vein north of the 133-foot plane, the latter amendment had ceased to have any significance in the case.

In submitting the case to the jury, after clearly defined instructions as to the law of the case, the court requested the jury to find specifically as to certain material and controlling facts as follows:

(1) Is the compromise strip, as contended for by the St. Louis Company and pictured on its map, Plaintiff's Exhibit No. 1, or as contended for by the Montana Company, and pictured on its map, defendant's Exhibit I?

The jury returned a finding that they found the compromise strip as claimed by the St. Louis Company.

(2) The jury was requested to find how much ore the Montana Company had extracted from the Drum Lummon or Nine Hour vein underneath the surface of the Nine Hour claim, north of the 133-foot plane and south of the 503-foot plane, and east of the compromise strip, and the value thereof.

The jury returned a finding that the ore extracted by the Montana Company from the vein as described was 1,912 tons, and that the value of such ore was \$237,470.40.

(3) The jury was also requested to find how much ore had the Montana Company extracted from the Drum Lummon or Nine Hour vein underneath the surface of the Nine Hour claim, north of the 268.6-foot plane and south of the 503-foot plane, and east of the compromise ground, and the value thereof.

The jury returned the same finding to this question as to question No. 2.

(4) The jury were also requested to find what amount of ore the St. Louis Company had extracted from underneath the compromise strip, as they should find the same to be, and the value thereof.

The jury returned a finding to this question that the St. Louis Company had extracted ore from beneath the compromise strip amounting to 218.29 tons, and the value thereof was \$34,341.38.

(5) The jury was also requested to find what amount of ore, if any, the St. Louis Company had extracted from underneath the Nine Hour claim belonging to the Montana Company, and outside of the compromise strip, and the value of the same.

To this question the jury returned a finding that no ore had been extracted by the St. Louis Company in the ground described belonging to the Montana Company.

The jury returned a verdict in favor of the plaintiff for the sum of \$203,129.02; and stated that this amount included interest and was in excess of any amount to which the Montana Company was entitled by virtue of its counterclaim or cross-complaint. The Montana Company brings the case here by writ of error.

E. C. Day, L. O. Evans, C. F. Kelley, and Charles J. Hughes, Jr., for plaintiff in error.

Gunn & Rasch, Clayberg & Horsky, and Walsh & Nolan, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It is contended by the Montana Company that the St. Louis Company has no extralateral rights in the Drum Lummon vein underneath the Nine Hour claim. This contention is based upon two facts: (1) That the Drum Lummon vein was not the discovery vein of the St. Louis claim, but is what is called a secondary vein. (2) This secondary vein enters and departs from the St. Louis claim by a side line. Section 2322 of the Revised Statutes (U. S. Comp. St. 1901, p. 1425) provides that:

"The locators of all mining locations * * * on any mineral vein, lode, or ledge, situated on the public domain * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

The patents for the St. Louis and Nine Hour claims, like all patents for mineral lands, conveyed to the grantees the respective claims and veins therein with the extralateral rights provided in the statute, with the express reservation in each patent:

"That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting or removing the ore from such other vein, lode, or ledge."

The evidence in this case on the last trial, as upon former trials, established the fact that the Drum Lummon vein apexes for a certain distance within the St. Louis claim and dips underneath the Nine Hour claim. We are therefore of the opinion that the right of the St. Louis Company to extralateral rights in the Drum Lummon vein to the extent that that vein apexes within the St. Louis claim has been previously determined by this court. (102 Fed. 430, 42 C. C. A. 415; 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; 147 Fed. 897, 78 C. C. A. 33), and that this determination has been affirmed by the Supreme Court of the United States (204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444), and that such has become the law of the case.

To what extent the St. Louis Company has extralateral rights in the Drum Lummon vein underneath the surface of the Nine Hour claim depends upon the extent to which that vein apexes within the St. Louis claim, and this question depends in turn upon the location of the boundary line between the St. Louis claim and the compromise ground, and the point where the Drum Lummon vein crosses that line. In the former trials of this case there had been no controversy about this fact. The lines of the compromise ground have been placed on numerous plats and maps showing a strip of ground 30 feet wide and containing about 12,844.5 square feet on the southeastern boundary of the St. Louis claim and parallel to the southeastern boundary line of that claim between corners Nos. 2 and 3, as described in the patent for that claim, and this description had been treated as correct by both parties. It had also been referred to in this court indifferently as either the "compromise ground," or "30-foot strip," and occasionally both terms have been used. 102 Fed. 430, 42 C. C. A. 415; 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; 147 Fed. 897, 78 C. C. A. 33; 168 Fed. 514, 93 C. C. A. 536. It was referred to in the Supreme Court in reciting the averments of the pleadings as the "30-foot strip or compromise ground." 186 U. S. 24, 22 Sup. Ct. 744, 46 L. Ed. 1039. The calls of the description of the compromise ground in the bond and deed do in fact describe

a strip of ground in the southeastern corner of the St. Louis claim with parallel sides 30 feet apart and containing about 12,844.5 square feet. But at the last trial the St. Louis Company called as a witness one John R. Parks, a mining engineer, who produced a map prepared under his direction showing the surface and underground workings of the St. Louis and Nine Hour claims, and the location of the 30-foot strip or compromise ground. The map was admitted in evidence and marked plaintiff's "Exhibit 1." When the witness had indicated on the map the courses and distances inclosing this strip of ground and particularly the location of the west side line of the compromise ground, the Montana Company objected to any further testimony with reference to this line as drawn upon the map for the reason that it was not drawn in accordance with the description of the ground as contained in the deed. The objection was overruled, and the witness traced the lines of the compromise ground in detail as shown upon the map. The objection was that the west side line of the compromise ground, which is also the east side line of the St. Louis claim after the compromise ground had been cut off, is not located as required by the initial call of the deed describing the compromise ground. That call is as follows:

"Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3, 50 feet distant."

The west side line of the compromise ground, as shown upon the map, plaintiff's Exhibit 1, instead of being 50 feet distant from the present discovery shaft of the Nine Hour claim, is 40 feet distant. To sustain the correctness of the lines of the compromise ground as shown on the map, the St. Louis Company introduced in evidence, over the objection of the Montana Company, evidence tending to show that the collar of the discovery shaft of the Nine Hour claim is not at the same point it was at the time of the compromise agreement; that the original shaft was perpendicular, such as a prospector usually sinks; that the shaft was afterwards sunk on an incline, corresponding with the dip of the vein, and the collar of that shaft was brought about 10 feet further west and nearer to the original eastern side line of the St. Louis claim. This evidence, if true, accounted for the fact that, if the commencement point were taken from the middle of the present shaft, it would make the width of the strip of compromise ground at the point of commencement 40 feet instead of 30 feet, as called for in the deed. Presumably for this reason the witness Parks in tracing the boundary of the compromise ground did not commence with the initial call of the deed, but commenced at corner No. 2 of the St. Louis claim as described in the patent; that is to say, he measured north from corner No. 2 of the patent, along the line in the direction of corner No. 1, 60.5 feet. This line followed in reverse direction the third call of the deed:

"Thence south 20 degrees 28 minutes west along the line of said boundary between corners one and two, 60.5 feet to corner 2."

He then commenced at corner No. 3 of the patent and measured along the line between corners 3 and 4, 30.34 feet to a point on that line; then by a survey connecting those lines and by mathematical calculations he found he had a line parallel to the east side line of the southern portion of the St. Louis claim inclosing a strip of ground 30 feet wide, but this strip of ground contains 12,929.8 square feet, instead of 12,844.5 square feet mentioned in the deed, a difference of 85.30 square feet. This difference is easily accounted for. In the original survey and plat for the adverse claim, the length of the side line of the St. Louis claim between corners Nos. 2 and 3 was determined by the surveyor as being 400.31 feet, and this was the length of the line subsequently incorporated into the bond. This line with the other calls in the bond described an area containing 12,844.5 square feet, the area of the compromise strip stated in the bond and deed. The deed erroneously gave the length of this line as 403 feet, instead of 400.31 feet, as stated in the bond. The survey for the map, plaintiff's Exhibit 1, makes the length of this line 402.34 feet, and the surface of the area, as before stated, 12,929.8 square feet. It appears that, if the point of commencement described in the deed is taken as 50 feet from the center of the discovery shaft as now located, the strip of compromise ground would be 40 feet wide at the point of commencement, but with the further calls of the deed the side lines would not be parallel, and the area of the surface would contain 16,095.4 square feet instead of 12,844.5 square feet; or if, commencing at the same point, the side lines of the strip are made parallel and 40 feet apart, disregarding the other calls of the deed, the area included would be 17,356.7 square feet, instead of 12,844.5 square feet, as called for by the bond and deed. It thus appears that, if the west side line of the compromise ground is located 50 feet from the discovery shaft of the Nine Hour claim as required by the first call of the bond and deed, no other call of the bond and deed is followed in describing the compromise ground, and the call for quantity is wholly disregarded. "Where there is uncertainty in specific description, the quantity named may be of decisive weight." *Ainsa v. United States*, 161 U. S. 208, 229, 16 Sup. Ct. 544, 552, 40 L. Ed. 673.

It is contended by the Montana Company that there was no controversy as to the description of the compromise ground; that it was described in the bond and deed and set forth in the amended complaint and admitted in the answer; that the west side line of the compromise ground was 50 feet distant from the center of the discovery shaft of the Nine Hour claim and was the dividing line between the St. Louis claim and the compromise ground. It is admitted by the St. Louis Company that prior to the last trial there had been no controversy upon the subject; that the compromise ground was described in the bond and deed as 30 feet wide with its west side line parallel to the east side line of the St. Louis claim, between corners numbered 2 and 3; that the courts had uniformly held as a matter of law that such was a description of the compromise ground, and the ground so described contained an area of 12,-

844.5 square feet. In other words, the primary contention of both parties is that the question at issue was one of law for the court. The court below treated it as a mixed question of law and fact. There was ambiguity in the description as contained in the deed, and the court was compelled to resort to extraneous evidence to identify and fix the lines of the survey on the ground, and this identification was a question of fact for the jury, as held by the Supreme Court in *Ayers v. Watson*, 137 U. S. 584, 590, 11 Sup. Ct. 201, 34 L. Ed. 803, where a similar question was before the court relating to the identification of the lines of a grant of land in Texas. The only question then arises: Did the court submit this question to the jury with proper instructions? The court instructed the jury upon this question as follows:

"You have heard a great deal about the boundaries of what was spoken of as the compromise strip, and, as the matter is important, I will direct your attention to it. The bond and the deed with respect to it are in evidence before you. In applying the description set forth in the bond for, and conveyance of, the ground, you are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the lands embraced would more nearly harmonize with the calls and objects of the grant. If an insurmountable difficulty is met with in running the lines in one direction, yet is entirely obviated by running them in the reverse direction, and all the known calls of the survey are harmonized by the latter course, it is only a dictate of common sense to follow it. The beginning point of a survey does not control more than any other point actually well ascertained, and you are not bound to follow the calls of a grant in the way said calls stand in the words of description. Therefore, if you can take the description, as specified in the bond and deed, by beginning at any point mentioned therein, and thus apply said description to the ground more nearly than in commencing at the beginning point of said survey as mentioned in said description, then you should so apply said description."

This instruction followed the rule laid down in *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803, where the Supreme Court, referring to an instruction given the jury by the trial court, said:

"The judge was entirely right in charging that the footsteps of the original surveyor might be traced backward as well as forward; and that any ascertained monument in the survey might be adopted as a starting point for its recovery."

The court said further, at page 598 of 137 U. S., at page 208 of 11 Sup. Ct. (34 L. Ed. 803):

"The 'beginning' corner does not control more than any other corner actually well ascertained, nor are we constrained to follow the calls of the grant in the order said calls stand in the field notes there recorded, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize with the objects of the grant."

The court said further, at page 604 of 137 U. S., at page 208 of 11 Sup. Ct. (34 L. Ed. 803):

"If an insurmountable difficulty is met with in running the lines in one direction, and is entirely obviated by running them in the reverse direction, and all the known calls of the survey are harmonized by the latter course, it is only a dictate of common sense to follow it."

In *Burge v. Poindexter* (Tex. Civ. App.) 56 S. W. 81, 82, the court said:

"It is not absolutely necessary, in locating a survey, to follow the calls of the grant in the order given. If, by reversing the calls, a more accurate result can be obtained in locating the land surveyed than by following the order of the field notes, then that method should be pursued."

For the purpose of further identifying the location of the boundary lines between the St. Louis claim and the compromise ground as agreed upon by the parties in interest, testimony was introduced by the St. Louis Company, over the objection of the Montana Company, tending to show that the compromise ground was staked off and marked upon the ground; that the width of the ground by such staking was 30 feet; the acquiescence of the party to the correctness of such stakings; that the Montana Company went into possession of the compromise ground as staked and built a shafthouse immediately east of the line so staked; that the St. Louis Company started a shaft immediately to the west of such line, the line being the dividing line between the two shafts; the building of brattices or board partitions across the workings beneath the surface of the compromise ground at or near the vertical plane so staked off; the fact that the brattices or partitions had the effect of preventing any one from entering the workings of the compromise ground from the St. Louis side; the fact that the St. Louis Company extracted ore from the apex of the vein down to the vertical line as established by projecting the west side line of the 30-foot strip as staked vertically downward; that the Montana Company made no claim for any ore taken by the St. Louis Company from the west side of this line. The admission of this and other testimony relating to the west side line of the compromise strip is assigned as error, as is also the instruction of the court to the jury with respect to such testimony.

The testimony was clearly admissible. It was for the jury to ascertain and locate the line in controversy, and to enable it to perform that duty intelligently, any evidence, whether parol or written, that had any natural or reasonable tendency to show its location, was admissible. *Washington Rock Co. v. Young*, 29 Utah, 108, 80 Pac. 382. In a note to this case as reported in 110 Am. St. Rep. 666, 682, the rule relating to the location of a boundary line is stated as follows:

"When questions arise as to the true location of a boundary line, a practical location thereof by the persons interested becomes of the highest importance. It is a well-settled rule of law, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long period of years will not be disturbed. It is binding on the parties thereto and their privies in estate. This doctrine has been adopted as a rule of repose with a view of quieting titles and preventing litigation"—citing the cases of *McGee v. Stone*, 9 Cal. 600; *Dupont v. Starring*, 42 Mich. 492, 4 N. W. 190; *Smith v. State*, 23 N. J. Law, 130; *Lavery v. Moore*, 33 N. Y. 658; *Sherman v. Kane*, 86 N. Y. 57; *Katz v. Kaiser*, 154 N. Y. 294, 48 N. E. 532; *O'Donnell v. Penney*, 17 R. I. 164, 20 Atl. 305. "It does not necessarily rest upon an actual agreement nor upon prescription or legal limitation. *Haring v. Van Houten*, 22 N. J. Law, 61."

The Montana Company contends that the ruling of the court in admitting testimony and in instructing the jury in accordance with
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this rule was error, and cites the case of *Schraeder Mining Co. v. Packer*, 129 U. S. 688, 699, 9 Sup. Ct. 385, 32 L. Ed. 760, as establishing a different rule. In that case the court said:

"Owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered."

The evidence in that case to which this instruction referred related to an alleged assent by one of the parties to a boundary line between two tracts of land located in ignorance of both parties as to the existence of any conflict as to the true line. That is not this case, and the court draws the distinction between the facts of that case and a case such as the one at bar in the following language, referring to the charge of the trial court to the jury (on page 698 of 129 U. S., on page 388 of 9 Sup. Ct. [32 L. Ed. 760]):

"The assent was given, not to settle a dispute, but to acquiesce in the running of a line about which no dispute had then arisen, and upon the supposition that the person engaged in running it knew where the true lines were; that it was an acquiescence resulting from a pure mistake and error, which should not bind the plaintiff or estop him from claiming his rights when he discovered the mistake."

The Supreme Court, commenting on this charge, said:

"We think the court in its charge brought out clearly and fairly before the jury the distinction between a mutual undertaking to adjust and settle a doubtful and disputed dividing line, in case of conflicting titles, on the one hand, and, on the other, the consent of parties to mark a boundary supposed to run between undisputed tracts, but in ignorance and mistake of both as to the existence of any conflict."

The law of that case is clearly not applicable here, where there was a controversy for many years as to the ownership of a vein in the compromise ground; but no controversy with respect to the dividing line between that ground and the St. Louis claim, but evidence of a knowledge of all the facts by the parties and a mutual assent and agreement as to its location.

The court in its instructions to the jury concerning the acts and conduct of the parties to the controversy and their declarations said:

"Consider whether for many years the parties thereto and each of their predecessors in interest acquiesced and recognized that the compromise ground was a strip 30 feet wide along the above-mentioned east boundary line of the St. Louis claim, as surveyed for patent, and, as I have said, any and all other evidence that was introduced by the plaintiff and the defendant in the trial of the case, showing or indicating, or tending to show, what the intention of the parties to the bond was, and the acts of the parties thereto, and their successors in interest. If you believe that the parties hereto and their predecessors in interest applied the description in said bond, by markings on the ground, and occupied it with reference to said markings, and, for many years, accepted a strip of ground 30 feet in width as conforming to the description in said bond, as shown by plaintiff's Exhibit 1, then and in that event the defendant here would be and is estopped from claiming that a strip of ground 30 feet wide along the east boundary line of the St. Louis claim, as surveyed for patent, between corners numbered 2 and 3, does not comply with the description of said compromise strip in said bond and deed, and from claiming or asserting that any other different or further ground was included in the description set forth in said bond and deed."

To these instructions the Montana Company objected in the following language:

"The defendant objects and excepts to so much of the court's instructions as referred to the drafting of the description of the compromise ground, and as to the acts of acquiescence and estoppel with reference to the compromise ground."

This objection was indefinite; it simply identifies the part of the instruction with which the Montana Company was not satisfied without in any manner apprising the court of the ground of the objection. The attention of the court was not called to the specific proposition which the Montana Company desired modified or withdrawn, and for that reason might well be disregarded. But it is not necessary to dispose of the objection in that way. The court showed by its instructions that it understood the case in all its bearing and was fully advised as to the law applicable thereto. The objection that there was no plea of estoppel on the part of the St. Louis Company is answered by the fact that the position of the St. Louis Company did not require that it should make such a plea. It alleged the ownership of the St. Louis claim and the vein in question, save as to the compromise ground. The line dividing the compromise ground from the St. Louis claim was not in controversy until the last trial, when the map of the St. Louis Company showing the location of the compromise ground was offered in evidence and was then objected to by the Montana Company on the ground that the witness had not drawn the line in accordance with the description of the compromise ground contained in the deed and complaint. There was no place for a plea of estoppel in such a proceeding. The objection that the court did not instruct the jury that, if the line in question had been fixed by acquiescence and agreement between the parties, such acquiescence must have been continued for a period of time at least equal to the statute of limitations, to be binding upon the Montana Company, cannot be sustained. The evidence was not introduced for the purpose of establishing adverse possession, but for the purpose of showing that the line had been drawn by the parties and marked upon the ground as the true line agreed upon in the compromise agreement. Upon the evidence, and under the instructions given by the court, the jury found the compromise strip as contended for by the St. Louis Company, and as pictured on its map, plaintiff's Exhibit 1. The compromise ground was there shown as a strip 30 feet wide and its western boundary line as claimed by the St. Louis Company.

It is contended by the Montana Company that, the compromise ground having been patented as a part of the St. Louis claim, and the St. Louis Company having conveyed the compromise ground to the Montana Company, the rights of the parties in the Drum Lummon vein are to be determined by the relation of grantor and grantee; and as the general rule of construction applicable to all grants is that, where it is not possible to determine from the deed just what is conveyed, the deed must be construed in favor of the grantee; that in the present case the grantee received a grant of a portion of the apex of the Drum Lummon vein, which by reason of its width was

partly in the St. Louis claim and partly in the compromise ground; that, as the vein was not susceptible of division, the deed must be construed against the grantor, and the whole of the vein must be held to have passed to the Montana Company. There are two answers to this contention: The first is that the purpose of this action was to determine from the deed, and the testimony relating thereto, just what was conveyed by the deed; and that fact has been determined by the verdict of the jury. In the absence of error in the proceeding, the grant as there determined must be held to be definite, certain, and free from ambiguity. The second answer is that we are not now dealing with the compromise ground. All controversy concerning the extralateral rights of the St. Louis Company in the Drum Lummon vein under the compromise ground was determined and set at rest by the Supreme Court of the United States in its decision in 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444. The deed related only to the compromise ground; it did not in any way purport to convey extralateral rights elsewhere, and the grantor parted with no rights in the Nine Hour claim, excluding the compromise ground. The relation of the St. Louis claim to the Nine Hour claim to the east of the compromise ground has been in no way disturbed and remains precisely what it was prior to the compromise agreement. This the Supreme Court was careful to state in its decision on page 218 of 204 U. S., on page 257 of 27 Sup. Ct. (51 L. Ed. 444):

"To the suggestion that giving this construction to the bond and conveyance is in effect the granting of a section of a vein of mineral, the answer is that there is nothing impracticable or unnatural in such a conveyance. It does not operate to transfer the vein in toto, but simply carves out from the vein the section between the vertical side lines of the ground and transfers that to the grantee. The title to the balance of the vein remains undisturbed."

What were the extralateral rights of the St. Louis claim in the Drum Lummon vein under the Nine Hour claim excluding the compromise ground? In the decision of this court in 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725, this court considered the question of extralateral rights of the St. Louis Company in the Drum Lummon vein, which by reason of its width was partly within the St. Louis claim and partly within the compromise ground. This court held that, inasmuch as neither the statute nor the authority of adjudicated cases permitted a division of the crossing portion of the vein, the rights of the parties would be determined by the priority of location and the entire vein considered as apexing upon the senior location until it had wholly passed beyond its side line. The compromise ground having been eliminated, the law is now applicable to the extralateral rights of the St. Louis claim under the Nine Hour claim, excluding the compromise ground. With respect to this question, the Montana Company contends that the court erred in taking from the jury the question of the priority of location of the St. Louis and Nine Hour claims. The court instructed the jury as follows:

"Accordingly, for all purposes of this case, it must be considered that all the ground within the limits of the survey for patent above referred to, except the compromise ground, as you may determine it to be, was within the St. Louis claim, as located, and that such location was prior in time to any

location of the defendant or its predecessors in interest of the Nine Hour claim."

The court also refused to submit the question of priority of discovery to the jury. It is contended by the Montana Company that by its answer to the St. Louis Company's third amended and supplemental complaint it denied and put in issue the priority of discovery and location of the St. Louis claim, and the question was one for the jury.

It is true that by its answer the Montana Company denied upon information and belief that the date of discovery and location of the St. Louis claim was prior to the discovery and location of the Nine Hour claim; but it admitted that the date of the recording of the notice of location of the St. Louis claim was prior to the date of the recording of the location notice of the Nine Hour claim; and that the patent was issued for the St. Louis claim prior in date to the patent issued for the Nine Hour claim. But the notices of location of both the St. Louis and Nine Hour claims were attached and made a part of the answer. In the notice of the St. Louis claim, dated September 28, 1878, the locator states that "he has discovered a vein or lode within the limits hereby located." In the Nine Hour claim the notice is that the locator has discovered and located a claim on the 26th day of July, 1880.

In the replication of the St. Louis Company, the allegations of the answer relating to the location and discovery of the two claims as here alleged were admitted. But in turning to the answer of the Montana Company we find that there is a further denial that the St. Louis claim at the time of its discovery and location embraced the compromise ground, and as to all veins apexing wholly or in part within the compromise ground, and particularly with respect to the vein described as the Drum Lummon vein, it is alleged that the discovery and location of the Nine Hour claim was prior to the acts of the predecessors of the St. Louis Company in discovering and locating that vein in the St. Louis claim. This is not a denial that the discovery in the St. Louis claim, and the location of that claim exclusive of the compromise ground, was not prior to the discovery in the Nine Hour claim; and the allegations respecting the compromise ground show that it was not the intention of the Montana Company to put in issue the question of the priority of the St. Louis claim either in discovery or location over the Nine Hour claim, excluding the compromise ground. Under this state of the pleadings, if we exclude the compromise ground, as we must under the decision of the Supreme Court, there was no issue as to priority, either in the location or discovery of the St. Louis claim. It was admitted that the St. Louis was the older claim, and under the law it took the entire width of all veins apexing within the claim including the Drum Lummon vein to the extent that that vein apexed within the St. Louis claim, and this despite the fact that a portion of the width of the vein at the point of crossing was outside the surface side line of the claim extended downwards vertically. *Lawson v. United States Min. Co.*, 207 U. S. 1, 15, 28 Sup. Ct. 15, 52 L. Ed. 65. The court was

therefore right in withdrawing from the jury the question of priority of discovery as between the St. Louis claim and the Nine Hour claim excluding the compromise ground.

It is objected that the court admitted immaterial, irrelevant, and incompetent testimony, introduced on behalf of the St. Louis Company, for the purpose of establishing the value of ores taken from the vein in question by the Montana Company from under the Nine Hour claim. The ore sued for had been taken and carried away by the Montana Company. The St. Louis Company was therefore unable to prove the value of the specific ore taken, but it was allowed to show the value of similar ores taken from the same vein near by. The evidence appears to have been the best the St. Louis Company could secure. If the value of the ore thus ascertained was incorrect and excessive, the presumption is that the Montana Company, having taken the ore and disposed of it, had the means to show its actual value.

It is objected that the court instructed the jury that, if they believed that the St. Louis Company was entitled to a verdict in its favor, it was also entitled to interest upon the amount found from the date of conversion of the ore by the Montana Company, if there had been conversion, to the date of the rendition of the verdict by the jury at the rate of 8 per cent. per annum. It is contended that the action was the local action of trespass, and not the transitory action of conversion; that interest as an element of damages is the creation of statute, and, as there is no statutory provision for interest in the state of Montana as an element of damages in an action of trespass, it was not recoverable. No claim was made for damages because of injury to the land, but judgment was demanded for the value of the ore which it was alleged had been converted by the Montana Company. The case was tried upon the theory that it was an action to recover the value of ore converted. In the case of *United States v. Ute Coal & Coke Co.*, 158 Fed. 20, 85 C. C. A. 302, Judge Sanborn, referring to a claim that the cause of action in that case was one for trespass upon land, and not a cause of action for the conversion of coal taken from the land, said:

"The cause of action for trespass upon the land, and for the taking from it and conversion of coal, timber, or other personal property wherein the only damage alleged is the loss of the value of the personal property converted, is the same in legal effect as a cause of action for the conversion of the personal property."

This rule of action is fully supported by *Stone v. United States*, 167 U. S. 178, 182, 17 Sup. Ct. 778, 42 L. Ed. 127.

The statutes of Montana provide as follows (Rev. Codes, § 6068):

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Rev. Codes, § 6071, is as follows:

"The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of its conversion, with the interest from that time. * * *

The claim that interest was not recoverable as a matter of right, but rested in the discretion of the jury, is answered by the case of *Drumm-*

Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606.

It is further contended that, if the St. Louis Company was entitled to recover interest, the Montana Company was also entitled to interest on its counterclaim. The presumption is that it did recover such interest. The court instructed the jury that in no event could it find for the Montana Company upon its counterclaim for an amount in excess of the sum prayed for in its answer, "together with interest thereon at the rate of 8 per cent. per annum from the date of extraction to the date of the verdict." This was equivalent to an instruction that the Montana Company was entitled to interest on any sum the jury might find in its favor on the counterclaim, providing such finding should not exceed the amount prayed for in the answer.

It is objected that the court permitted the St. Louis Company at the close of the case on the part of the Montana Company to amend its pleadings so as to substantially change the cause of action. The amendments referred to changed the allegation of the complaint as to the crossing of the foot wall of the Drum Lummon vein from the 133-foot plane to a point further south designated as the 268.6-foot plane. As the jury found that all the ore extracted by the Montana Company was from that part of the vein north of the 133-foot plane, the amendment did not prejudice the case of the Montana Company in any particular. An amendment alleging that the compromise ground had always been a part of the Nine Hour claim had the effect of making the allegations of the third amended and supplemental complaint as amended conform to the testimony relating to the title to that ground, and as alleged in the original amended and supplemental complaint; but, as has already been stated, the compromise ground has been eliminated from the case so far as the St. Louis Company's rights are concerned, and the allegations concerning it have no bearing upon the issues as now presented, except as the ownership of the ground forms the basis of the Montana Company's counterclaim. These amendments may therefore all be treated as having been irrelevant and immaterial.

We find no error in the record.

The judgment of the Circuit Court is therefore affirmed.

SHAFFER V. KOBLEGARD CO.

(Circuit Court of Appeals, Fourth Circuit. October 17, 1910.)

No. 930.

1. BANKRUPTCY (§ 458*)—APPEAL—OBJECTIONS NOT RAISED AT TRIAL.

An objection to the consideration of specifications of objection to a bankrupt's discharge, not urged in the trial court, is unavailable on appeal.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 458.*]

2. BANKRUPTCY (§ 467*)—REVIEW—RECORD—PRESUMPTIONS.

Where the clerk's certificate, appended to the record on an appeal from an order denying a bankrupt's discharge, recited that the record was a true transcript of so much of the record and proceedings of the court as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was requested by counsel for appellant, it would be presumed, in the absence of anything shown to the contrary, that there was a sufficient appearance by the objecting creditors on the day they were required to show cause against a discharge, as required by General Order 32 (89 Fed. xiii, 32 C. C. A. xxxi).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 467.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

B. BANKRUPTCY (§ 414*)—DISCHARGE—OBJECTIONS—EVIDENCE.

Where, in answer to specification of objections to a bankrupt's discharge, the bankrupt prayed that, in so far as the same might be relevant, there might be read on the hearing the bankruptcy proceedings resulting in his adjudication as a bankrupt, from which it appeared that on his examination before the referee he stated under oath that before making a written statement as to his financial condition, because of the falsity of which objection was made to his discharge, he knew that he owed \$7,500 which he failed to include in the statement, he could not thereafter object to the use of such evidence against him in support of his creditors' objections.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

4. BANKRUPTCY (§ 414*)—DISCHARGE—STATEMENTS MADE BY BANKRUPT.

In general, statements made by a bankrupt under oath in his examination before the referee may be considered in determining his right to a discharge, so far as material to the issues.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

5. BANKRUPTCY (§ 414*)—DISCHARGE—FALSE STATEMENT.

Evidence held to require a finding that a bankrupt made a false statement concerning his financial condition to the objecting creditors, intending thereby to create a false impression as to his financial ability, and that the creditors acted thereon to their injury, requiring a denial of the bankrupt's petition for a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi, in Bankruptcy.

In the matter of bankruptcy proceedings against E. Brown Shaffer. From an order denying bankrupt's discharge (169 Fed. 724), on objections filed by the Koblebard Company, the bankrupt appeals. Affirmed.

J. Hop Woods, for appellant.

R. S. Douglass, for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and CONNOR, District Judges.

PRITCHARD, Circuit Judge. This is an appeal from an order of the District Court of the United States for the Northern District of West Virginia, denying a discharge to the bankrupt.

In argument in this court the appellant for the first time suggested that the record does not disclose any appearance by the objecting creditors on the day when the creditors of the bankrupt were by law required to show cause against his discharge, and that, therefore, the specifications of objection subsequently filed should be disregarded.

It is a sufficient answer to this suggestion to say that no such objection to the consideration of these specifications of objection in op-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

position to petition for discharge was urged in the court below; that the certificate of the clerk of the District Court, appended to the record herein recites that the same "is a true transcript of so much of the record and proceedings of said court as was requested by counsel for appellant"; and, finally, that under these circumstances, it must be presumed that such appearance as is required by General Order No. 32 (89 Fed. xiii, 32 C. C. A. xxxi) was duly and properly entered.

The first assignment of error relates to the alleged insufficiency of the specification of objection, which was raised by the demurrer of the bankrupt embodied in his answer thereto. It does not appear that this demurrer was ever argued before the District Court, or passed upon by it, and apparently it was abandoned, and not relied upon by appellant in the court below. However this may be, we think the specifications are not only sufficiently explicit, but that they are, in fact, unusually so, and fully directed the attention of the bankrupt to the particular transactions therein relied upon.

The first specification embodies every essential element prescribed by Bankr. Act July 1, 1898, c. 541, § 14, subsec. 3, 30 Stat. 550, as added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]), which denies a discharge to a bankrupt "who has obtained property on credit from any person, upon a materially false statement in writing made to such person for the purpose of obtaining said property on credit."

The second assignment of error relates to the alleged failure of the objecting creditor to sustain the burden of proof resting upon him. We think that this contention is without merit, and that the burden of proof by a preponderance of the evidence was fully met by the objecting creditor. By the answer of the bankrupt he prayed that "in so far as the same may be relevant" he "asks to be read upon this hearing" the bankruptcy proceedings resulting in his adjudication as a bankrupt. From such proceedings, as well as from his answer (page 11 of record), it appeared that upon his examination before the referee he stated under oath that before the making of the written statement, upon which the first objection to his discharge is predicated, that he well knew that he owed to his mother, brothers, and L. W. Campbell large sums of money, aggregating \$7,500, which he failed to mention and include in his written statement of October 14, 1904. This admission under oath, together with the evidence of Mr. Koblegard and the admitted prior declination of the Koblegard Company to fill a prior order of the bankrupt until he had made a satisfactory statement in writing of his financial condition, fully meets the legal requirements as to a preponderance of the evidence to prove all the facts material to this inquiry.

What we have said in this connection applies with equal force to the third and fourth assignments of error.

As to the fifth assignment of error, it is sufficient to say that it has generally been held that statements made by the bankrupt, under oath in his examination before the referee, may and should be considered in a proceeding touching his right to a discharge, so far as the same may be material to the issues involved. In *re Bard* (D. C.) 108 Fed.

208; In re Wilcox, 109 Fed. 628, 48 C. C. A. 567; In re Leslie (D. C.) 119 Fed. 406; In re Goodhile (D. C.) 130 Fed. 782. See, also, Collier on Bankruptcy (7th Ed.) p. 270, and cases there recited.

However, in this case the bankrupt in his answer to the specifications prays that the bankruptcy proceedings, in so far as they are material and relevant, shall be read, and he should not be heard to object to the granting of his request.

The sixth assignment of error is without merit, and need not be considered. It relates merely to the small amount actually lost by the objecting creditor, and has no relation to any principle.

The seventh assignment of error presents the question as to whether the bankrupt should be denied his discharge because of the circumstances under which the written statement upon which he secured credit was made, under section 14, subsec. 3, of the bankrupt act, and this necessarily involves the further question as to whether such statement was made with a fraudulent intent. Said assignment is as follows:

"The court erred in holding, to the prejudice of the petitioner, that the question of bona fides on the part of petitioner, under the circumstances conceded and shown by the record, could not be considered in support of his petition and motion for a discharge, but only the question of the execution of the paper and its verity. This, it is submitted, would not even be the rule in a criminal proceeding under such a statute."

The learned judge who heard this case below, in referring to this point, said:

"The signing and delivery of the statement to the Koblegard Company is admitted by the bankrupt; but he insists that after the goods were purchased, but before separation and delivery, a member of this company called him back, and caused him to make and sign the statement. He further testifies that at the time he informed the member of the company that the statement was not a full and complete one. So far as the items of assets contained therein there is no dispute, it being agreed that in this particular the statement was substantially accurate. The contest is wholly over the accuracy of that part relating to the liabilities. It subsequently turned out that at the time this statement was made the bankrupt was indebted something over \$11,000, as shown by the list of outstanding debts which he admitted upon the examination before the referee and creditors in the bankruptcy proceeding. In extenuation and justification of the discrepancy existing between his statement to the Koblegard Company, as to these liabilities, and the evidence given by him before the referee, he now insists that, at the time this statement was given, his property, in effect, had been inherited by him in connection with his mother, brother, and sisters from his father's estate, which was unsettled, substantially held in common, and that he was unacquainted with the actual condition of the accounts relating thereto existing between him and the other members of the family. Further extenuating facts relied upon by him are that for six months, from February until September, just prior to the making of this statement to the Koblegard Company, he had been dangerously sick with typhoid and pneumonia, during which time he had been wholly unable to attend to his business, and in fact had no knowledge of its true condition, and verily believed at the time he made such statement that it was true and correct, and that he did not ascertain his true condition until afterward, when it was revealed to him by counsel whom he consulted. It may be added that the whole proceeding shows pretty clearly that Shaffer was illiterate, inexperienced, and incompetent to properly care for a mercantile business.

"If it were a matter of discretion with me, I frankly confess that the exten-

uating circumstances in this case would lead me to grant this discharge: but, upon a careful investigation of the law governing the matter, I am constrained to reach the conclusion that I am not permitted, under the circumstances, to do so."

The opinion of the court below was rendered April 30, 1909. At that time there had been no adjudication on this question by the court. However, at the February term of 1909, the court, in the case of *W. S. Peck Co., Creditor, v. Julius Lowenbein, Bankrupt* (C. C. A.) 178 Fed. 178, said:

"It has been held by the Supreme Court of North Carolina in the case of *Des Farges v. Pugh*, 93 N. C. 31 [53 Am. Rep. 446], that insolvency and the concealment of the same are not sufficient to render a contract null and void. In that case the court said: 'The facts of insolvency and its concealment, alone, are not sufficient to enable the vendor to annul the contract; they must be coupled with the intent not to pay for the goods.'

"It is the evident purpose of the bankruptcy act to protect that unfortunate class of debtors who are unable to pay their debts, by giving them a discharge, thus affording them an opportunity to engage in business again, while, on the other hand, it is manifestly intended to deny a discharge to those whose conduct has been such as to show that they obtained credit by false statements calculated and intended to deceive, and thereby defraud their creditors.

"Construing the act with these ends in view, it would be manifestly unjust to deny a discharge to a debtor, when it appears, as it does in this instance, that the statement which he made was not actuated by any fraudulent purpose. This finding of fact has been approved by the learned judge who heard the case below, and is within itself conclusive in so far as the question involved in this controversy is concerned."

It should be borne in mind that the facts in that case are easily distinguished from those in the case at bar. In the light of the evidence offered in the court below, we are of opinion that the petitioner is not entitled to a discharge, inasmuch as it appears that the statement upon which credit was obtained, and which was made for the purpose of obtaining the same, was not only erroneous and untrue, but it also clearly appears that there was an intention on the part of the petitioner, at the time such statement was made, to withhold from the creditor his true financial status.

It is true that the petitioner now insists that he did not intend, at the time he made the statement, to conceal any facts as to his financial condition; but, when we consider all the evidence, we are unable to draw any inference therefrom other than that he intended thereby to create a false impression as to his financial ability.

In view of the ruling of this court in the case of *W. S. Peck Co. v. Lowenbein*, supra, we are of opinion that the court below was in error as to the meaning of the word "false" as it appears in Bankr. Act, § 14b, subcl. 3, yet its judgment is, under the evidence, sustainable by the proofs in the case; and it is therefore affirmed.

McCLURE et al. v. GLADY FORK LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. October 13, 1910.)

No. 970.

1. BOUNDARIES (§ 41*)—ACTION TO DETERMINE—SURVEY—NATURAL OBJECTS AS CORNERS.

In an action of ejectment to recover a tract of land surveyed as one subdivision of a larger tract in 1842, where the notes and plat of survey call for definitely described natural objects as corners which can be identified, it was error to instruct the jury that they might ignore such monuments if satisfied that the surveyor made a mistake, of which there was no oral or other evidence, except that the survey does not give plaintiff the quantity of land called for, especially where the owners of other subdivisions of the tract whose lands would be affected have possessed and occupied the same for such length of time as gives them a perfect title by prescription to the boundaries claimed by them.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

2. BOUNDARIES (§ 11*)—ACTION TO DETERMINE—ACQUIESCENCE.

A purchaser of a tract of land described by definite and ascertainable boundaries is not entitled at law or in equity to a reformation and enlargement of such boundary at the expense of adjoining owners.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 92-94; Dec. Dig. § 11.*]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Philippi.

Action by the Gladly Fork Lumber Company against John W. McClure, W. H. Tyson, and Charles H. Irvin. Judgment for plaintiff, and defendants bring error. Reversed.

On May 7, 1842, David Goff, commissioner of forfeited and delinquent lands for Randolph county (then in the state of Virginia, but now in the state of West Virginia), reported a tract of land as forfeited in the name of Henry Phillips and John Law, containing 14,845 acres, and by order of the circuit superior court of law and chancery for said county the commissioner was directed to ascertain the boundaries of the land and the junior grants therein, if any, and lay the residue off into convenient lots and sell the same. Commissioner Goff laid the tract off into various lots, and on the fourth Monday in August, 1842, sold the same at public auction, and afterwards reported his proceedings to the court, and on October 5, 1842, said sale was confirmed and a plat of the subdivision of the tract was made as sold by the commissioner, and entered of record.

On October 5, 1842, the commissioner reported to the court another tract of 17,000 acres of land, a part of a tract of 100,000 acres, as forfeited and delinquent in the name of William De Wees, and on the same day an order was made by said court directing the commissioner to lay off the last-mentioned tract into convenient lots, if necessary, and sell the same at public auction, and after laying said tract off into 19 lots of various sizes, on the 4th Monday in November, 1842, the same was sold and said sale confirmed. On the said 5th day of October, 1842, Commissioner Goff reported another tract of 22,104¼ acres of land as forfeited in the name of Richard Smythe, and on the same day the court ordered the boundaries of the said last-mentioned tract to be ascertained, etc., and ordered the commissioner to sell the same on the fourth Monday in November next, and, in accordance with this order, the commissioner laid the 22,104¼ acres of land off into 26 lots of various sizes, and on the date directed in the decree of sale sold the same to various persons, and on October 6, 1843, this sale was confirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At the sale of the 17,000 acres of land forfeited in the name of William De Wees, Nimrod Dent, Jr., became the purchaser of lot No. 3 of 1,056 acres, No. 4 of 1,372 acres, No. 5 of 906 acres, and No. 6 of 1,087 acres, and on April 5, 1844, by deed of that date, David Goff, commissioner, etc., conveyed said four lots to Nimrod Dent, Jr. At the sale of De Wees 17,000 acres of land Jonathan Arnold became the purchaser of lot No. 9 thereof, a part of the 100,000 acres forfeited and sold in the name of said William De Wees, and on February 20, 1844, said Goff, as commissioner, conveyed lot No. 9 to the purchaser, Jonathan Arnold, and, in said deed the same is bounded as follows: "Beginning at three beeches and hemlocks, a corner to Nos. 3, 4, and 10, thence S. 36° E. 888 poles to a corner of Nos. 5, 6, and 8, thence S. 54° W. 174 poles, thence N. 36° W. 818 poles to a sugar, thence S. 31° W. 128 poles to a beech and spruce and two hemlocks, thence N. 54° E. 320 poles to the beginning."

The title to lots Nos. 3 and 4, purchased by Nimrod Dent, Jr., passed by successive alienations to S. Bacon Eilenberger and J. H. Yeager, by two deeds of conveyance, the first of which was made June 17, 1893, and the second May 3, 1909, the latter deed merely confirming the former. Eilenberger and Yeager conveyed all the timber on said lots, and one-half of the fee, to Harrison Lewis et al. by deed dated December 12, 1902, and Lewis et al., by deed dated June 10, 1905, conveyed the same to the plaintiffs in error herein. The title to lot No. 9 passed by successive alienations from the purchaser, Jonathan Arnold, to the defendant in error herein.

The plaintiffs in error claim the three beeches and two hemlocks, marked and designated on the official plat by a figure "1," with an arrow pointing thereto, to be the beginning corner lot No. 9 as conveyed by David Goff, commissioner, to Jonathan Arnold, and a common corner between their lots Nos. 3 and 4, and known and designated upon the official plat as the "Flint Corner," and that the three beeches and two hemlocks were marked on the official plat as the "Flint Corner" by David Goff, commissioner, at the time he laid off and sold the De Wees 17,000 acres, as the corner between lots 3, 4, 9, and 10. This is not seriously controverted by the defendant in error, but it contends that Commissioner Goff was in error when he marked the three beeches and two hemlocks as a corner to said lots, and claims that the said corner should be at the white figure "1" on the plat filed with the record, and the black or blue figure "1," on the original tracing.

The plaintiffs in error claim the calls in the defendant in error's deed beginning at three beeches and two hemlocks, known as the "Flint Corner," and by running the calls of its deed to the figure "2," thence to figure "3," thence to figure "4," thence to figure "5," thence to figure "6," thence back to figure "1" to the place of beginning marked "Flint Corner," is the correct boundary of the defendant in error's land, while the defendant in error claims that the plaintiff in error's land stops at the white dotted line, and should follow that line through from white figure "1" to figure "2," thence to figure "3," thence to figure "4," thence to figure "5," thence to figure "6," thence back to figure "1."

E. D. Talbott and U. G. Young (Talbott & Hoover, on the brief), for plaintiffs in error.

E. A. Bowers and W. B. Maxwell (F. O. Blue, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and KELLER, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). As appears from the statement of facts, this is an action instituted by the defendant in error as plaintiff in the court below against the plaintiffs in error who were the defendants below. Therefore reference will be made to the defendant in error, as plaintiff, and to the plaintiff

in error, as defendant, in discussing the questions involved in this controversy.

The plaintiff alleges that it is the owner and possessed of all the timber upon a certain tract of land of ——— acres, being a part of lot No. 9 of the De Wees survey lying west of the top of Middle Mountain, situate in the county of Randolph, state of West Virginia, and described as follows:

"Beginning at three beeches and hemlocks, a corner to Nos. 3, 4, and 10, thence S. 36° E. 888 poles to a corner of Nos. 5, 6, and 8, thence S. 54° W. 174 poles, thence N. 36° W. 818 poles to a sugar, thence S. 31° W. 160 poles to a corner of No. 13, thence N. 36° W. 128 poles to a beech and spruce and two hemlocks, thence N. 54° E. 320 poles to the beginning."

The sole question at issue is as to the true location of the lot of land described in the declaration. It appears that lot No. 9 is one among a number of lots carved out of what is known as the De Wees 17,000-acre tract. The beginning corner of this lot is designated as follows: "Three beeches and hemlocks, a corner of lots 3, 4, and 10." This beginning corner is a common corner between lots Nos. 3 and 4, claimed by the defendants. The declaration filed by the plaintiff sets forth with particularity the metes and bounds of the lots sought to be recovered. These calls are free from ambiguity, and are capable of being located by any competent surveyor. The three beeches and hemlocks called for as the beginning corner of lots Nos. 3, 4, and 10 were established by the surveyors at the time the division was made, and as to their location at that time there seems to be no real controversy. It was shown at the trial that the annulations of the marked trees that were blocked corresponded to the time that the commissioner subdivided the De Wees land in 1842. It was also shown that in running the lines according to these calls trees were found the marks on which corresponded in age to the date of the survey, and the location of the tract in accordance with these well-defined calls was accomplished by Surveyor Taylor without the slightest difficulty.

Notwithstanding the fact that this suit was instituted on the law side of the docket and is in the nature of a suit in ejectment, involving as it necessarily does the location of the land on which the timber in question was standing, the case below seems to have been tried on the theory that Commissioner Goff made a mistake in locating the lines of lot No. 9, and that the court in a proceeding of this nature had the power to correct the same.

We will first consider instruction No. 1, which is in the following language:

"The court instructs the jury that although they may believe from the evidence that Commissioner Goff in laying off the De Wees 17,000-acre tract of land into lots under the order of the circuit superior court of law and chancery of Randolph county in fact made the corner at the letter 'H,' shown on the official plat of surveyor, E. E. Taylor, in evidence in this case, and in fact ran and marked the line from the corner at said letter 'H' to the corner shown at the red figure '1' upon said map, and made the corner at said red figure '1,' and, in fact, ran and marked the line from said red figure '1' to the red figure '6,' and made the corner at said red figure '6,' and, in fact, ran and marked the line from said red figure '6' to the figure '5,' yet, if the jury believe from all the evidence in this case that said Commissioner Goff in running

and marking said lines and in making said corners mislocated said lines and corners by mistake, and intended to locate said lines and corners so as to correspond with the black dotted lines, shown upon said official plat, and intended the beginning corner of lot No. 9, in controversy in this case, to be located at the black figure '1,' as shown upon said plat, and intended the true boundary of said lot No. 9 to be as designated by the black dotted lines thereof, as shown upon said plat and designated by the black and blue figures '1,' '2,' '3,' '4,' '5,' and '6,' that then the mislocation of said corners at the red figures '1,' '6,' and '5,' and the lines connecting said corners, are not binding upon the parties, and the jury should disregard the same and treat said mislocated corners and lines as having been made by mistake, and the jury should adopt as the true lines and corners between the parties the black dotted line of said lot No. 9 as shown upon said official plat of surveyor E. E. Taylor."

This instruction virtually assumes that the beginning corner of lot No. 9 was located by Commissioner Goff as contended by defendants. However, the court submitted to the jury the question as to whether Commissioner Goff made a mistake in locating the corners at the point indicated by the calls, as shown in the report of the surveyor and as indicated by the plat filed by said commissioner on the date the same was established.

The defendant excepts to the giving of instruction No. 1, and this exception constitutes the first assignment of error. Commissioner Goff is now dead and likewise those who participated with him in making this survey. Therefore it is impossible to secure any parol evidence as to what Commissioner Goff actually did at the time he made the survey in question. Under these circumstances, the best evidence we have are the notes of the survey and the plat filed with the same. Even if it were competent in this proceeding to show that Commissioner Goff made a mistake in the location of the corner of lot No. 9 at "three beeches and hemlocks," we have no testimony from those present at the time the survey was made from which we can draw any inference other than that which appears in the notes of the survey and plat as respects the location of the corner of lot No. 9. Nevertheless it is insisted by counsel for the plaintiff that an inspection of the map discloses the fact that to locate the corner at this point would result in depriving it of a considerable number of acres, and also lessen the number of acres in certain other adjacent tracts. On the other hand, it is insisted by counsel for defendants that to establish the line at the point contended for by the plaintiff would deprive their clients of a considerable number of acres.

The plaintiff relies upon the case of *Clement v. Packer*, 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721. That was a case from the state of Pennsylvania, and the Supreme Court of the United States, among other things, said:

"* * * By an unbroken current of decisions in that state that the surveys constituting a block are not to be treated as separate and individual surveys, nor can each tract be located independently of the rest by its own individual lines or calls or courses and distances, but such tracts are to be located together as a block or one large tract. If lines and corners made for such a block of surveys can be found upon the ground, this fixes the location of the block, even to the disregard of the call for adjoiners. The lines and corners found upon any part of the block of surveys belong to each and every tract of the block, as much as they do to the particular tract which they adjoin."

The court then cites the case of *Pruner v. Brisbin*, 98 Pa. 202, in which Mr. Justice Sterrett, of the Supreme Court of Pennsylvania, said:

"The 13 tracts having been surveyed in a block and so returned must be located upon the ground as a block. Neither of them can be arbitrarily located in disregard of the lines and corners found upon other parts of the block. All the lines and corners marked upon the ground and returned must be considered in ascertaining the proper location of the block. Those found upon any part of the block belong to each and every tract of which it is composed, and, if sufficient lines and corners can be found, they determine the location of the entire block without regard to its calls for adjoiners or for waters, if such calls conflict with the lines actually run upon the ground and returned."

He added:

"It requires neither argument nor citation to show that the learned judge was clearly right in thus instructing the jury."

The Supreme Court based this decision solely upon the Pennsylvania law. It should also be remembered that in that case the outside lines and corners of the entire body of land, comprising the numerous subdivisions, were established, while in the case at bar the outside lines and corners of the De Wees 17,000-acre tract and the Smythe 22,104 $\frac{1}{4}$ -acre tract are not given on the plat, nor were all the lines of the De Wees subdivision or the Smythe subdivision located by surveyor Taylor in the preparation of the map which was used in the trial of this case. Therefore, even if this case were governed by the Pennsylvania law, it would be impossible to reach a correct determination as to the true location of the various lines of the adjacent owners without having a complete survey of the outside lines as well as the lines of the various subdivisions. We fail to find any case, either in Virginia or West Virginia, wherein the rule laid down in the case of *Clement v. Packer*, supra, is approved by the courts of last resort of either of those states. It also appears that various other lots that were included in the division of the De Wees tract and the Smythe tract were sold to different individuals; and it further appears that some of the owners have been in actual possession of some of the lots a sufficient length of time to acquire title to the same. There is no means by which these people could be required to readjust their lines inasmuch as they have acquired perfect title to the lands within their boundaries, and, without adjusting such lines, it would be a physical impossibility to readjust the lines of the other lots so as to secure an equitable and fair division of the lands claimed by the holders of the same. This fact alone would be conclusive if this were a proceeding in a court of equity.

Now, that more than 67 years have elapsed since the establishment of these lines, and the parties interested having acquired title by peaceable possession to much of the land in controversy, it would be unjust and inequitable at this late date to undertake to readjust a portion of the lines, when, from the very nature of things, no court would have the power to readjust all the lines within the 17,000-acre tract.

The plaintiff cites *Shaw v. Clements*, 1 Call (Va.) 429, and a number of other cases to sustain the contention that "where it is shown that such mistakes as leaving out lines, putting in north for south and east for west are to be corrected" by parol evidence to the true intent of the parties. Those cases are easily distinguished from the case at bar. There it was held that such mistakes as leaving out lines, putting in north for south and east for west could be corrected. This is in accordance with the well-settled, and we might say universal, rule, but here we have a different state of facts. The report of the survey made and the plat filed by Commissioner Goff show that the lot in question has well-defined corners, and the beginning corner, as well as the various corners, are definitely referred to, and correspond exactly with the calls of the deed and are capable of being located. There is not a scintilla of parol evidence in the record to show that at the time Commissioner Goff made this survey he acted under a misapprehension, nor is there any evidence to show that lot No. 9 was improperly located. It is true that, when you come to run the lines of the various lots that were surveyed, it will be found that some of them contain a greater, and others a less, number of acres than called for in the notes of the survey. However, we should remember that at the time this survey was made land was not considered as valuable as now, and, owing to that fact, the question as to the exact number of acres was not considered as being of much importance at that time. Therefore any discrepancy in this respect is immaterial.

Under these circumstances, there is nothing in this case to justify the application of the rule announced in the case of *Clement v. Packer*, *supra*, and there is not anything on the face of the deed to indicate that a mistake was made, and there being no evidence to show that the location as shown by the plat and report of survey is not the true location of the tract of land in question, while, on the other hand, the surveyor had no difficulty in locating the calls of this tract as indicated by the plat. That course and distance must yield to the call for natural objects is so well established that it is hardly necessary to cite any authorities in support of such proposition. However, we will call attention to the case of *Watkins v. King*, 118 Fed. 524, 55 C. C. A. 290, in which Judge Goff, in speaking for the court, said:

"Under this settled rule that calls in a survey for natural objects must control both courses and distances, it is error for a court to charge a jury to ignore such calls as having been made through ignorance or mistake, and to be governed by courses and distances, because the objects called for are not to be found on the courses or at the distances called for, where there is evidence tending to show that the objects exist, and to identify them sufficiently to justify a finding that they were those seen and called for, by the surveyor, however much they may be at variance with the courses and distances called for; nor is such charge justified by the further fact that such a finding would make the quantity of land embraced within the survey much smaller than that stated."

In the case of *Jones et al. v. Johnson*, 18 How. 154-155, 15 L. Ed. 320, the court, in discussing this question, said:

"As we have seen, this lot No. 34 was conveyed to the plaintiffs the 22d October, 1835, and described as included within side lines dropped at right

angles from the northwest and northeast corners of Water street, which were 60 feet apart, and fixed and extended in right lines till they intersected the shore of the lake below. The boundaries, therefore, including and locating the lot were specific and complete. The north boundary was marked on the south side of Water street. The side lines extended, according to the plat, at right angles from Water street to the lake. The lake was the southern boundary which closed the lines of the lot. Now, in order to determine what land was conveyed to the plaintiff by this deed of 22d October, 1835, all that was necessary was to locate the lot upon the ground in conformity to the description at that date. The calls in the deed having reference to the plat furnished the necessary data for the location. There was the fixed line north on the ground, the lake, a natural object, south, and the lot inclosed between two lines extending at right angles from the corner from Water street to the lake."

Also in the case of *Jones et al. v. Johnson*, supra, 18 How. 153, 15 L. Ed. 320, the court said:

"If there was in fact any error or mistake in this reference, by way of description of the premises conveyed, the remedy was in chancery to reform the deed. So long as that remained unreformed, the description of the lot by reference to the recorded plat was conclusive upon the parties."

Counsel for plaintiff have filed with us a copy of an opinion rendered by the Supreme Court of West Virginia in the case of *Mylius v. Raine-Andrew Lumber Company*, — S. E. —,¹ but not reported as yet. We have carefully considered the facts of that case, and are of the opinion that they are wholly different from those of the case at bar. However, the first paragraph of the syllabus in that case is pertinent to the questions involved herein. It reads as follows:

"(1) In the trial of an action involving title to land, dependent upon the location of boundary lines and application of the title papers to their subject-matter, it is not error to instruct the jury that they must give controlling influence to lines and corners marked upon the ground and identified, in so far as the lines were actually surveyed, and to courses and distances, in these instances in which the lines were not actually surveyed nor marked upon the ground."

Thus it will be seen that the court held it was not error to instruct the jury that they must give controlling influence to lines and corners marked upon the ground and identified where the lines were actually surveyed. The rule thus stated is in conflict with the instructions given by the court below in its general charge to the jury to the effect that the jury could ignore lines and corner trees in determining the true location of the land in controversy.

Applying the rule as announced in *Watkins v. King*, supra, and the other cases to which we refer, there is not the slightest difficulty in surveying and ascertaining the true location of the lot in controversy. Where lands are conveyed with particular reference to a recorded plat, if there should be any error or mistake in the plat in describing the premises, the remedy is not in a court of law, but the proper remedy is in a court of equity to reform the deed, and, so long as the deed remains unreformed, the description of the lot by reference to the plat is conclusive upon the parties.

¹ Rehearing pending.

In the case of *Prentice v. Stearns*, 113 U. S. 435, 5 Sup. Ct. 547, 28 L. Ed. 1059, the second syllabus is in the following language:

"In a suit at law to recover possession of real estate, the court cannot take note of facts, which, in equity, might afford grounds for relieving the plaintiff, by reforming the description in his deed."

The plaintiff below took title to the timber standing on the lands described in the declaration with full knowledge of the calls contained in the deed upon which it relied.

It had ample opportunity to investigate the title under which its grantors held and it is fair to assume that such investigation was made. An investigation of this title shows that the beginning corner of lot No. 9 is at "three beeches and hemlocks," and that the boundary lines are clearly set forth, and this would enable one to go upon the ground and locate the lot in controversy. Having purchased this land under these circumstances, with the means of ascertaining full knowledge as to all the facts surrounding the location of the same, the plaintiff cannot now be heard to say that it was misled as to the true location of lot No. 9, nor would a court of equity, under such circumstances, undertake to reform a deed thus made, the plaintiff being estopped by its conduct from denying the location of the lot to be as indicated in the notes of the survey and the plat filed by Commissioner Goff. In the case of *Murray et ux. v. Paquin*, 173 Fed. 328, the court said:

"But there is an additional reason against the complainant's right to relief in this case, and it grows out of the fact that the record shows that they had the same opportunity the defendant had for getting the true facts, but failed to avail themselves of the information which was readily at hand. They were furnished defendant's deed to the property and the chain of title for their examination. They placed the examination of title in the hands of competent attorneys, and altogether could have known, just as well as the defendant could have known, everything about the lot and its proper and true boundaries. The authorities are uniform to the effect, that, this being true, they are not entitled to relief in a court of equity."

"In *Crowder v. Langdon*, 38 N. C. 486, the rule on this subject is stated in this way: '* * * The general rule unquestionably is that an act done or a contract made under a mistake or ignorance of a material fact is relievable in equity. 1 Story, Equity, 155. But where the means of information are alike open to both parties, and when each is presumed to exercise his own judgment in regard to extrinsic matters, equity will not relieve. The policy of the law is to administer relief to the vigilant, and put all parties to the exercise of a proper diligence. In like manner where the fact is equally known to both parties, or where each has equal and adequate means of information, or when the fact is doubtful from its own nature, in any such case, if the party has acted with entire good faith, a court of equity will not interpose. 1 Fond. Eq. bk. 1, c. 2, § 7, note "v"; 1 Pow. on Com. 200; 1 Mad. Ch. Pr. 62, 4; 1 Story, Eq. 163.' * * *

In *Farnsworth v. Duffner*, 142 U. S. 47, 12 Sup. Ct. 165, 35 L. Ed. 931, in the opinion of Mr. Justice Brewer, the proper rule on this subject is stated in this language:

"This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, when the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such

means he could have ascertained. In *Slaughter, Administrator, v. Gerson*, 13 Wall. 379, 383, 20 L. Ed. 627, the court said: 'Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.' See, also, *Southern Development Company v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. In *Ludington v. Renick*, 7 W. Va. 273, it was held that 'a party seeking a rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.' In the case of *Atwood v. Small*, decided by the House of Lords, and reported in 6 Cl. & Finn. 232, 233, it is said that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or the means of knowledge open to him or to his agents, he cannot be heard to say that he was deceived by the vendor's representations.' And in *Pomeroy's Equity Jurisprudence*, § 892, it is declared that a party is not justified in relying upon representations made to him * * * '(1) when, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; (2) when, having the opportunity of making such examination, he is charged with the knowledge he necessarily would have obtained if he had prosecuted it with diligence; (3) when, the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.'"

In *Shappirio v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, in the opinion of Mr. Justice Day, this is said on this subject:

"When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor. *Slaughter, Administrator, v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931."

The plaintiff purchased this land with full knowledge of the facts, and it certainly cannot claim any more than was shown to be the property of the vendor by an inspection of his title.

The beginning corner of lot No. 9 is in these words:

"Beginning at three beeches and hemlocks, known as the 'Flint Corner.'"

It appears from the evidence that this corner is capable of being located. If the reference to the beginning corner had been vague and indefinite or the calls in the deed irreconcilable, parol evidence, in a proper proceeding instituted within a reasonable time after the establishment of the same, would have been competent to show the true location of the same, but there is not the slightest suggestion by allegation or proof that this corner could not be definitely located. The

owners of the adjacent lots are not parties to this action, nor is there anything contained in the pleadings or shown by the proof as to what occurred at the time this survey was made to indicate that Commissioner Goff made a mistake. And, as we have said, it appears that some of the owners of the adjacent lots have acquired perfect titles within their boundary lines, and, under these circumstances, even though it were proper in a proceeding at law to grant the relief sought, the plaintiff would not be entitled to recover.

In view of these circumstances we are of opinion that the court erred in submitting instruction No. 1. There are a number of assignments of error, but the first assignment goes to the root of the whole matter, and, being of the opinion that there was error in submitting instruction No. 1, it necessarily follows that the court erred in submitting instructions Nos. 1, 2, 3, 4, 5, and 6, but we do not deem it necessary to discuss the matters involved in these instructions, inasmuch as what we have said with respect to instruction No. 1 also applies to the questions involved in the other instructions.

For the reasons stated, the judgment of the lower court is reversed, the verdict of the jury set aside, and the case remanded for further proceedings in conformity with the views herein expressed.

Reversed.

ATCHISON, T. & S. F. RY. CO. v. CITY OF SHAWNEE et al.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1910.)

No. 3,297.

1. CONSTITUTIONAL LAW (§ 134*)—VESTED RIGHTS—CONTRACT OF MUNICIPALITY.

Under St. Okl. 1893, § 584 (Comp. Laws 1909, § 688), which confers express authority upon the councils of cities and towns to vacate streets, and provides that on such vacation the title shall revert to the owners of the adjacent property, and the decisions of the Supreme Court of the state thereunder that, when a street has been so vacated, it cannot again be taken for public use without just compensation to the owners, where a municipal ordinance granting right of way to a railroad company also, in consideration of the establishing of a division station at that point, expressly vacated portions of certain streets through and across the station grounds of said company, and the company duly accepted the ordinance as required by its provisions, and constructed its tracks and buildings, the ordinance constituted a contract protected from impairment by the city by the federal Constitution, and the city had no power to order one of such streets reopened across the railroad company's yards without instituting condemnation proceedings and paying the damage which the company would sustain.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344; Dec. Dig. § 134.*]

2. COURTS (§ 282*)—FEDERAL COURTS—LAW IMPAIRING OBLIGATION OF CONTRACT—MUNICIPAL RESOLUTION.

A resolution of a city council, ordering a railroad company to open and put in condition for public travel a street through its station yards, previously vacated by an ordinance which constituted a contract with the company, where disobedience of such order subjected the railroad company to a penalty under the laws of the state, is a legislative act, which im-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pairs the obligation of the contract and entitles the company to relief by injunction in a federal court of equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

3. MUNICIPAL CORPORATIONS (§ 657*)—VACATION OF STREETS—"VACATED."

A street is "vacated," within St. Okl. 1893, § 584 (Comp. Laws 1909, § 688), relating to the vacating of streets, when its character as such is destroyed, and it is thereafter held in private ownership, the same as the adjacent lots to which it has accreted.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 657.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7254-7259, 7826.]

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Suit in equity by the Atchison, Topeka & Santa Fé Railway Company against the City of Shawnee and others. Decree for defendants, and complainant appeals. Reversed.

Gardiner Lathrop (J. R. Cottingham, S. T. Bledsoe, and John Devereux, on the brief), for appellant.

J. H. Woods, City Atty., and W. M. Engart, Asst. City Atty. (B. B. Blakeney, on the brief), for appellees.

Before HOOK and ADAMS, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. The Atchison, Topeka & Santa Fé Railway Company sued the city of Shawnee, Okl., and certain of its officers, to enjoin them from enforcing a resolution of the mayor and councilmen that a street within the bounds of the station grounds of the company be opened and put in condition for public travel. The trial court granted a temporary injunction, but at the final hearing and upon the same proofs it dismissed the bill. This change of view was probably thought necessary because of *City of Des Moines v. Railway*, 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958, then recently decided. The company appealed.

The railroad of the Santa Fé Company was built into and through the city of Shawnee and a division point established there by a predecessor in ownership, in consideration, in part, of the passage of a city ordinance granting rights of way over certain streets and alleys and vacating others for station grounds, etc. The correct construction of this ordinance is one of the questions in the case. The company contends that the ground in controversy, which was "Tenth street, from the center of Minnesota avenue to the east line of Pennsylvania avenue," was duly vacated by the ordinance, and the title thereupon reverted to the owner of the adjacent lots. On the other hand, defendants deny the power of the Legislature of Oklahoma to authorize such a disposition of a public thoroughfare, and also contend that, even if the power existed and was exercised, all that was in fact granted by the ordinance was a mere right of way, which did not withdraw the street from municipal control, nor exclude its use as such by the in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

habitants of the city. The power of the Oklahoma Legislature is too plain for discussion. Express authority to vacate streets was conferred by the Legislature upon the municipal council, and provision was made in the law that upon a vacation the title should revert to the owners of the adjacent property. St. 1893, § 584; Comp. Laws 1909, § 688; Blackwell, etc., Ry. Co. v. Gist, 18 Okl. 516, 90 Pac. 889; Bullen v. Railway, 20 Okl. 819, 95 Pac. 476.

In the first of these cases it was expressly held that when a street had been vacated, and had become attached in title to the adjacent property as provided by the statute, it could not again be taken for public use without just compensation to the owners. The city ordinance in question in this case clearly shows by its title and context that both a right of way and a vacation were in contemplation and were separately dealt with. The first section granted to the railway company named, "its successors and assigns, the right to construct, maintain and operate all necessary tracks, turnouts and sidings over and across the streets, avenues and alleys," which were described. This was a mere right of way; but none of the highways described are involved in the present case. The second section provided "that the following streets, avenues and alleys through and across the station grounds of the said" railway company "be and the same are hereby vacated." This was followed by a particular description of parts of various streets and alleys, which, as the record shows, are embraced in the area comprising the terminal grounds of the company, and among them is the part of Tenth street in controversy. A railroad right of way along a street and a vacation of the street are wholly different things. In the former the highway in its public character continues, and the railroad is but a phase of the public use to which it is devoted. The highway still remains subject to municipal regulation. But when, under statutes like that of Oklahoma, a street is vacated, its character as such is destroyed, and it is thereafter held in private ownership, the same as the adjacent lots to which it has accreted. The intent of the city to vacate the part of Tenth street within the limits of the station grounds is so patent from the face of the ordinance that resort to the circumstances of its adoption is unnecessary. The grantee duly accepted the ordinance as its provisions required, constructed its tracks and buildings on the station grounds, and its contract rights so secured are protected from impairment and its property from appropriation without due process of law by the national Constitution. The purpose of the city, of which complaint is made, is the opening for public travel without compensation of a strip 80 feet in width through the very heart of the station grounds over the railroad tracks of the company. The serious consequences to the railroad use of the property are apparent. No proceedings in condemnation were instituted; no inquiry set afoot for ascertaining the loss and damage the company would undoubtedly sustain.

It is contended by defendants that the case is controlled by *City of Des Moines v. Railway*, supra. In that case all the parties were citizens of Iowa, and jurisdiction of the Circuit Court was invoked upon a federal question claimed to arise from the impairment, by a resolu-

tion of the municipal council, of its contract rights under an ordinance granting the use of the city streets for the operation of a street railway. It was also asserted that the resolution, if enforced, would take the property of the complainant without due process of law, contrary to the fourteenth amendment. The Supreme Court held the resolution was not a legislative act infringing the rights of complainant, but was a mere declaration by the city of its position in a controversy then going on, and a direction to its law officer to resort to the courts if its view was not accepted. The case was therefore dismissed for want of jurisdiction. In the case at bar jurisdiction is founded upon diversity of citizenship, but the question as to the character and effect of the resolution is nevertheless involved in the general equities of the case. The resolution instructed the mayor and city clerk to serve a written notice upon the company to open the street and put it in condition for travel within 30 days or steps would be taken by the city to compel it to do so. Embodied in the resolution was the form of the notice, as follows:

"You are hereby notified that by resolution passed by the mayor and councilmen of the city of Shawnee, state of Oklahoma, on the 25th day of September, 1908, you must place the crossing of your right of way over and across Tenth street in the said city of Shawnee in good condition for travel by the general public within thirty days from the service of this notice upon you, or the mayor and council of said city of Shawnee will proceed as by law authorized to compel you to do so."

We think this resolution is quite different from that in the Des Moines Case, and that it is substantially like that held in Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, to impair the obligation of a prior contract. It is more than a mere declaration of the attitude of the city and a direction to its law officer to bring suit in court. It not only denies the company has any right or title to the street arising from a lawful vacation, but demands that it shall assume the burden of opening it up and restoring it to public travel. The resolution is militant, not merely declaratory. What steps the city would take if the company failed to comply are not expressed; but they may be inferred from the provisions of an Oklahoma statute which imposes upon every railroad company doing business in the state the duty to construct and maintain in good condition for the use of the public the crossings at the intersection of its tracks and public highways, and prescribes a penalty of \$25 per day for each day's neglect to do so after 30 days' written notice by the board of aldermen of a city. Comp. Laws 1909, § 7498. According to well-settled principles, a court of equity has jurisdiction of such a case as this.

The decree is reversed, and the cause is remanded for the entry of a decree for complainant as prayed for.

HAW MOY v. NORTH, Com'r of Immigration, et al.

(Circuit Court of Appeals, Ninth Circuit. November 21, 1910.)

No. 1,756.

1. ALIENS (§ 32*)—CHINESE—DEPORTATION PROCEEDINGS—HABEAS CORPUS.

Where a Chinese person, defendant in a deportation proceeding, alleges citizenship, a determination of such question by the Secretary of Commerce and Labor is conclusive, subject only to the jurisdiction of the federal courts to review on habeas corpus whether the person had been accorded a proper hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 18*)—REGULATION—CONGRESSIONAL POWER.

Congress has power to legislate with reference to undesirable aliens desiring to enter the United States, and also with reference to the deportation of undesirable aliens already within the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 70-72; Dec. Dig. § 18.*]

3. ALIENS (§ 32*)—DEPORTATION—PROCEEDINGS—REVIEW—HABEAS CORPUS.

Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), forbids the bringing into the United States for prostitution, or any other immoral purpose, of any alien woman or girl. Sections 19, 20, and 21 provide for the deportation of aliens found in the United States in violation of law, and section 25 declares that where an alien is excluded under any law or treaty now existing, or hereafter made, the decision of the immigration officials, if adverse to such alien, shall be final unless reversed on appeal to the Secretary of Commerce and Labor. *Held*, that the rule that the Secretary's decision is reviewable on habeas corpus only to determine whether the alien had a proper hearing, was applicable to an alien, or person claiming to be a citizen, who had been admitted into the United States from China, and whom the immigration authorities were seeking to deport because they had since determined that such person was unlawfully within the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93-95; Dec. Dig. § 32.*]

4. ALIENS (§ 32*)—DEPORTATION—DECISION OF IMMIGRATION OFFICERS—CONCLUSIVENESS.

Under Immigration Act Feb. 20, 1907, c. 1134, § 25, 34 Stat. 906 (U. S. Comp. St. Supp. 1909, p. 462), providing that the decision of immigration officers, excluding an alien from admission into the United States, is final only when the decision is adverse to the right of the alien to such admission, a decision of such officers that a Chinese person applying to enter was entitled to enter as a native-born citizen was not conclusive in her favor for three years thereafter.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93-95; Dec. Dig. § 32.*]

5. HABEAS CORPUS (§ 55*)—PROCEEDINGS—PETITION—REQUISITES.

A petition for habeas corpus to inquire into the validity of the detention of a Chinese person in deportation proceedings was insufficient to require a review of the fairness and good faith of the immigration officers, where copies of the warrant of arrest and proceedings were not annexed to the petition and were not substantially stated therein, and no cause was assigned for their omission.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 52; Dec. Dig. § 55.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Northern District of California.

Habeas corpus on petition of Haw Moy to obtain his release from the custody of Hart H. North, Commissioner of Immigration at the Port of San Francisco. From a judgment denying the application and dismissing the petition, petitioner appeals. Affirmed.

Catlin & Catlin, Hiram W. Johnson, and O. P. Stidger, for appellant.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from an order of the United States Circuit Court for the Northern District of California denying an application for a writ of habeas corpus on behalf of the appellant, and dismissing the petition praying for the same. The petitioner is one Kar Dip, who alleges that he is a friend of Haw Moy; that Haw Moy is a native-born citizen of the United States; that on or about the 1st day of October, 1908, she returned to the United States from a temporary visit to the Empire of China, and applied to the Commissioner of Immigration at the Port of San Francisco for permission to enter the United States upon the ground that she was a native-born citizen; that she submitted the evidence and proof in support of her application, and after investigation and hearing, as required by law and the rules and regulations of the Department of Commerce and Labor, she was allowed to enter the United States; that afterwards, and at the date of her petition for a writ of habeas corpus, she was being held in custody under a warrant of deportation issued on or about the 2d day of August, 1909, by the Secretary of Commerce and Labor under the provisions of the Immigration Act of February 20, 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1909, p. 447]); that as a native-born citizen she was not subject to the provisions of said act, and was not subject to the jurisdiction of the Secretary of the Department of Commerce and Labor, or the jurisdiction of the Commissioner of Immigration of the Port of San Francisco.

The court denied the petition for the writ on the authority of the United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. In those cases the question was whether the petitioners had the right to land and come into the United States. The Supreme Court held that a Chinese person seeking to enter the United States and alleging citizenship, presented a question to be determined by the Secretary of Commerce and Labor upon a proper hearing; that upon such a hearing his decision was final and conclusive, subject only to the jurisdiction of the federal courts to determine on habeas corpus whether such person had been denied a proper hearing. If it was found that a proper hearing had been had, the writ should be dismissed. If a proper hearing had not been had, then the court should hear the case upon the merits.

It is contended on behalf of the petitioner in this case that this law is not applicable to an alien or person claiming to be a citizen who has been admitted into the United States from a foreign country, and whom the immigration authorities are seeking to deport because they have since determined that such person is unlawfully in the United States. The general object of the immigration statutes is not only to prevent the admission of undesirable and forbidden classes of aliens, but to remove from this country all such aliens who may have succeeded in effecting an entry. That Congress has power to legislate as to both classes of aliens has been settled by many decisions of the courts and is not now open to investigation. Each class is equally undesirable, and each is equally inimical to the best interests of the country at large. In the Immigration Act of February 20, 1907 (34 Stat. 898), which is the latest expression of the legislative will upon the subject, Congress has provided, in section 2, that certain classes of aliens therein enumerated shall be excluded from admission to the United States. Section 3 forbids the importation to the United States for the purpose of prostitution, or for any other immoral purpose, of any alien woman or girl. Sections 19, 20, and 21 provide for the deportation of aliens found in the United States in violation of law. Section 25 provides, among other things:

"That in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of Commerce and Labor."

It will be seen from this legislation that Congress intended to exercise its admitted jurisdiction not only in excluding defective and undesirable aliens who might be seeking entry into this country, but also to deport those who, having entered, were found to be unlawfully here. The immigration acts commit to the officers of immigration the duty of enforcing the provisions of this law and the only appeal is through the Commissioner of Immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Commerce and Labor. The act must be construed with reference to the objects which Congress had in view and the evils sought to be remedied. It is as important that a defective and undesirable alien who has entered the country should be deported, as it is that one who seeks entrance should be excluded; and, if Congress had intended that the courts should have jurisdiction in the first case and not in the second, the language of the act would have indicated such intention. We are of opinion that the act of February 20, 1907 (34 Stat. 898) is applicable to such a case as presented in this petition. *Looe Shee v. North*, 170 Fed. 566, 571, 95 C. C. A. 646.

It is further contended by the appellant that the officers of the Department of Commerce and Labor having investigated her alleged right to land and enter the United States as a citizen thereof, and having admitted her upon that claim, her alleged right has been adjudicated, her status has become fixed, and she cannot be arrested and again subjected to an investigation with respect to that question. The officers of the Department of Commerce and Labor had jurisdiction

to investigate the question of appellant's citizenship. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. Section 25 of the Immigration Act of February 20, 1907, provides that the decision of the immigration officers in excluding an alien from admission into the United States is final only when the decision is adverse to the right of an alien to such admission. Under that section the decision was not final, as it is alleged to have been in her favor, but was conditional for the period of three years provided in the statute. *Looe Shee v. North*, 170 Fed. 566, 571, 95 C. C. A. 646.

The remaining questions relating to the alleged lack of fairness and good faith on the part of the officers in re-examining the question of the appellant's right to be and remain in the United States cannot be inquired into upon this appeal; the petition for the writ of habeas corpus being insufficient for that purpose. Copies of the warrant of arrest and proceedings under which the appellant is held are not attached or annexed to the petition, nor is the essential part stated, nor is there any cause assigned for any such omission. In this regard the petition is insufficient to enable the court to consider the objection to the proceedings. The general rule is undoubted that, if the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the parties held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate. *Craemer v. Washington State*, 168 U. S. 124, 128, 18 Sup. Ct. 1, 42 L. Ed. 407; *Terlinden v. Ames*, 184 U. S. 270, 279, 22 Sup. Ct. 484, 46 L. Ed. 534; *Hyde v. Shine*, 199 U. S. 62, 85, 25 Sup. Ct. 760, 50 L. Ed. 90.

The judgment of the Circuit Court is affirmed.

HOO CHOY v. NORTH, Com'r of Immigration, et al.

(Circuit Court of Appeals, Ninth Circuit. November 21, 1910.)

No. 1,757.

Appeal from the Circuit Court of the United States for the Northern District of California.

Habeas corpus on petition of Wong Dune to obtain the discharge of Hoo Choy, a female Chinese person from the custody of Hart H. North, Commissioner of Immigration at the port of San Francisco, under a deportation warrant. From an order dismissing the writ, Hoo Choy appeals. Affirmed.

Catlin & Catlin, Hiram W. Johnson, and O. P. Stidger, for appellant.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from an order of the United States Circuit Court for the Northern District of Cali-

fornia denying an application for a writ of habeas corpus on behalf of the appellant, and dismissing the petition praying for the same. The petitioner is one Wong Dune, who alleges that he is the lawful husband of Hoo Choy, for whom and on whose behalf he appears as the petitioner.

The petition alleges that Hoo Choy is a bona fide domiciled resident, inhabitant, and denizen of the city and county of San Francisco, State of California, and of the United States of America, and has no home or domicile elsewhere; that she came to the United States of America from the empire of China with the petitioner as his lawful wife on or about the 1st day of August, 1908, and since her arrival in the United States has continued to be the lawful wife of the petitioner, living with him at his home in the state of California, and there cohabiting with him until about the 22d day of June, 1909, when she was forcibly taken into custody as set forth in the petition; that the said Hoo Choy entered the United States lawfully on or about the 1st day of August, 1908, as the wife of the petitioner; that she has not since changed her status; that Hoo Choy is being held in custody under a warrant of deportation issued on or about the 2d day of August, 1909, by the Secretary of the Department of Commerce and Labor, issued by him under the provisions of the Immigration Act of February 20, 1907 (chapter 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1909, p. 447]), when she was a bona fide domiciled resident and inhabitant of the United States and the lawful wife of an American citizen, domiciled with and living with her husband; that she is not subject to the provisions of the immigration act and is not subject to the jurisdiction of the Secretary of the Department of Commerce and Labor, or the jurisdiction of the Commissioner of Immigration at the port of San Francisco, or of any other officer, board, or department of the executive branch of the government of the United States. The court denied the application, as in the case of *Haw Moy v. North*, 183 Fed. 89, and upon the same authorities. The only difference between that case and this is the fact that Hoo Choy, upon whose behalf the petition for the writ of habeas corpus is made in this case, does not claim to be a citizen of the United States; her claim is that she is the wife of a citizen of the United States. The case in all other respects is the same as the case of *Haw Moy*.

For the reasons stated in the opinion in that case, the judgment of the Circuit Court is affirmed.

BIDWELL v. GEORGE B. DOUGLAS TRADING CO.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 26.

1. APPEAL AND ERROR (§ 87*)—REVIEW—ORDER ON MOTION FOR NEW TRIAL.

The ruling on a motion for a new trial is not reviewable on a writ of error in the federal courts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 588; Dec. Dig. § 87.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 272*) — EXCEPTIONS TO INSTRUCTIONS — TIME FOR TAKING.

An exception to the direction of a verdict taken after the verdict has been returned cannot be considered on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.*]

3. APPEAL AND ERROR (§ 237*)—PRESENTATION OF QUESTIONS TO LOWER COURT —NECESSITY.

A party who has not asked the court to direct a verdict in his favor cannot urge its failure to do so as a ground for reversal in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1384; Dec. Dig. § 237.*]

4. PAYMENT (§ 39*)—APPLICATION—APPROPRIATION BY CREDITOR.

Where a customs collector refunded money to an importer on account of duties which had been illegally exacted from him, without direction as to its application, the importer had the right to apply it first to the payment of legal interest accrued on his claim.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 39.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by the George B. Douglas Trading Company against George R. Bidwell. Judgment for plaintiff, and defendant brings error. Affirmed.

On writ of error to review a judgment entered upon a verdict directed by the court in favor of the plaintiff for the sum of \$127.86, being a sum equal to the amount of interest due upon \$1,266.36 which was unlawfully exacted by the defendant, acting as collector of customs, as duties upon sugar imported from Porto Rico by the plaintiff. The defendant, sued as an individual, exacted the sum of \$1,266.36 from the plaintiff, which sum, with interest, amounted on September 30, 1901, to \$1,394.22. The complaint alleges:

"Fifth.—That on September 30, 1901, the defendant refunded to the plaintiff the sum of twelve hundred sixty-six and 36/100 (\$1,266.36) dollars, leaving a balance still due the plaintiff amounting to one hundred and seventy-seven dollars and eighty-six cents (\$177.86), which has not been paid."

The answer alleges:

"IV. The defendant admits that on September 30, 1901, he refunded to the plaintiff the sum of twelve hundred sixty-six and 36/100ths dollars (\$1,266.36), as alleged in the fifth paragraph of said complaint, but denies each and every other allegation in said fifth paragraph contained."

At the trial George B. Douglas was the only witness sworn. He testified that he had calculated the interest to September 30, 1901, and added it to the amount originally paid, the total being \$1,394.22, and that the plaintiff has never received from the defendant any other sum upon account of the cause of action other than the sum of \$1,266.36.

After the testimony was closed the record proceeds as follows:

"Plaintiff rests.

"By direction of the court the jury returned a verdict in favor of the plaintiff for the sum of \$127.86, subject to computation by the collector.

"Mr. Nichols: I take an exception to the direction and move to set the verdict aside as contrary to the law and the facts and for a new trial upon the judge's minutes, and on all grounds mentioned in section 999 of the New York Code of Civil Procedure, except the insufficiency of damages.

"Motion to set aside verdict denied.

"Exception."

Henry A. Wise, U. S. Atty. (William L. Wemple, Asst. U. S. Atty., of counsel), for plaintiff in error.

Percival H. Gregory, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. There are no disputed facts. At the close of the testimony the court directed a verdict in favor of the plaintiff. The defendant did not move for a direction in its favor. The motion for a new trial presents no question reviewable in this court. *Reader v. Haggin*, 160 Fed. 909, 88 C. C. A. 91; *Denison v. Shawmut Mining Co.*, 159 Fed. 102, 86 C. C. A. 292.

The only question, therefore, is whether the defendant's exception to the direction of a verdict for the plaintiff, taken after the verdict was rendered, was well taken. The record presents the somewhat anomalous situation of the defendant insisting that a verdict should have been directed in his favor when he did not ask that this be done. If he had made such a motion it might have been granted. Instead of doing so, he waited until the verdict had actually been rendered and then coupled a motion to set it aside with an exception to the action of the court in directing it. So far as appears from the record, the defendant's counsel took no part in the trial from beginning to end. His first appearance, as stated above, was to take an exception to the rendition of the verdict after it had been rendered. This court, following the decisions of the Supreme Court, has frequently held that an exception taken after the jury has retired is valueless. *Railway Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58; *Park Bros. & Co. v. Bushnell*, 60 Fed. 583, 9 C. C. A. 138; *Mann v. Dempster*, 179 Fed. 837. It also seems to be well settled that a party who has not asked the court to direct a verdict in his favor cannot successfully urge as a ground for reversal that such a direction was not made. *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Oswego Township v. Travelers' Ins. Co.*, 70 Fed. 225, 17 C. C. A. 77.

However, we will consider the case upon the theory that the exception taken sufficiently presents the questions debated. The contention of the plaintiff is that the action is brought to recover the balance due on a debt of \$1,394.22, which remained after a payment of \$1,266.36, and that this amount was first applied to the payment of accrued interest and then to the reduction of the principal. There is nothing in the proof to show that this was not done. Indeed, in the absence of proof to the contrary, the presumption is that this was the disposition made of the payment. It was the natural thing to do. *Story v. Livingston*, 13 Pet. 370, 10 L. Ed. 200. In *Bidwell v. Preston*, 160 Fed. 653, 88 C. C. A. 19, the plaintiff at the time of payment delivered to the defendant a letter in which he says:

"In addition to the amount set forth in my claim for duties erroneously exacted on my importation of sugar by the Julia Frances from Porto Rico, amounting to \$4,843.32, I claim the interest due on the amount set forth in my claim at the same rate per annum which I reserve and do not abandon."

This shows clearly that the plaintiff in the Bidwell Case endeavored after receiving the amount due him as principal to reserve his claim for interest.

The plaintiff here was deprived of the use of its money by the unlawful act of the defendant and the record should be strictly construed to sustain an obviously just result. The defendant, when he paid the money, gave no direction that it be applied on the principal and the plaintiff, or the court, if the plaintiff failed to do so, was justified in applying it upon the interest. *Bank v. Webb*, 94 N. Y. 467. The validity of the judgment will be assumed unless the contrary appears.

The judgment is affirmed with costs.

AMERICAN CAN CO. et al. v. ERIE PRESERVING CO. et al.

SAME v. NEW YORK COUNTY NAT. BANK et al.

SAME v. TIMERMAN et al.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

Nos. 11-13.

1. PLEDGES (§ 11*)—NATURE AND ESSENTIALS—DELIVERY AND POSSESSION.

A pledge is utterly invalid unless accompanied by actual or constructive possession.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

2. PLEDGES (§ 11*)—NATURE AND ESSENTIALS—DELIVERY AND POSSESSION.

A preserving company made a lease of all its premises to a warehousing company for the purpose of obtaining warehouse receipts for goods stored therein to be used as collateral for loans. Such receipts were issued on requisition from its superintendent, who was also made custodian for the warehousing company and were pledged as collateral, but the goods covered by the receipts were not separated from other goods of the pledgor, nor were the goods or the buildings marked in any way to indicate possession by the warehousing company. Other receipts similar in form were issued by employes of the preserving company for goods on the same premises and pledged by the company, and in one instance only the pledgee had the goods segregated, marked, and placed in charge of an agent. *Held*, that in the latter case the pledge was valid, but in all others they were invalid for want of delivery to and possession by the pledgees.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

3. RECEIVERS (§ 77*)—INVALID PLEDGE—EQUITABLE LIEN.

If the essential element of possession of property by a pledgee was wanting to make the pledge good when receivers were appointed for the pledgor, equity will not thereafter supply it to the detriment of the general creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 141; Dec. Dig. § 77.*]

4. WORDS AND PHRASES—"FIELD STORAGE WAREHOUSING."

"Field storage warehousing" is warehousing the owner's goods on the premises of the owner or of the former owner.

Appeals from the Circuit Court of the United States for the Western District of New York.

Suit in equity by the American Can Company and Paul Voorhees against the Erie Preserving Company. From orders (171 Fed. 540)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

denying the petitions of Ladenburg, Thalmann & Co., Conrad Heinrich Donner, the New York County National Bank, and Arbuthnot, Latham & Co., they appeal; and from an order (171 Fed. 548) allowing the petition of the Bank of North Collins, Clark H. Timmerman and William E. Peugeot, receivers, appeal. Affirmed.

Rogers, Locke & Babcock (L. L. Babcock, Frank B. Colton, and Edwin J. Rice, of counsel), for appellants in Nos. 11, 12.

John Hull, for receivers.

George P. Keating, for intervening creditors.

E. F. Kruse, for the Bank of North Collins.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The Erie Preserving Company was engaged in the business of canning vegetables and fruit in factories at Irving, North Collins, and Model City, N. Y. The American Warehousing Company was engaged in what is known as "field storage warehousing"; that is, warehousing the owner's goods on the premises of the owner or of the former owner. This system is frequently practiced and is entirely effective when properly carried on. *Phila. Co. v. Winchester* (C. C.) 156 Fed. 600.

In August, 1907, the preserving company entered into an agreement with the warehousing company for the purpose of obtaining warehouse receipts for goods stored on its own premises; the receipts to be used as collateral for loans. To that end it leased all its premises to the warehousing company, and the warehousing company appointed one Wode, who was the preserving company's superintendent, to act as its own custodian of the warehoused goods. Various other agreements not necessary to mention were entered into to carry out the arrangement.

The course of dealing was that, upon requisitions of Wode, the warehousing company issued warehouse receipts for property actually on the premises to the order of the preserving company, which it indorsed and used as collateral. Receipts of this kind were held by the New York County National Bank, dated in June, 1908, and Arbuthnot, Latham & Co., dated from September, 1907, to March, 1908.

Other receipts similar in form were issued by Edward J. Sheridan, an employé of the preserving company, as a warehouseman, and used in the same way. Such receipts were held by Ladenburg, Thalmann & Co., dated in March, 1908, and by Conrad Heinrich Donner, dated in February, 1908, both of whom supposed that Sheridan was an independent warehouseman.

Other similar receipts were issued by Wode as a warehouseman and used in the same way. Such receipts were held by the Bank of North Collins, dated January, February, and March, 1908. It knew that Wode was the superintendent of the preserving company, but appointed him as its own custodian of the goods mentioned in the receipt.

March 7, 1908, receivers of the preserving company were appointed in this suit by a stockholder and a general creditor, alleging that

it was not able to meet its obligations in due course and praying that it be wound up and its assets distributed among its creditors. The defendant company in its answer admitted the allegations of the bill.

The goods mentioned in the receipts of the Bank of North Collins and goods in kind and amount of those mentioned in the other receipts were sold without prejudice to the rights of any one, and the holders of the receipts claim the proceeds or an equitable lien on the same.

Only one lease is in evidence, viz., that to the warehousing company for all the preserving company's premises. Sheridan testified that he had a "little lease" which was called for but not produced. Of course there could not be two leases of the same premises to different persons at the same time, and at the date of Sheridan's receipts the premises were leased to the warehousing company, which had a custodian there. Wode did not pretend to have any lease.

The business of the preserving company after the lease of its premises to the warehousing company went on in exactly the same way as before. Goods covered by the receipts, except in the case of the Bank of North Collins, were sold and other goods substituted. The use and occupation of all the premises by the preserving company was open, continuous, and exclusive. Care was taken by the warehousing company and by Sheridan that there should always be more goods of the same kind on the premises than were called for by the warehouse receipts, but none of the goods called for by the receipts were segregated or marked so as to be distinguished from the general stock of the preserving company, except in the case of the Bank of North Collins.

All the loans were made in entire good faith on the strength of the receipts and of the goods called for by them, and the preserving company intended to give a valid lien thereon. The receipts were assigned to the lenders for the purpose of pledging the goods, and we think the case turns on the question: Had the lenders valid pledges? A pledgee, though he may sell the pledge if the debt is not paid, has only a lien upon and no title to it. The common law does not recognize a lien unaccompanied by possession either actual or constructive. This does not depend in any way upon fraud, actual or presumptive. We therefore need not examine the statutes or the law as to sales unaccompanied by delivery. We are not concerned with the questions whether such sales are void as absolutely fraudulent or only voidable as presumptively fraudulent, or whether all creditors may attack them or only creditors existing when the sales were made. The law as to pledges is clear, viz., that they are utterly invalid unless accompanied by actual or constructive possession. The subject is elaborately considered by Mr. Justice Bradley in *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

The judge of the Circuit Court rightly held that the receipts were invalid because the goods were not warehoused, and that there was no valid pledge because no delivery was made to the lenders except in the case of the Bank of North Collins.

Warehouse receipts would give constructive possession of goods actually warehoused; but it is plain that the warehousing company did not maintain a warehouse in any proper sense, because it had no

exclusive and unequivocal possession. There is no pretense that either Sheridan or Wode were warehousemen at all. *Yenni v. McNamee*, 45 N. Y. 614. Therefore the holders of these receipts who had no actual possession had no constructive possession either. The Bank of North Collins has, however, been found both by the special master and the judge of the Circuit Court to have actually set apart and marked and kept in its own custody the goods described in its receipts which remained undisturbed down to the time receivers were appointed. We will adopt the conclusion of the court below as to its claim also because it did have actual possession and a valid lien.

It is contended by the holders of the receipts of the warehousing company and of Sheridan that they have an equitable lien. Equity would have compelled the preserving company to make actual delivery of the goods intended to be pledged, and it is said that the receivers standing in the place of the preserving company are subject to the same rule. But, though equity will treat that which ought to have been done as done between the parties, it will not do so to the prejudice of third parties. If the essential element of possession of property in existence was wanting to make the pledges good when receivers were appointed, equity would not thereafter supply it to the detriment of general creditors.

All the orders are affirmed, with costs.

WILLIAM WRIGLEY, JR., & CO. v. GROVE CO. et al.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 148.

1. TRADE-MARKS AND TRADE-NAMES (§ 3*)—WORDS SUBJECT TO APPROPRIATION—"SPEARMINT."

The word "Spearmint," as applied to chewing gum, is a term descriptive of the flavor, open to every manufacturer who uses such flavor, and cannot be appropriated as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 60*)—UNFAIR COMPETITION—IMITATION OF PACKAGES.

Defendants, in imitating complainant's cartons and packages containing "Spearmint" gum, *held* chargeable with willful and intentional unfair competition, which entitled complainant to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 60.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by William Wrigley, Jr., & Co. against the Grove Company, Samuel Grove, Jr., Charles E. Blauvelt, and Simon S. Schiener. Decree for complainant, and defendants appeal. Decree modified and affirmed.

See, also, 161 Fed. 885.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The decree of the Circuit Court granted an injunction and an accounting. The decree restrains the use of the word "Spear-mint," holding it to be a valid trade-mark for chewing gum. It also finds the defendants guilty of unfair trade in imitating the wrappers, labels and coverings of the packages used by the complainant and enjoins the use of such simulated covers and wrappers. The defendants appeal to this court.

Louis Hicks, for appellants.

Offield, Towle, Graves & Offield (James R. Offield, Philip B. Adams, and Charles K. Offield, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The right to make and sell chewing gum out of ingredients not deleterious to health and to flavor it with winter-green, vanilla, strawberry, pineapple, spearmint or any other flavoring material, is inherent in every citizen, whether a corporation or an individual. Having a right to make and sell gum, it follows, as a necessary corollary, that he has the right to describe it. The flavor is a very important factor, regarding which the public desires to be informed and which the seller has a clear right to communicate, if, indeed, he is not under obligation to do so. If his gum be flavored with spearmint, for instance, he cannot inform the public of this fact without using the word "Spear-mint," and to deprive him of that privilege is to interfere with his rights. Spearmint is a descriptive term as applied to chewing gum, and no one can deprive a manufacturer of its use or appropriate it as a trade-mark. The first paragraph of the decree is as follows:

"It is hereby ordered, adjudged and decreed: First: That the said word or name 'Spear-mint' when used in a prominent way, either in advertising matter, on labels, or on boxes, is a good and valid trade name or mark for chewing gum; that the title thereof and the entire and exclusive right to the use of the same in the manner above specified is vested in complainant."

The language quoted is too broad and the decree cannot be upheld in so far as it sustains as a trade-mark the word "Spear-mint" and awards to the complainant the exclusive right to use the same in connection with chewing gum. Indeed, at the argument we understood counsel for the complainant to concede that the decree was too broad. Similar concessions are made in the complainant's brief. For instance, at pages 12 and 13 it is said:

"The bill of complaint in this case is not founded on any technical trade-mark. * * * This case is not governed, therefore, nor affected by the fact that the word 'Spear-mint' is descriptive of the quality of the goods, and as such is not capable of being monopolized as a trade-mark. * * * The complainant appellee is not seeking to monopolize the word 'Spear-mint,' to the exclusion of all others, whereby other manufacturers cannot notify the public that their product is flavored with the oil of spearmint."

The difficulty is that the decree as entered does give the complainant the very monopoly which is thus disclaimed, namely, an exclusive right to the use of the word "Spear-mint" as a trade-mark for chew-

ing gum. In *Florence Mfg. Co. v. Dowd & Co.*, 178 Fed. 73, 101 C. C. A. 565, this court upon similar facts decided that the word "Keep-clean" as applied to toothbrushes was descriptive only and not the subject of a valid trade-mark. We think the rationale of that decision applies with even greater force to the word "Spearmint" when used in connection with chewing gum. The complainant has no exclusive property in the word "Spearmint." The defendants have a perfect right to use the word as descriptive of their goods; but they have not the right to use it in collocation with other words and symbols in such manner as to induce the public to believe that their "Spearmint gum" is the "Spearmint gum" of the complainant.

Although not entitled to a trade-mark in the word "Spearmint," we have little doubt that the complainant has proved a cause of action against the defendants based upon unfair competition. The complainant for at least five years has been selling "Wrigley's Spearmint Gum" put up in packages containing five individual sticks inclosed in pink wrappers with an outside label of less length than the individual sticks, wrapped around the package, thus permitting the ends of the pink individual packages to show. This wrapper has in the center a crude spear in green with the word "Spearmint" in white block letters appearing in the center of the spear. There is a sprig of mint on the left side and the words "The Flavor Lasts" printed in green on the other end. Above the green spear, printed in red, is the name "Wrigley's" and below the spear, in the same red letters, are the words "Pepsin Gum." On one side of the package, printed in white on a green spear, are the words "The Flavor Lasts," and on the other side in similar letters, the words "Perfumes the Breath." The cartons in which are 20 of these individual packages of five sticks are displayed on the counters of retail dealers. The color scheme of these boxes is yellow, green and red, yellow being the prevailing color.

The first spearmint gum produced by the defendants was packed in yellow boxes, having the same general appearance as those of the complainant, with the word "Spearmint" prominently printed on a rectangular green bar with a sprig of spearmint behind it. In place of "Wrigley's Pepsin Gum" the defendants have printed "Grove's Pepsin Gum" in red letters. Their box contains 20 packages, each containing five sticks put up in wrappers colored the same as complainant's wrappers. These packages are in appearance similar to the complainant's. In the center of the wrapper is the word "Spearmint" printed in white on a green bar, which differs from the complainant's only in the fact that it does not terminate in a spear-head. Above the green bar in heavy red letters is "Grove's" and below in similar letters are the words "Pepsin Gum." On the side of the package the defendant has substituted for the words "The Flavor Lasts" the words "The Flavor That Takes." In both cases the words are printed in white on a green background. Subsequently the defendants, on being notified of their infringement, made some changes in the wrappers of the five-stick packages, the cartons or boxes remaining substantially the same. These changes it is unnecessary to describe in detail, the prin-

cial difference, stated generally, is the substitution of red for green wherever it appears on the original packages.

We think that no impartial person can read this record in connection with the exhibits without being convinced that the defendants have attempted to profit by the popularity of the complainant's gum and to appropriate part of the profits due to the expensive, ingenious and systematic advertising of the complainant. It is impossible to believe that the defendants could have dressed up their goods in packages so closely resembling those of the complainant if they honestly intended to sell them on their own merits. No inference can be drawn except that they resolved to imitate, without making exact copies, the complainant's boxes and labels, and thus secure a portion of the complainant's trade. This course could not have been adopted by them through inadvertence, ignorance or mistake. It was done deliberately and it must have been done to secure a portion of complainant's good will produced by the expenditure of a fortune in advertising. The usual argument that no one but an imbecile can be deceived is advanced. It is the old excuse and the old answer is applicable, namely, that no one should be permitted to dress up his goods so as to confuse them with those of his competitor. It is enough that confusion exists and that the purchaser may be deceived. In the case at bar it is well known that the gum chewing community is not, as a class, drawn from the most intelligent and discerning portion of the public. The proof shows that in the city of New York the majority of customers come from the East Side and is largely composed of ignorant foreigners, many of them unable to speak our language. That such customers may be induced to purchase the defendant's gum for the complainant's is more than probable. If the defendants are honest in wishing to sell their goods on their merits, it will aid them in so doing if they dress their goods so that no one can be deceived.

The decree should be modified by striking out the first paragraph thereof and by so amending the remaining paragraphs as to make them applicable to an action for unfair competition only. Neither party is entitled to the costs of this court.

LEYER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 53.

1. CRIMINAL LAW (§ 901*)—WAIVER OF ERROR—RULING ON MOTION FOR DIRECTED VERDICT.

An exception to a refusal to direct a verdict at the close of plaintiff's case is waived, if defendant thereafter proceeds to put in proof; and the strength of plaintiff's case must then be tested upon a new motion to direct a verdict after both sides have rested on an examination of the entire record made; and such rule applies in criminal as well as in civil cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. § 901.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PERJURY (§ 36*)—EVIDENCE—QUESTION FOR JURY.

Evidence considered in a prosecution for perjury, and *held* sufficient to warrant the submission of the case to the jury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 133; Dec. Dig. § 36.*]

3. PERJURY (§ 37*)—INSTRUCTIONS—SUFFICIENCY.

Instructions in a prosecution for perjury considered, and *held* without error.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 134–138; Dec. Dig. § 37.*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Otto Leyer was convicted of perjury, and brings error. Affirmed.

J. E. Finegan, for plaintiff in error.

William J. Youngs, U. S. Atty. (L. R. Bick, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The defendant was charged by indictment with having committed perjury in statements made by him under oath as to his property, upon executing a bail bond for one Vecchio, who was under indictment. The particular statement was his declaration that on June 23, 1909, the day he executed the bail bond, he was the "owner in fee simple of the premises situate and known as No. 122 Grattan street, in the borough of Brooklyn, county of Kings; it being a plot of ground 100 by 25 feet, on which is erected a four-story double brick dwelling." The making of the sworn statement was proved by the introduction of the original, and is not disputed.

The prosecution, having proved the statement, put in evidence from the register's office of Kings county the record of a deed made by Otto Leyer and Mary Leyer to Ferdinand and Edwidna Leyer, dated May 13, 1909, and recorded July 20, 1909, and, after some further testimony as to a search of the records in said office, rested its case. The deed purported to convey by metes and bounds two adjoining lots, each 25 by 100 feet, on the southerly side of Grattan street 25 feet east of Porter avenue. It did not give the street numbers of these two lots. Thereupon defendant's counsel moved the court to acquit the defendant, on the ground that the government had failed to establish that the defendant committed a crime. The motion was denied, and exception reserved.

The government's chain of proof at that stage of the case was defective in one important particular: It had proved that defendant had executed a deed of property on Grattan street on May 13, 1909, but had failed to prove that such deed had been delivered and the title to the property passed prior to the time (June 23, 1909) when defendant swore that he owned it. Since it had not been recorded until nearly a month later, it might fairly be inferred that it had not been delivered until after he made the affidavit on which indictment was founded. Defendant, however, did not stand upon his exception,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as it would seem he might safely have done, but proceeded to put in evidence in defense, calling several witnesses and himself taking the stand.

It is well-settled practice that an exception to a refusal to direct a verdict at the close of plaintiff's case is waived, if defendant thereafter proceeds to put in proof. The strength of the case for plaintiff must then be tested upon an examination of the entire record, made upon a new motion to direct a verdict when both sides have rested. *Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 14 Sup. Ct. 768, 38 L. Ed. 627.

We see no reason to repudiate this rule in criminal causes. If the whole record indicates that a verdict of guilty was justified, it is immaterial that evidence essential to conviction was voluntarily introduced by defendant himself. There is no force in the contention that the denial of the motion to direct acquittal at the close of the case for the prosecution "would in effect shift the burden of proof, and the defendant would be compelled to go forward and prove his innocence before the prosecution had succeeded in proving his guilt." Defendant was not compelled to go forward. If the prosecution failed to make out its case, he could quite safely rest upon his exception, knowing that, even if the jury should find a verdict against him on such incomplete proof, it would be promptly set aside.

At the close of the entire case motion to acquit was again made, and on its denial exception was reserved, and is here relied upon. Defendant's own testimony removed any question as to identity of one of the parcels in the deed of May 13, 1909, with the 122 Grattan street, which he swore that he owned when he executed the bail bond. He himself and the notary who took the acknowledgments to the deed also established the fact that it was delivered on that day. Defendant says it was executed to secure his father, Ferdinand Leyer, to whom he owed \$2,300, and was left with the notary to hold in escrow. The latter filed it for record after Vecchio failed to appear and before the day when the bond was actually forfeited, so that the government could not take steps to recover on it. The proofs showed quite convincingly that on May 13, 1909, before he made affidavit to the bail bond, defendant had conveyed away his title to 122 Grattan street.

There was also testimony tending to show that on the same day his father, Ferdinand (Ferdinand's wife joining), executed a deed of the same property to Otto Leyer, which deed was left with the same notary, but has never been recorded. This deed is not found in the record. It would seem from the charge that it contained some words written over erasures, and that there were other respects in which it might suggest suspicion as to the date of its execution. But all that was for the jury, which might have discredited the stories of defendant, of his father, and of the notary. There was sufficient in this case, after defendant had admitted the delivery of the first deed, to require the court to send the case to the jury.

It is next contended that the court erred, in that it did not require the prosecution to prove by at least two witnesses, or by one witness

and corroborating circumstances, that defendant was not in fact the owner of 122 Grattan street on June 23, 1909. We find no exception in the record which presents any such point; but the deed of May 23, 1909, coupled with the evidence of defendant himself that he delivered it on that day, the notary corroborating such statement, was sufficient proof to meet all requirements.

There are a dozen or more assignments of error to passages in the charge, of which two only have been argued. We find no exceptions covering these. Nevertheless we have looked at them, and find them without merit. The court informed the jury that "the sole charge is whether defendant was in truth and fact the owner in fee simple of the property." Defendant's counsel contends that this took away from the jury the consideration of the question whether or not defendant at the time honestly believed that he was the owner. Examination of the context shows that the court's language went to no such length. He was merely calling the jury's attention to the circumstances that the government might have charged perjury on the theory that there were other incumbrances besides the \$9,500 mortgage which he stated was unpaid, but had chosen to confine itself solely to the question of ownership. Elsewhere he charged, at defendant's request, that in order to convict the jury must find that defendant, at the time he swore to the bail bond, must have known that his statement as to ownership was untrue and false.

The court is also criticised for telling the jury that they had direct testimony, not only that the affidavit was made, but also "as to the other transactions upon which the questions in the case depend." We find no error in this, in view of defendant's own evidence that he executed and delivered the deed of May 13, 1909, on that day. The court charged the jury correctly as to the effect of a delivery in escrow; indeed, he so charged them in the very words of defendant's request.

We find no error in allowing the prosecution to call a witness in rebuttal solely to deny a statement which one of the defendant's witnesses said she made to him.

Judgment affirmed.

THE J. G. GILCHRIST.

THE SIMLA.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 41.

1. ADMIRALTY (§ 118*)—APPEAL—REVIEW—QUESTIONS OF FACT.

The rule is well settled in courts of admiralty that the decision of the trial court, which heard the witnesses, on questions of fact, will not be disturbed by an appellate court, unless clearly against the weight of evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 770-772; Dec. Dig. § 118.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COLLISION (§ 94*)—STEAM VESSELS MEETING—EVIDENCE AS TO FAULT.

When the steamer *Simla*, bound down the St. Clair river, was being passed on her starboard side by the overtaking steamer *Gilchrist* in accordance with a signal agreement, at a distance of 100 feet or more and at a moderate speed, the *Simla* sheered and struck the *Gilchrist*, and then took a violent sheer to port, coming into collision with the steamer *Smith*, which was passing up on a course 600 or 800 feet distant. *Held*, on the evidence that the *Gilchrist* was passing in a proper manner and in a proper place, and that the fault for the collision was wholly that of the *Simla*, which, although navigating a crowded river, had only the mate on deck, who failed to keep her on her course and allowed her to approach until she came within reach of the suction of the *Gilchrist*.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 197-199; Dec. Dig. § 94.*]

Appeal from the District Court of the United States for the Western District of New York.

Suit in admiralty for collision by the United States Transportation Company, as owner of the steamer *J. C. Smith*, against the steamer *Simla*, the *Calvin Company*, Limited, claimant; and the steamer *J. G. Gilchrist*, the *Gilchrist Transportation Company*, claimant. Decree (173 Fed. 666) against the *Simla* alone, and her claimant appeals. Affirmed.

Appeal from a decree of the District Court in favor of the libelant against the *Simla* for damages to the steamer *L. C. Smith*, occasioned by a collision which occurred between these vessels November 26, 1905, in the St. Clair river, near Woodtick Island. The decree dismissed the libel against the steamer *Gilchrist*. The *Smith* was bound up the river; the *Gilchrist* and *Simla* were both bound down. The *Gilchrist* signaled for and obtained permission to pass on the starboard side. While doing so, the *Simla* took a violent sheer to port and collided with the *Smith*, causing the injury complained of.

Clinton, Clinton & Striker (George Clinton, of counsel), for the *Simla*.

Hermon A. Kelley (Hoyt, Dustin, Kelley, McKeehan & Andrews and G. W. Cottrell, of counsel), for the *Gilchrist*.

Harvey D. Goulder and Frank S. Masten, for the *Smith*.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The principal question is one of fact, which was decided by the District Judge in favor of the *Gilchrist* and against the *Simla*, after seeing and hearing all of the important witnesses. The rule is well settled that his decision will not be disturbed, unless clearly against the weight of evidence. In the present case we are of the opinion that the weight of testimony upholds his conclusions, and, after an examination of the record, we fail to see how he could have reached a different result. It was a gross fault for the *Simla* to attempt the navigation of the St. Clair river, crowded as it is with vessels, having but one man, the second mate, on deck. He was expected to act as master, helmsman, and lookout, and at the same time

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

to give signals to the engine room and also to passing and meeting vessels. The Gilchrist, on the contrary, was fully manned, with all necessary officers on deck. The Simla took a violent sheer, passed over the 600 or 800 feet which separated her course from that of the Smith, and collided with the latter, causing the damages complained of.

We cannot find that anything in the Gilchrist's navigation initiated the sheer. Having asked and obtained assent to her passing the Simla on the latter's starboard hand, the Gilchrist, as the overtaking vessel, was required to keep out of her way, and it seems to us she did all that was required of her to that end. There was not such a difference between the respective speeds of the two vessels as to render the passing hazardous. The Gilchrist began the maneuver on a course sufficiently far away from the Simla as to be entirely safe. She steered for a fixed point on shore, and, as the evidence conclusively shows, kept her course. That being so, one of two possible causes must have operated to bring them closer together as they both progressed. Either the Simla's original course was not parallel with that of the Gilchrist, or the Simla changed her own course to starboard while the maneuver was being executed. The Gilchrist was keeping her course well over towards the American shore when the Simla sheered towards her. If the Gilchrist's suction contributed to this result, it was the Simla's action which brought her (the Simla) within its influence.

The District Judge was satisfied that the Simla changed her course to starboard, which initiated the violent sheer towards the Smith; and we are not persuaded that his finding was erroneous.

The Smith was concededly free from fault, and we are unable to find any fault in the navigation of the Gilchrist which justifies a decree against her.

It follows that the decree should be affirmed, with interest. As the Calvin Company, claimant of the Simla, is the only party appealing to this court, and as its appeal has not succeeded, it follows that the costs of the successful parties in this court must be taxed against the Calvin Company.

HEIN et al. v. HARRIS.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 66.

COPYRIGHTS (§ 52*)—INFRINGEMENT OF COPYRIGHT FOR MUSICAL COMPOSITION—DEFENSES.

Under Rev. St. § 4952, as amended by Act March 3, 1905, c. 1432, 33 Stat. 1000, which gives the author of a musical composition who has complied with its provisions the sole liberty of printing, publishing, and vending the same, it is no defense to a suit to enjoin infringement of such a copyright that defendant did not knowingly copy complainant's composition, but without knowledge of it independently produced substantially the same thing.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 50; Dec. Dig. § 52.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Silvio Hein and Marie Cahill against Charles K. Harris. From an order granting a preliminary injunction (175 Fed. 875), defendant appeals. Affirmed.

A. H. Rosenfeld, for appellant.

Wilder, Ewen & Patterson (John Ewen, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The order appealed from restrains defendant during the pendency of the action from publishing, selling, producing, or making use of the music in the chorus of the song known as the "Arab Love Song" in the operetta "The Boys and Betty." Hein made affidavit that he composed the music and took out copyright in conjunction with one Daniel Arthur, author of the words, who subsequently assigned his interest in the copyright to complainant Cahill. The infringement is found in the chorus of a song entitled, "I Think I Hear a Woodpecker Knocking at My Family Tree," in the musical comedy known as "The Golden Girl," and has been published by defendant. We do not think it necessary to add anything to Judge Hand's discussion of the music of the two choruses and of the earlier pieces from which it is contended that Hein substantially took the chorus of his "Arab Love Song." We concur with him in the conclusion that complainant's composition discloses sufficient novelty to be entitled to copyright, and that the chorus published by defendant infringes it.

One point not discussed in the court below is relied upon and may be briefly considered. Defendant contends that in order to infringe a copyright the defendant must have actually copied or pirated the production of the plaintiff, and not merely, while ignorant, have himself produced substantially the same thing. The case cited in support of this proposition is *S. S. White Dental Company v. Sibley*, (C. C.) 38 Fed. 751. This is not applicable, holding merely that, by copyrighting a chart showing engraved illustrations of artificial teeth made by plaintiff, a monopoly was not secured of that plan of advertising. An authority which apparently sustains defendant's contention, however, is found in *Reed v. Carusi*, Fed. Cas. No. 11,642, where Mr. Justice Taney held, in the case of a musical composition, that defendant was not liable for producing a piece, the same in all important parts, if it was not taken from the plaintiff's, but was the effort of defendant's own mind. That cause, however, was an action to recover penalties under the seventh section of the act of 1831, which expressly provided that there might be recovery if defendant's act was "with intent to evade the law."

The cause now before us involves only the property right of the original composer in his copyright. The act in force when this copyright was issued (Rev. St. U. S. § 4952, as amended by Act March 3, 1905, c. 1432, 33 Stat. 1000) provides that the author of a musical composition, upon complying with the provisions of the copyright

statute, shall have the sole liberty of printing, publishing, and vending the same. We are referred to no authority, and know of no reason for holding that the person to whom this right is secured may not maintain it by injunction against another person who threatens to invade it.

The order is affirmed, with costs.

PHILADELPHIA & R. RY. CO. V. RIVER & HARBOR IMP. CO. et al.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 24, Oct., 1910.

1. COLLISION (§ 123*)—SUIT FOR DAMAGE TO ANCHORED SCOW AT NIGHT.

In a suit to recover damages by collision to a scow which was struck and sunk while moored at night in a place where other vessels were likely to pass, libellant has the burden to show that a light was burning on the scow at the time of collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 260; Dec. Dig. § 123.*]

2. COLLISION (§ 79*)—SUIT FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

Testimony that a light was set on a scow anchored in the Delaware river at night, that it was burning five hours before the scow was struck by a tug, and also four hours afterward, *held* not sufficient to establish the fact that it was burning at the time of collision against the positive testimony of the master of the tug, who was at the wheel, the lookout, who was apparently attentive to his duties, and two other hands, that there was no light on the scow at the time of the collision, nor when they passed her again two hours later, and therefore insufficient to establish the fault of the tug for the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 123; Dec. Dig. § 79.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in admiralty by the River & Harbor Improvement Company as owner of dump scow No. 21 against the Philadelphia & Reading Railway Company, owner of the tug Penllyn. Decree for libellant (180 Fed. 954), and respondent appeals. Reversed.

James F. Campbell, for appellant.

Henry R. Edmunds, for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. The proofs of this case show that through the night of December 26, 1908, dump scow No. 21 of the River & Harbor Improvement Company was anchored in the Delaware river to a buoy in front of its yard. At half past 4 the next morning the barge was struck and sunk by the Penllyn, a tug of the Philadelphia & Reading Railway Company. On libel filed by the owner of the scow against the tug the latter was decreed in fault, and from such decree the tug owner appealed to this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The case turns on whether the scow had a light burning at the time she was struck. Being anchored at a point where vessels were likely to pass, the burden was on the scow to show a light was burning at the time of the collision. *The Armonia* (D. C.) 67 Fed. 362. The scow contends that her light was burning at the time of the collision from her proving by one witness it was lighted in the evening, by another that it was burning at 8, by another at half after 11 that night, and by a third who testified he took down the burning light from the sunken scow at half after 8 the next morning. As to the five intervening hours before the accident and the four following it the scow makes no proof. On the other hand, the *Penllyn* produced five witnesses, who testify as to the intervening time, and four of them testify to two different times they saw the scow without a light. *Derrickson*, the master of the *Penllyn*, who was at the wheel, testifies the scow had no light when she was struck. In this he was corroborated by *Matos*, the lookout, and by *Kernich* and *Gorman*, two other hands aboard who saw the scow immediately after the collision. The tug passed the scow again on her return trip about two hours later, and *Butler*, the tug's engineer, says no light was then burning on her. In this he is corroborated by *Matos*, *Kernich*, and *Gorman*, all of whom say no light was burning on her at that time. The fact that the *Penllyn* has shown her master was at the wheel, the lookout on watch, and that her engines were promptly stopped on signal indicated such vigilance aboard her that the evidence on her behalf that no light was observed on the scow should be accorded very grave weight and should not be disregarded except on strong, countervailing proof. Those aboard the *Penllyn* were seemingly in the line of their duty; their own safety, that of the crew, and the property they had in charge all united to lead them to due care, and it is impossible to believe the captain and lookout would run down a lighted, anchored vessel (see *The John H. Starin*, 122 Fed. 238, 58 C. C. A. 600), and at a point outside the dredging company's yard where they knew scows were likely to be anchored. Taking all these facts into account, that the proof of the scow that her light was burning at the time of the collision was inferential, while that of the tug that it was not was positive, and the number of witnesses the tug produced on that point, we are of opinion the weight of the proof is with the tug, and that the decree of the court must be reversed with directions to dismiss the libel.

FRIED & REINEMAN PACKING CO. v. HUGEL.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 52.

MASTER AND SERVANT (§§ 286, 288, 289*)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

Plaintiff, who was a foreigner, new at the work, was employed by defendant in digging a trench, and when at the depth of 12 feet was injured by earth which fell in from the sides. The trench had been shored

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

two feet from the top, but there was evidence that there was no shoring below that. About halfway down a platform had been constructed, supported by crosspieces let into the earth at the sides, on which earth was thrown from the bottom, and from which it was thrown out by other men standing on the platform. The weight on the platform caused it to begin to slip, when plaintiff and other workmen in the bottom went out and reported the fact to the engineer in charge, who after an inspection pronounced it all right and ordered the men back, and within a few minutes thereafter the accident occurred. *Held*, that on such evidence the question of defendant's negligence and plaintiff's contributory negligence and assumption of risk were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050, 1068-1132; Dec. Dig. §§ 286, 288, 289.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by John Hugel against the Fried & Reineman Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. V. Blaxter (Lazear & Blaxter, of counsel), for plaintiff in error.

T. Mercer Morton and Henry Meyer, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below, John Hugel recovered a verdict against the Fried & Reineman Packing Company for damages for personal injuries. On the entry of judgment thereon against it the company brought this writ of error.

The present differs from many cases cited to us wherein recovery by a man working in a trench for damages caused by a fall of earth has been denied. In those cases the danger incident to such work was known to and assumed by the injured man. But the proofs in this case are quite different. They show that Hugel was injured by a fall of earth while he was working at the bottom of a trench some 12 feet deep, which the defendant company was excavating. As the work proceeded, the defendant, by its engineer in charge, had caused the trench to be shored or braced in proper form about two feet from the surface. As to the precautions taken below this point the proofs differ. The defendant contended that five or six feet lower it had shored and braced the trench in the same way. The proof on behalf of the plaintiff, however, tended to show that at such place it was not shored at all; that the trench got so deep the earth could not be pitched to the surface, and all the defendant did was to put up an intermediate platform to which the earth could be thrown and from which it could be pitched to the surface by workmen standing on the platform; that to hold the platform the defendant made cuts or holes in the sides of the trench in which crosspieces were placed and platform boards laid thereon; that the weight of the dirt and the men working caused the earth under the cross-supports to weaken and give way. From the proofs before it, the jury could find the defendant was negligent, for they could infer that shoring at the depth the trench had reached was a proper precaution to safeguard the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

workmen, and that the defendant had not properly performed at that point the duty which it assumed. But, assuming the proofs were such as to warrant a finding of negligence on defendant's part, it is further contended that Hugel assumed the risk and continued working in the face of it. But the facts do not support such contention. Hugel was a foreigner, new at the work. After the platform had been used for some little time, it began to slip. Thereupon he and his fellows went out of the ditch and called the attention of Samuel, the engineer in charge, to the fact. Thereupon the latter examined the platform or shoring, as defendant claimed it was, pronounced it right, and ordered the men back to work. The accident occurred within 15 minutes thereafter. In view of these facts, the court was right in refusing to hold as a matter of law that Hugel was guilty of contributory negligence or assumption of risk. To do so he must be held to have assumed a risk he had neither time or call to inspect, for he had the assurance of the defendant, through its engineer, that no danger existed and he should return to work. Under the circumstances, the effect of Samuel's assurance, as bearing on Hugel's alleged negligence, was for the jury. *Northern Pacific Railroad Co. v. Amato*, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506; *Slentz v. Western, etc., Co.* (C. C. A.) 180 Fed. 390.

The judgment is affirmed.

BREAKWATER CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 20.

MASTER AND SERVANT (§ 13*)—EIGHT-HOUR LAW—CONSTRUCTION—"LABORERS" OR "MECHANICS."

Defendant was a contractor engaged in constructing for the United States jetties near Cape May harbor, extending from the shore into the open sea. The jetties were built up with stone, thrown overboard from barges, which were towed across Delaware Bay, anchored, and as needed towed to the jetties and warped along while being discharged. As crews of such barges defendant employed engineers, boatmen, and hookmen, selected for their seafaring experience, who operated the barges and also discharged their cargoes. The work done and the time required to do it depended on tide, wind, and weather, which ordinarily required variable hours of service on the part of the men. *Held*, that such men were seamen, with the rights of such, including the right to a lien on the vessel for their wages, and could not be classed as laborers or mechanics, within the meaning of Act Aug. 1, 1892, c. 352, § 1, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521), which makes it unlawful for any contractor for government work to require or permit any laborer or mechanic employed by him thereon to work more than eight hours in any calendar day, except in case of extraordinary emergency.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 14; Dec. Dig. § 13.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 3952-3968; vol. 8, p. 7700; vol. 5, pp. 4457-4461.]

In Error to the District Court of the United States for the District of New Jersey.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

The Breakwater Company was convicted of a criminal offense, and brings error. Reversed.

See, also, 174 Fed. 78.

F. C. Adler and John F. Lewis, for plaintiff in error.

John B. Vreeland, U. S. Atty., and Walter H. Bacon, Asst. U. S. Atty.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below the plaintiff in error, the Breakwater Company, was found guilty and sentenced for violations of the first section of Act Cong. Aug. 1, 1892, c. 352, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521), which provides:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States, or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States government, or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency."

To review such judgment the present writ of error was sued out.

The Breakwater Company contracted with the United States government for the erection of two jetties near Cape May harbor in the state of New Jersey. The jetties were parallel, and extended from shore to a depth of 26 feet at low water, with tops 10 feet above mean low water. All work done on them was off shore, and the men, whose work more than eight hours was the offense for which the Breakwater Company was convicted, were employed on a barge which, with its cargo of stone, was towed across Delaware Bay to the jetty. The stones were used in the construction of the jetties, and were thrown from the barge into the water to build them up. The men named in the indictment were either engineers, boatmen, or hookers on such barges. The latter, after being towed across the bay, were anchored, and, as needed, were towed by some of these men, using a gasoline launch, to the jetty. Here all aboard helped in discharging cargo. As occasion required the men also warped the barges along the jetty, by warping lines run by the barge engine. The barge had no other crew than these men, who worked in various capacities in discharging cargo, except a watchman, who also attended the fires. The men were selected for their seafaring experience, were hired by the month, and lived ashore. Some of the barges had four engineers, whose sole duty was to run the engines while discharging cargo and warping the vessel. The boatmen handled yawl and gasoline boats and assisted in discharging cargo. The hookmen handled the lines in discharging the cargo and aided in warping. The work done and the time required to do it depended on tide, wind, and weather on an open, exposed seacoast.

It is clear, therefore, that no exact hours could be fixed when the work of these men should and could cease. Under ordinary circumstances the elements of tide, wind, and weather necessitated variable hours of service on the part of those employed on the barge. In view of this, was it the intent of Congress, by the act in question, to describe these men by the terms "laborers and mechanics," and thus make it illegal to employ them more than eight hours, even though in the ordinary performance of their duty an exact eight-hour day was impossible in handling a barge and cargo on an open coast? Is it not much more reasonable to say that these men, who were doing a maritime service, and who by virtue thereof had at law rights, privileges, and obligations peculiar to themselves, were more aptly described as seamen? The barge was a maritime vessel. She was engaged in a maritime duty. The men were entitled to a maritime lien on her for their wages, for their work was of a maritime character. *Lawrence v. Flatboat* (D. C.) 84 Fed. 200; *Disbrow v. Walsh* (D. C.) 36 Fed. 607. Their labor contributed to the work in which the barge was engaged, and they were clothed with the rights of seamen. *Saylor v. Taylor*, 77 Fed. 476, 23 C. C. A. 343. We are therefore of opinion that these men were in the eyes of the law seamen, and, being such, the Supreme Court, in *Ellis v. United States*, 206 U. S. 258, 27 Sup. Ct. 600, 51 L. Ed. 1047, held seamen were not laborers or mechanics, within the meaning of the act here in question.

The judgment of the court must therefore be reversed.

AMERICAN CAR & FOUNDRY CO. v. THORNTON.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 8.

1. MASTER AND SERVANT (§§ 286, 288*)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

In an action by an employé against the master to recover for an injury to plaintiff while operating a machine, evidence tending to show that the operating of such machine was dangerous to the operator, unless skilled, and that plaintiff was without experience and was given no instructions. *held* to justify the submission of the questions of assumption of risk and failure of defendant to give instructions to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 286, 288.*]

2. EVIDENCE (§ 474*)—OPINION EVIDENCE.

In an action for an injury to an employé while operating a machine with which he was unfamiliar, the testimony of witnesses who were experienced with such machines as to pertinent matters which rendered their operation dangerous was competent; but the conclusion of an inexperienced witness that there was no danger in operating the machine was inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474.*]

3. WORDS AND PHRASES—"REAMING MACHINE."

A "reaming machine" is a heavy, cumbersome device, which reams or enlarges bolt holes already drilled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Action by Oscar S. Thornton against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Sprout & Cupp, for plaintiff in error.

Sherwood & Hess, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below Oscar S. Thornton brought suit and recovered a verdict against the American Car & Foundry Company for personal injuries. On entry of judgment thereon the latter sued out this writ, and assigned for error the court's admission of the testimony of Jacobsky and Thomas, witnesses for plaintiff; the exclusion of certain testimony of Faust, a witness for defendant; and the refusal of binding instructions in defendant's favor.

After a careful review of all the testimony we find no error. That testimony tends to show the defendant was engaged in manufacturing steel cars; that Thornton had for some days worked as a laborer and as foreman of a hoisting crane in its works; that about four days before the injury complained of he was put to work, under an experienced operator, as helper on a reaming machine. This is a heavy, powerful device, run by air, at from 250 to 300 revolutions per minute. It reams or enlarges bolt holes already drilled. As helper, Thornton's duty was simply to hold the machine steady, taking no part in its control or operation. After working four days as helper, Thornton was put in charge of the machine, and was given no instruction, although he told the superintendent he knew nothing about it and that it was too heavy for a man of his light build. He was told to "go ahead and do the best you can." He was given an inexperienced helper named Faust. After trying to work for some time and not accomplishing much, Thornton found the end of the half-inch reamer bit he was using was broken and would not cut. Pursuant to previous orders from the foreman, he took the bit to the toolroom and was told by the man in charge that he had no half-inch bit, but that he should use a seven-sixteenth one which he gave him. This bit was worn or rounded off at the tang shoulder. Thornton then showed it to the foreman, who told him he could use it by tapping it with a hammer when it came loose; that it would fasten all right, and for him to use it until he got him another. He followed these directions; but the bit, being, as he contended, too small, kicked, wobbled, and finally flew out, and a chip therefrom caused the injury to his eye complained of.

There was evidence as to the danger in running a reamer. When on the stand the defendant's foreman was asked what experience and instruction were required to operate such a machine, and said:

"It would be well for you to take a man down there and show him how to operate the machine, fix his reamer, or something like that," and that "a man

with ordinary intelligence could learn to run one of those machines in ten hours of time."

On the plaintiff's side there was proof tending to show the dangerous character of a reaming machine, that it required instructions to work it as safely as possible, that by the use of a relatively smaller sized bit than the hole required, and by the wear or rounding of the tang shoulder, the danger was increased through wobbling. In view of this testimony, the court committed no error in refusing binding instructions and submitting the case, as it did, on the questions of the plaintiff's assumption of risk and the defendant's failure to give instructions.

Nor was there error in its rulings as to testimony. The plaintiff's witnesses, Jacobsky and Thomas, were experienced in the operations of reaming machines, knew the dangers incident thereto, and their testimony was as to matters which made their operation dangerous. With such facts before them, the jury was better qualified to judge whether the work was dangerous, and whether those dangers were such as to be patent, assumed risks, or so latent as to call for warning and instruction to an inexperienced man. On the other hand, we find no error in excluding the testimony of Faust, whose sole experience on such machine was the few hours he acted as Thornton's helper. He was asked to testify to the broad, general conclusion that there was no danger in operating such a machine. But, apart from his lack of qualification as an experienced man, that was a question for the jury, not for him, and the court properly sustained the objection.

Finding no error in the judgment, it will be affirmed.

THE RELIABLE

THE W. E. GLADWISH.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 44.

COLLISION (§ 95*)—TUGS WITH TOWS—FAILURE TO OBSERVE RULES.

A tug *held* in fault for a collision between her tow and the tow of another tug, on the ground that, having the other tug and tow on her starboard hand, heading up the river, as she came from her slip, she failed to observe the starboard hand rule, and attempted to cross ahead without first receiving assenting signals. The second tug *held* not in fault, in the absence of evidence that she did not hold her course.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by the New York & New Jersey Transportation Company against the tug Reliable, the F. A. Verdon Company, claimant, and the tug W. E. Gladwish, Elmer A. Keeler, claimant. Decree

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for libelant against both tugs (167 Fed. 571), and claimants appeal. Reversed as to the Reliable, and affirmed as to the W. E. Gladwish.

The libelant, as the owner of the barge Maggie Moore, brought a suit in admiralty against the steam tugs Reliable and Gladwish for the recovery of damages for injuries sustained by said barge on February 7, 1907, while in tow of the Gladwish, in a collision with the barge Long Island City, in tow of the Reliable. The District Court held both steam tugs responsible for the collision and liable equally for the damage. The claimants of both tugs have appealed.

Carpenter & Park (J. E. Carpenter, of counsel), for the Reliable. James J. Macklin (De Lagnel Berier, of counsel), for the Gladwish. Wray & Callaghan and Albert A. Wray, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We fully concur in the conclusion of the District Judge that the Gladwish was in fault. She failed to observe the star-board hand rule and attempted to cross ahead of the Reliable without first receiving assenting signals.

But we are unable to accept the conclusion that the Reliable was also in fault. The testimony leaves it uncertain just what course she was taking before the collision. The course stated by her master was obviously erroneous. But, while the precise course is uncertain, the testimony shows clearly that the Reliable was heading up the river and that the Gladwish in leaving the slip had her on her own star-board side. In this situation it was the duty of the Reliable to hold her course, and we find no satisfactory testimony that she failed to do so. Moreover, there is no suggestion in the libel or in the answer of the Gladwish that the Reliable was guilty of any such fault.

It is true, as pointed out by the District Judge, that if it be assumed that the Gladwish was going up stream the Reliable must have been heading toward the shore to strike a head-on blow. But just the extent to which the Gladwish had turned is not clearly shown. We find nothing in the physical peculiarities of the situation requiring the inference to be drawn that the Reliable failed to hold her course.

But, if the Reliable did hold her course, she might still be liable for failing to take timely measure to avoid the collision. It is said that she should have stopped and backed in time to let the Gladwish pass ahead. In our opinion, however, when the collision seemed imminent, the master of the Reliable did as well as could have been expected of him.

The decree of the District Court is reversed, with costs, and the cause remanded, with instructions to dismiss the libel as against the Reliable, with costs, and to enter a decree for full damages and costs against the Gladwish.

L. E. WATERMAN CO. v. MODERN PEN CO.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 175.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

An order granting a preliminary injunction at suit of the L. E. Waterman Company, restraining defendant from infringing complainant's trade-mark of "Ideal" as a name for fountain pens and from unfair competition by using the name "Waterman" without initials as a name for such pens, affirmed; but a further provision restraining the use of the name "A. A. Waterman & Co." by defendant in connection with its business held erroneous.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the L. E. Waterman Company against the Modern Pen Company. Defendant appeals from an order granting a preliminary injunction. Order modified and affirmed.

The injunctive provisions of the order are printed in the foot-note.¹

The complainant, a New York corporation, has been engaged for many years in the manufacture and sale of fountain pens under the name of the L. E. Waterman Company and has built up a large business therein. It has also registered the following trade-marks as applied to such pens: "Ideal"; "Waterman's Ideal Fountain Pen, N. Y."; and "Waterman's."

The defendant, a West Virginia corporation, is selling agent of a firm called A. A. Waterman & Co. which manufactures fountain pens and marks them with such name.

Arthur A. Waterman had been employed by the complainant; but in 1898 he formed a partnership for the manufacture of fountain pens under the name of the A. A. Waterman Pen Company. The present complainant brought suit against said firm for the infringement of trade-mark and unfair competition

¹"1. Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pen of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Pens, or Waterman's Pens or Waterman Fountain Pens or Waterman's Fountain Pens or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens sold, represented or advertised are fountain pens of plaintiff's manufacture.

"2. Infringing the plaintiff's trade-mark 'Waterman's Ideal Fountain Pen, N. Y.' or infringing the plaintiff's trade-mark 'Ideal' and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letter-heads, bill-heads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever.

"3. Using in connection with the manufacture or sale of fountain pens (other than fountain pens of plaintiff's manufacture) the name 'A. A. Waterman,' or 'A. A. Waterman & Co.' or 'A. A. Waterman & Company' or 'Arthur A. Waterman & Company,' or any corporate, firm or individual name containing the words Waterman, Waterman's or Watermans, or any mark or name containing the word Waterman in any form whether the same be or be not coupled with other names or initials, or with the initials 'A. A.,' or with the initial 'A.' or whether the same be or be not used in collocation with the word 'Pen' or Fountain Pen, or other descriptive words."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the Supreme Court of the state of New York, and a decree was rendered in September, 1898, enjoining the defendant from using a corporate name containing the word "Waterman," but providing as follows:

"But the defendants are not prohibited from indicating that fountain pens made by them are made or prepared or sold for or by Arthur A. Waterman & Co. or A. A. Waterman & Co."

Subsequent to this decision the name A. A. Waterman & Co. was used by successive partnerships of which said Waterman was a member. The business was not successful, and in 1905 a reorganization took place, and an agreement was entered into whereby in effect said Waterman assigned to Isaac E. and William L. Chapman, who had been previously interested with him in the business, the right to use in connection therewith the name "A. A. Waterman & Co."

The defendant was shown to have sold a limited number of fountain pens marked "Royal Ideal Pen." The evidence also tended to show some use of the word "Waterman" in connection with the sale of the goods of the firm of A. A. Waterman & Co. without the distinguishing initials.

A. S. Bacon, for appellant.

S. S. Watson (Walter B. Raymond, of counsel), for appellee.

Before NOYES, Circuit Judge, and HOLT and HAZEL, District Judges.

NOYES, Circuit Judge (after stating the facts as above). The complainant's trade-mark "Ideal" is conceded to be valid. The defendant infringed it by the sale of the pens marked "Royal Ideal Pen." Consequently the second paragraph of the injunction order was proper.

Assuming that the present copartnership of A. A. Waterman & Co. has the right under the agreement with Arthur A. Waterman to use that firm name, they have no right to use the name "Waterman" without the initials. The use of the name which they may have the right to employ concededly causes confusion, and they have no right to increase that confusion by employing any name less definite.

The defendant disclaims the use of the name "Waterman" alone. If so, an injunction against such use will do it no harm. But, as already stated, we think there was sufficient evidence of such use to warrant the first paragraph of the injunction.

The third paragraph of the injunction order is, in our opinion, erroneous. It is clear that the partnerships of which Arthur A. Waterman was a member had the right to use the name A. A. Waterman & Co. in connection with their business and to so mark their pens. The decision of the Supreme Court of the state of New York in which all parties acquiesced for many years was in accordance with principles now well established by decisions of the Supreme Court of the United States.

Similarly, said Waterman had the right to transfer to his former associates, in connection with the reorganization and sale of the business, the right to use his name. It is true that it became their duty, as it had been the duty of the previous firms, to do no act to increase the confusion necessarily arising from the use of a name similar to that of the complainant. But we find nothing in the record showing any such acts except those which we have seen to be covered by the first two paragraphs of the injunction.

There is insufficient basis presented for the contention that the agreement granting the right to use the name "A. A. Waterman & Co." to the present firm was a mere sham and fraudulent device, not connected with the reorganization and sale of the business.

The order of the Circuit Court is modified by striking out the last paragraph thereof (paragraph 3), together with the finding that the defendant has been guilty of unfair competition by using the name "A. A. Waterman & Co.," and, as so modified, is affirmed. The costs of this court may be divided between the parties.

WATERBURY BUCKLE CO. v. ASTON.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 34.

1. PATENTS (§ 72*)—ANTICIPATION—IDENTITY OF INVENTION.

A patent cannot be invalidated by a structure which can only be altered into an anticipation by the use of inventive skill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86-91; Dec. Dig. § 72.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SUSPENDER BUCKLE.

The Peller patent, No. 847,811, for a suspender buckle, was not anticipated, and discloses patentable invention; also *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Suit in equity by the Waterbury Buckle Company against Walter F. Aston. Decree (172 Fed. 672) for complainant, and defendant appeals. Affirmed.

The appeal is from a decree sustaining complainant's letters patent No. 847,811 granted to Morris Peller, March 19, 1907, for an improvement in suspender buckles. The application was filed January 8, 1902. All of the six claims were upheld, but the third which was not in issue. The opinion of the Circuit Court was filed August 2, 1909, and is reported in 172 Fed. 672.

David J. Wagner and George A. Clement, for appellant.

George D. Seymour and Robert B. Killgore, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The patent relates to a suspender buckle. It is an exceedingly simple device, indeed its chief merit lies in its simplicity, cheapness and adaptability. The specification says:

"My invention relates to an improvement in that class of suspender-buckles called 'rustless' for the reason that the webbing is disposed so that the perspiration of the wearer is kept away from the metal, the object being to produce a simple, compact, effective, and convenient buckle constructed with particular reference to economy of webbing and to the avoidance of the production of any such humps or bunches of webbing upon the back of the webbed buckle as will interfere with the comfort of the wearer."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The patentee seems to have hit upon the buckle which the public demands as demonstrated by its popularity and the fact that it has largely supplanted other buckles in the market.

The first claim, which is the broadest of those in controversy, will serve as an example of the others, and is as follows:

"1. In a rustless suspender-buckle, the combination with a frame having an upper and a lower side with an opening between the same, of a lever pivoted to the upper side of the frame in position to have its clamping edge coact with the upper edge or top of the lower side of the frame, and a piece of webbing having its lower reach attached to the lower side of the frame and its upper reach passed from front to rear through the said opening and engaged by the clamping edge of the lever which deflects it over or approximately over the upper edge or top of the lower side of the frame."

It is for a combination having the following elements in a suspender buckle, which must be rustless: First: A frame having an upper and lower side with an opening between the same. Second: A lever pivoted to the upper side of the frame in position to have its clamping edge coact with the upper edge or top of the lower side of the frame. Third: A piece of webbing having the lower reach attached to the lower side of the frame and its upper reach passed from front to rear through the said opening and engaged by the clamping edge of the lever which deflects it over, or approximately over, the upper edge or top of the lower side of the frame.

In short, the combination consists of three elements, a frame, a lever and a piece of webbing. The metal parts may in practice be reduced to two, as the sheet metal strap can be omitted and the frame bent to form a clasping edge, as shown in the patent to Smith of June 14, 1904, without departing from the substance of the invention. We thus have two pieces of steel and a piece of webbing so arranged as to produce a rustless lever buckle, no part of the metal coming into contact with the underwear of the user. Prior to the invention, in order to produce this result, it was necessary to use brass, which does not rust when brought in contact with perspiration, but this metal was much more expensive than steel and considerably increased the price of a pair of suspenders. The manufacturer who could use the cheaper metal without subjecting the clothing of the wearer to rust stains, would not only acquire an advantage over his competitors, but would also secure "the potentiality of becoming rich." And so it proved. The new rustless buckle took the market, the older forms of steel buckles being practically superseded. By the new device, the material, both metal and webbing, was reduced to the minimum, followed, of course, by a corresponding reduction in the cost, and the back of the buckle was completely protected without the "bunches or humps" referred to in the description.

The invention of Peller, like the rubber button in *Frost v. Cohn* (C. C.) 112 Fed. 1009, and 119 Fed. 505, 56 C. C. A. 185, and the collar button in *Krementz v. Cottle*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, was one of those fortunate discoveries which seem obvious after it has been made. Peller has produced a device the value of which has been demonstrated not only by its popularity in the trade, but by the persistent contest in the patent office for the honor

of being its inventor. As was said by the Supreme Court in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658:

"While the question of patentable novelty in this device is by no means free from doubt, we are inclined, in view of the extensive use to which these springs have been put by manufacturers of wagons, to resolve that doubt in favor of the patentee and sustain the patent."

That the patent is not anticipated is conceded by the defendant's expert. He says:

"If you wish me to find a single illustration in any single reference which exactly agrees in all particulars with the device of the patent in suit I am free to state that I do not find it and I do not think there can be anything found in my previous testimony to the effect that I have claimed to find it."

"XQ. I understand you to admit that no patent and no exhibit discloses the particular thing set forth by claim 1 of the patent in suit. What I wish you to do now is to state for the information of the court and to simplify the consideration of the case by the court what one patent or exhibit comes the closest on the whole, taking everything into consideration to meeting claim 1 as you find it? A. The first part of your question is correct, and in reply to the latter part of your question I would again refer to the U. S. patent to La Chappelle, No. 485,104, as coming the nearest, all things considered, to the device of the patent in suit."

"XQ. Now, to save time, I will ask the same question as to claims 2, 4, 5 and 6 of the patent in suit? A. On the basis of your question and in my opinion the same reference applies to the other claims."

"XQ. Then in your opinion the La Chappelle patent No. 485,104 comes the closest on the whole taking everything into consideration in your opinion to meeting the invention of the patent in suit and the terms of claims 1, 2, 4, 5 and 6 of the patent in suit, out of all the exhibits in the case? A. It does."

It seems necessary, therefore, to examine only the La Chappelle patent. A diagram of the device of this patent will be found in the opinion of the Circuit Court. La Chappelle states that his object is—

"to produce an improved form of buckle that is especially adapted for use in suspenders; and it consists, mainly, in improved means of holding the web of the suspender securely without cutting or tearing it and of a secure and simple means for uniting the buttonholed ends of the buckle."

Evidently the patentee did not have the Peller concept. His was not a rustless buckle and was not designed to be such. A person skilled in the art, familiar with the complainant's buckle might, by removing the hooked part, reconstruct the La Chappelle device so that it would accomplish in an awkward manner the same result as Peller, but this is not enough. A patent cannot be invalidated by a structure which can only be altered into an anticipation by the use of inventive skill. There is nothing in the La Chappelle device to suggest the Peller device to the mechanic. It does not operate and was not intended to operate, in the same way and, without radical changes, it is incapable of producing the same result.

We have no doubt that the defendant infringes. The only appreciable difference between the defendant's buckle and those of the claims is that he has omitted the sheet metal strap which is specifically covered by claim 3, which is not involved in the present controversy. As before pointed out, the first claim and the other claims in controversy do not make this strap an element of the combination. The first

element of the first claim is a frame having an upper and lower side with an opening between them. In the drawings the metal strap is shown but it is not mentioned in the claim and is not essential to the combination. In other words, the drawings show the first element made in two pieces, but this does not make each of these pieces a separate element and thus enable one who has sufficient intelligence to make the frame in one piece, instead of two, to escape infringement. The first element of the claim is a frame and any one who uses it in combination with the other elements is an infringer whether the frame be composed of one piece or fifty. The buckle of the claim has two members composed of three pieces, the buckle of the defendant has two members composed of two pieces, this is the only difference.

We understand this to be conceded by the expert for the defendant. Speaking of the defendant's buckle, he says:

"The manner of webbing, the mode of gripping and the function performed are substantially the same as in the patent in suit. The buckle, however, is a two piece buckle and differs from the buckle of the patent in suit, which is a three piece buckle. The defendant's buckle is without a strap member."

We have already expressed the opinion that this strap is not an element of the claims in controversy. It is an element of claim 3, where it is specifically described. If it is to be regarded as part of the combination of the other claims, claim 3 is meaningless. There was no necessity for importing into that claim an element which was already there by implication. The interpretation which we give to the claims makes the patent sensible and consistent. It is unnecessary to attempt to unravel the complicated and labyrinthian interference proceedings in the Patent Office, as we are unable to perceive that they destroy the validity or limit the scope of the Peller invention. It is enough that Peller was the first in the office and, after a bitter contest with nine other applicants, the defendant being among them, he emerged therefrom with the patent in suit. The persistency shown by the others in their endeavor to wrest the invention from Peller is eloquent testimony of its meritorious character. The file wrappers of the patent in suit and of the Aston application were not printed in the record, but by stipulation between the parties the printing thereof was waived and the same were returned as exhibits. This was done without the consent of the court and we are under no obligation to receive them.

The writer has, however, examined them sufficiently to justify the conclusion that, with the exception of the excerpts therefrom printed in the record, the file wrappers throw very little light upon the present controversy.

The decree is affirmed with costs.

ACME TRUCK & TOOL CO. v. MEREDITH.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1910.)

No. 3,299.

1. PATENTS (§ 185*)—CONSTRUCTION—SCOPE.

A patentee who has sufficiently described and distinctly claimed his invention is entitled to every use to which his device can be applied, whether he perceived or was aware of all of such uses at the time he secured his patent or not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 263; Dec. Dig. § 185.*]

2. PATENTS (§ 246*)—INFRINGEMENT—PATENTS FOR COMBINATION.

A device does not infringe a patent for a combination if any essential element of the combination is omitted without substituting therefor its clear mechanical equivalent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. § 246.*]

3. PATENTS (§ 328*)—INFRINGEMENT—VEHICLE SPRING.

The Meredith patent, No. 878,081, for a vehicle spring, construed, and held not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In Equity. Suit by Charles A. Meredith against the Acme Truck & Tool Company. Decree for complainant, and defendant appeals. Reversed.

Howard G. Cook, for appellant.

James L. Hopkins (Hopkins & Eicks, of counsel), for appellee.

Before HOOK and ADAMS, Circuit Judges, and REED, District Judge.

REED, District Judge. The Acme Truck & Tool Company, a Missouri corporation (which will be called the defendant), challenges by this appeal the correctness of a decree of the Circuit Court which enjoins it from making, using, or vending a vehicle spring made by it in alleged infringement of United States letters patent No. 878,081, issued to the appellee (who will be called the complainant) February 4, 1908, the application for which was filed September 3, 1907. Defenses: That complainant is not the original or first inventor of the invention claimed by him; noninfringement; that the invention is anticipated by a number of prior patents; is lacking in patentable novelty and void. The invention relates to improvements in vehicle springs, is for a combination of parts as described to provide a greater resiliency of the spring and lessen the effect of the jolting of the vehicle in passing over uneven surfaces. In the specification the patentee says:

"In the construction of my invention I provide a spring of the elliptic type consisting of an upper section 4 and a lower section 5, the ends of said sections being connected together in the usual manner at the points indicated by the numeral 6. The lower section 5 is divided into halves, the ends firmly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

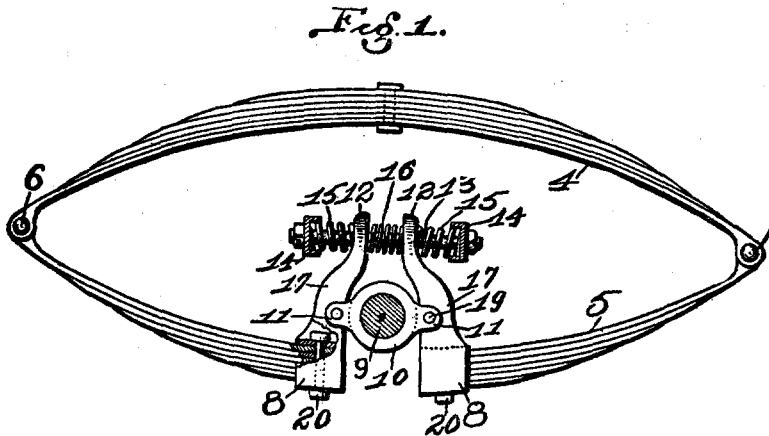
secured in a socket 7 formed in the supports 8. The supports, 8, are so arranged as to be fitted on each side of the vehicle axle, 9, and connected together by a sleeve, 10, placed over the axle, 9; and said sleeve is provided with perforated projecting lugs or ears, 11, through which bolts are passed for retaining the same in position upon the supports, 8. * * * (The numerals refer to Figure 1 of the drawings of the patent.)

There are two claims which are as follows:

"1. A spring of the class described comprising an upper section; a lower section; supports connected with the lower section; a sleeve mounted upon the axle of the vehicle and pivotally connected to the supports; an auxiliary spring carried by the supports to provide a more even and equal movement to the vehicle springs, substantially as described.

"2. A device of the class described comprising a spring of the elliptic type; a pair of supports connected to the lower section of said spring; a sleeve connected to said supports in combination with an axle upon which the sleeve is mounted; a bolt passing through the upper ends of the supports, and a plurality of springs mounted upon the bolt between and on each side of the supports to assist in the resiliency of the spring, substantially as specified."

The following is figure 1 of the drawings:



Springs of the elliptic type are old, and their purpose is to provide a more even movement of the vehicle in passing over rough or uneven surfaces. The patent in suit is for alleged improvements in such springs to make them especially adaptable to automobiles, increase their resiliency, and relieve the pneumatic tires and body of the vehicle of the jolting incident to its passing over rough and uneven roads. It is contended in behalf of complainant that his invention not only relieves the vehicle of shocks caused by vertical jolts, but also those caused by obstacles which suddenly arrest, in whole or in part, its movement in a longitudinal direction. If this is true, the patentee has failed to describe or claim that as a feature of his invention. A patentee, however, who has sufficiently described and distinctly claimed his invention is entitled to every use to which his device can be applied, whether he perceived or was aware of all of such uses at the time he claimed and secured his patent or not. *Stow v. Chicago*, 100 U. S.

547-550, 26 L. Ed. 816; *Roberts v. Ryer*, 91 U. S. 150-157, 23 L. Ed. 267; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186-201, 14 Sup. Ct. 310, 38 L. Ed. 121; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-709, 45 C. C. A. 544.

In passing over a rut, or obstacle of any character, it is desirable that the connection between the wheels and the body of the vehicle should be a yielding one; and this it is the purpose of all springs to secure. The complainant's expert says of the spring of the patent in suit:

"When the load on the vehicle is increased the auxiliary springs will yield slightly by virtue of the pivotal mounting of the supports on the bolts, 19, of the drawings. Any up and down motion of the vehicle body which puts the vehicle springs under varying compression will involve a slight yielding around these pivots on which the lower half of the spring is mounted. When the wheel strikes an obstacle which arrests it in part these auxiliary springs also permit a yielding around the axle so that the car body does not deliver a blow upon the rubber tire except through this yielding cushion."

It is obvious that an increased load upon, or sudden jolt of the vehicle in a vertical direction, sufficient to increase the compression of the main spring of the patent would straighten and extend its sections lengthwise, and such compression would cause a slight rotary movement of the supports around the pivots upon which they are mounted and lessen proportionally the distance between the inner ends of the divided lower section of the main spring, and this in co-operation with the auxiliary springs may permit of a greater flexibility of the main spring and relieve to some extent vertical jolts of the car body. The yielding "around the axle" is referred to by this witness in the same sense apparently as the yielding "around the pivots" upon which the supports are mounted. But it is obvious that there cannot be such a yielding. The supports are mounted upon the pivots to permit of such yielding, but the sleeve is rigidly mounted upon the axle and must be to secure it in its proper position thereon. If it is meant that the auxiliary springs permit a movement of the upper and lower sections of the main spring "around the axle," that is only what they permit in the case of a vertical compression upon the spring. The main spring, however, could only move very slightly, if at all, in a direction relatively oblique to the car body, for the momentum of the body would tend to carry it forward in its course, and if this momentum was sufficiently great it would either distort the spring or completely wreck its connection with the car body, or the axle, or both if the movement of the car is arrested, and there would be no yielding in a longitudinal or forward direction. We are, therefore, of the opinion that these auxiliary springs of the patent will no more relieve the wheels and their tires from the effects of a blow of the car body caused by the sudden arrest in whole or in part of its movement in a forward direction than would the ordinary elliptic spring unmodified by such auxiliary parts. So construing the patent the questions remain, Has the complainant invented any new improvement in elliptic springs? or if he has, Does the defendant infringe the same? The division of one or both sections of the ordinary elliptic spring into two equal parts and pivotally connecting the ends thus formed in different ways with one or more intermediate members and auxiliary springs to gain a greater

amount of flexibility than the main spring itself affords, is old, and is disclosed in a number of patents prior to complainant's application for the patent in suit. Among such patents is that to A. F. Hickok, No. 229,609, July 6, 1880. In his specification Hickok says:

"My invention * * * consists in combining with an elliptic spring that is formed of four pivotal pieces, one or more coiled springs being connected to the shorter and inner ends of the four pivotal pieces, whereby the strain upon the elliptic spring is transferred to the coiled one, as will be more fully described hereinafter. The object of my invention is to use both the elliptic and coiled springs on the sides and ends of vehicles, where the elliptic springs have heretofore been used, and thereby make the elliptic spring much less liable to break, and to gain a greater amount of elasticity than is found in the elliptic spring by itself."

The drawings disclose an oval shaped support mounted upon the axle to receive the inner ends of the springs, which ends are pivotally connected to the support and held between a coiled spring below and a plate above; also a similar spring above a crosspiece resting upon the upper section of the main spring.

The patent to R. E. Hardesty, No. 828,206, August 7, 1906, is for improvements in elliptic springs for vehicles. The drawings disclose the lower section, also both sections, of such a spring divided at the center, and the ends thus formed pivotally connected to intermediate supports and springs, the supports for the lower springs being mounted upon the axle and pivotally connected with the inner ends of the main, and outer ends of the auxiliary, springs.

The patents to Buchanan, No. 45,696, January 3, 1865; to Illingworth & Smiley, No. 350,629, October 12, 1886; and to Senderling, No. 565,238, August 4, 1896—also disclose that it was old to divide springs of other types into equal parts and connect the ends thus formed to supports mounted immediately, or through intermediate members, upon the axle of the vehicle. The disclosures of these, without referring to others of the prior patents in evidence, are sufficient to show that at the time of the application for the patent in suit it was old to divide both the upper and lower sections of the ordinary elliptic spring, and springs of other types, into two equal parts, and pivotally connect the ends thus formed immediately or through intermediate members to sleeves or brackets mounted upon the axle of the vehicle. The complainant, therefore, invented nothing new in dividing the lower section of an ordinary elliptic spring and connecting the ends thus formed immediately, or through intermediate bearings, to the axle and body of the vehicle. Pretermitted the question, Does the complainant's method of connecting the inner ends of the lower section of the main spring through the intermediate members with the axle and the auxiliary springs differ substantially from the devices of the prior patents in evidence in this respect? we are of the opinion that defendant does not infringe the complainant's combination.

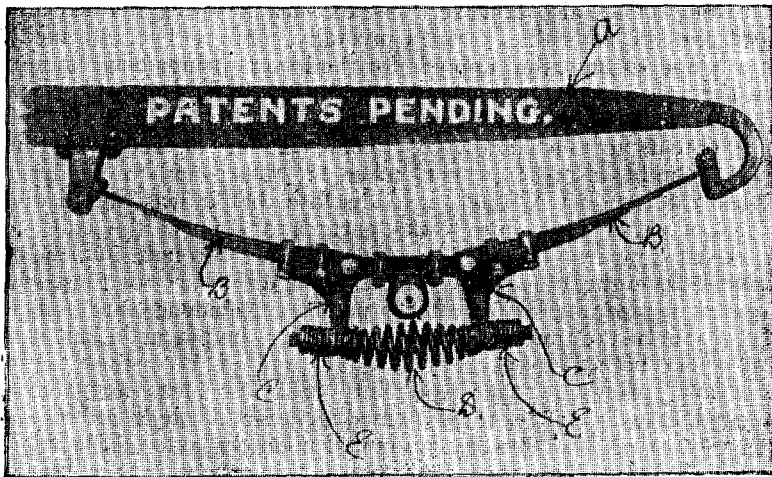
In patents for a combination it is well settled that if any essential element of the combination is omitted from an alleged infringing device without substituting therefor its clear mechanical equivalent, the charge of infringement is not sustained. *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979; *Boyd v. Janesville Tool Co.*, 158

U. S. 260-267, 15 Sup. Ct. 837, 39 L. Ed. 973; Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399-410, 25 Sup. Ct. 697, 49 L. Ed. 1100; Eames v. Godfrey, 1 Wall. 78, 79, 80, 17 L. Ed. 547; Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; Union Match Co. v. Diamond Match Co., 162 Fed. 148-155, 156, 89 C. C. A. 172.

In *Fay v. Cordesman* above it is said, beginning at page 420 of 109 U. S., at page 244 of 3 Sup. Ct. (27 L. Ed. 979):

"The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality."

The construction of the alleged infringing spring as made by the defendant is shown in its photograph thereof, which is as follows:



DEFENDANT'S EXHIBIT. "PHOTOGRAPH DEFENDANT'S SPRING."

Whether or not the spring of the photograph is an elliptic spring, or one of that type, the opinions of complainant's and defendant's experts are directly opposed. It may be admitted that complainant's expert is correct and that it is the lower section of an ordinary elliptic spring divided at its center, though it more nearly resembles a section of the coach platform spring, shown at No. 91½ of the complainant's catalogue of vehicle springs, so divided. The defendant, however, uses in its structure only the lower section of the ordinary elliptic spring, admitting it to be such, cut into halves with its outer ends connected with the frame "A" of the vehicle or car body by means of the link or shackle as shown in the photograph, which is quite unlike the

method of connecting the upper and lower sections of the springs of the patent. Such a construction permits of a movement of the forward end of the spring around the pivot or bolts of the link connecting it with the frame, but permits also a movement of the spring in a longitudinal direction relatively to the vehicle body by means of the shackle connecting the rear part with the frame. A spring so constructed operates in a substantially different manner from that of complainant's patent, for the spring of that patent has no longitudinal movement relatively to the vehicle body; and if defendant's spring was connected to the frame of the vehicle in the manner in which the upper and lower sections of the spring of the patent are connected at their outer ends, the entire spring would have little, if any, spring action, for the rigidity of the vehicle frame "A" would prevent such action except in a very slight degree, and that through the auxiliary springs below the axle. In *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547, in speaking of a patent for a combination, it is said:

"The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

The complainant has seen fit to particularly specify the upper section 4 of the spring of his patent equally with the lower section 5 as an essential element of his combination. The frame "A" of the vehicle body, shown in defendant's photograph, is clearly not the mechanical equivalent of the upper section 4 of the spring of the patent in suit, for it is a rigid piece of steel forming a part of the car body, and possesses none of the qualities, and performs none of the functions of a spring; nor is the method and manner of connecting the spring and the frame the mechanical equivalent of the bolt 6 of the drawings of the patent in suit.

Neither does the defendant infringe by the spring it placed upon the ambulance wagon of the health department of the city of St. Louis. That spring was installed as a mere temporary expedient, by attaching it to the upper section of a spring then upon the wagon, that the city might have the use temporarily of its vehicle. The entire spring as so constructed did not work satisfactorily, was soon removed, and a rigid bar made to take the place of the upper section. Defendant received nothing for the attachment of its spring to the upper section then upon the wagon, and never made or constructed any others in the same manner.

The spring shown on defendant's advertising card was never made by the defendant. The conclusion therefore is that the defendant does not infringe the complainant's combination. The decree of the Circuit Court is reversed and the cause remanded to that court, with directions to dismiss the bill at complainant's costs.

CHARLES E. TAYNTOR GRANITE CO. v. GOETCHIUS et al.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 35.

PATENTS (§ 328*)—ANTICIPATION—ROOF FOR MAUSOLEUMS.

The Tayntor patent, No. 722,392, for a roof for mausoleums, vaults, and other similar structures, claim 2, which covers merely a roof having a raised joint in the center, where the side-stones meet, with a central cap having lips to fit over the ribs on the edges of the side-stones, is void for anticipation.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Charles E. Tayntor Granite Company against Sarah G. K. Goetchius and others, executors. Decree (171 Fed. 108) for defendants, and complainant appeals. Affirmed.

D. Frank Lloyd, E. Hayward Fairbanks, and Hector T. Fenton, for appellant.

George Cooper Dean, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The patent in suit is for an improvement in roofs for mausoleums, vaults and other similar structures. The object of the patentee was to provide an improved roof construction in which the seams are protected so as to prevent the rain from drifting through them into the interior of the building. The patented structure is provided with a roof, the two side-stones having raised ribs along their inner top edges and a ridge-stone having lips upon its opposite side edges, the lips of the ridge-stone overlapping and resting upon the ribs of the roof-stones. Claim 2, the only one in controversy, is as follows:

"A roof for mausoleums, vaults and the like, comprising pediments, side roof-stones having ribs along their inner top edges and a central roof-stone having lips along its opposite side edges fitted to overlap the ribs upon the side roof-stones, substantially as set forth."

The judge of the Circuit Court briefly but accurately describes the alleged invention as follows:

"In my opinion the invention asserted to reside in this patent (in so far as this suit is concerned) consists solely in so cutting away the major portion of the exposed surface of the two side roof-stones as to leave a rib or ridge along its upper outer edge and then resting the capstone lips upon said ridges or ribs instead of upon the plane surface of the roof-stones. This construction elevates the exposed line of joinder between capstone and roof-stones above the general level of the sloping roof just so much as the roof-stones are cut away to form said ribs or ridges; in practice from three-quarters of an inch to 1¼ inches."

The longitudinal joints are thus raised above the general slope of the roof the distance that the said roof-stones have been cut away to form the ribs. If, therefore, rain should be driven horizontally

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the wind, the water, in order to reach the inside of the tomb, must be driven not only up the slanting roof-stone, but also up the vertical wall of the rib. Whatever novelty there may be in the combination of the claim must be found in these raised joints or seams. It cannot be pretended that, with these omitted, there is anything patentable in the Tayntor structure, as exemplified by the claim in controversy. We do not understand that the combination can be saved by reason of the fact that it includes pediments as one of its elements. The person who first conceived the raised joint may be entitled to rank as an inventor, but it required no exercise of the inventive faculty to apply the old joint to the roof of a structure having pediments or any other special characteristic, provided no new result is produced by such application. The raised joints produce the same result whether there are pediments at the ends of the building or not. There is nothing novel in the pediments, so far as the second claim is concerned. It is not limited to any particular variety of pediment. A roof, having the other elements of the claim and pediments of any construction, would anticipate. The special features of the pediments of the Tayntor structure are covered by claims 7 to 10, inclusive. The raised joints which are the features upon which the claim must stand or fall, are clearly shown in the Black and Feigenspan tombs. The general construction of these edifices differs from that of the Tayntor tomb; the pitch of the roof-stones is less and there are many minor differences, but the raised joints are clearly shown in each, operating precisely as in the tomb of the patent. In both the prior structures wind-driven rain will necessarily be forced up the slanting roof not only, but up the vertical ribs as well in order to reach the seams. The differences in the slant of the roofs, the height of the ribs and the width of the lips are differences in degree only. It cannot be successfully maintained that the pitch of the roof, or any of the differences pointed out between the prior structures and the patent, are of the essence of the alleged invention. The raised joint performs its function as well in the one case as in the other, though evidently the necessity for such a joint would be minimized in high-pitched roofs like those of the Phelps and Billaud tombs and would find its greatest efficiency in low-pitched roofs like those of the Black and Feigenspan structures. Surely it did not require an exercise of the inventive faculty to place the old raised joints of Black upon the Goetchius tomb. No new result was accomplished. The plain simplicity and beauty of the defendant's tomb is not due to anything found in the second claim of the patent. The patent is not for a design.

The decree of the Circuit Court is affirmed with costs.

CONTINENTAL SECURITIES CO. v. INTERBOROUGH RAPID
TRANSIT CO. et al.

(Circuit Court, S. D. New York. October 28, 1910.)

COURTS (§ 348*)—RULES OF EVIDENCE IN FEDERAL COURTS.

Under the rule of *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, the parties to a suit in equity in a federal court are entitled to great latitude in the examination of witnesses, to the end that the court of last resort may have a complete record on which it may finally dispose of the cause, and objections for irrelevancy and immateriality are not to be considered.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 348.*]

In Equity. Suit by the Continental Securities Company against the Interborough Rapid Transit Company and others. On motion to require witness to answer questions and produce books and papers. Motion granted.

See, also, 165 Fed. 945.

Stephen M. Yeaman, for complainant.

Winthrop & Stimson, Nicoll, Anable, Lindsay & Fuller, R. R. Rogers, Rollins & Rollins, and Cravath, Henderson & De Gersdorff, for defendants.

WARD, Circuit Judge. In these two actions I understand the complainant to be asserting its individual rights as a stockholder of the Interborough Rapid Transit Company. The defendants allege that it is not a bona fide stockholder. If it appear at any time in the course of the cause that the stock was transferred to the complainant collusively, for the purpose of giving jurisdiction to this court, it will be the duty of the court to dismiss the bill. Act March 5, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511).

The defendants are entitled to great latitude in examination upon this point, under the case of *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521. The rationale of that decision is to prevent new trials in equity causes, and to that end to give the court of last resort a complete record, upon which it can finally dispose of the cause. For this reason, the objections for irrelevancy and immateriality are not to be considered. The only limitation upon the extent of the examination is apparently that it should be confined to the issues and shall not violate the personal privileges of the witness. Consistently with these views, the witness must answer questions 25, 56, 57, 58, 59, 60, 69, 73, 74, and 75, and must produce the books and papers mentioned in the notice of motion.

To this extent the motion is granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MANNINGTON et al. v. HOCKING VALLEY RY. CO. et al.

(Circuit Court, S. D. Ohio, E. D. June 13, 1910. On Motion for Temporary Injunction, etc., August 3, 1910.)

(No. 1,527.)

1. COURTS (§ 289*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit based on an alleged violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), whereby direct and special injuries are inflicted on and threatened to the complainants, is one arising under a law of the United States of which a federal court has jurisdiction regardless of the citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

2. REMOVAL OF CAUSES (§ 95*)—PROCEEDINGS FOR AND EFFECT OF REMOVAL—PROCEEDINGS IN STATE COURT AFTER REMOVAL.

The filing of a sufficient petition and bond for removal, in a cause which is removable, ipso facto divests the state court of jurisdiction to proceed further therein except to pass on the sufficiency of the papers, and any further action it may take is coram non iudice and void. While a formal order of removal is usual, it is not necessary, nor will the failure of the state court to take any action on the petition prevent the attaching of the jurisdiction of the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.*]

3. INJUNCTION (§ 157*)—ORDERS—WHAT CONSTITUTE—ORAL OPINION OF COURT—"JUDGMENT."

An oral opinion of a judge sustaining a motion for a preliminary injunction is not a "judgment," either under the Ohio statutes or the rule of the federal courts, nor does it become effective as an order and binding on the parties until reduced to writing and entered of record, nor, in Ohio, until bond has been given and approved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 340, 342; Dec. Dig. § 157.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7696, 7696.]

4. REMOVAL OF CAUSES (§ 114*)—JURISDICTION ACQUIRED BY FEDERAL COURT—MOTIONS PENDING IN STATE COURT.

After the removal of a cause, the federal court has authority to hear and act on a motion pending in the state court at the time of removal to modify or vacate a restraining order or preliminary injunction previously granted.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 241-244; Dec. Dig. § 114.*]

5. RAILROADS (§ 15*)—RIGHT TO REDEEM PREFERRED STOCK—OHIO STATUTE.

Rev. St. Ohio, § 3309b (Gen. Code, § 8805), authorizes railroad corporations to issue preferred stock and to provide in their articles of incorporation terms and provisions of such preferred stock in addition to and not inconsistent with the provisions of section 3309, Rev. St. (Gen. Code, § 8817), which provides, inter alia, that "the company which issues such preferred stock shall reserve the privilege of redeeming and canceling the same at par at any time after three years from the date of its issue." Rev. St. Ohio, § 3264 (Gen. Code, § 8700), which is a part of the general

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

corporation act, provides that the board of directors of a corporation may, "with the written consent of the persons in whose names a majority of the shares of the capital stock stands on the books of the company, reduce the amount of its capital stock, * * * and a certificate of such action shall be filed with the Secretary of State." A railroad company organized under such statutes issued both common and preferred stock, having equal voting power; the preferred being the greater in amount. Its articles of incorporation and each certificate of stock, whether common or preferred, contained a provision that "all the preferred stock is and will be subject to the right of the company to redeem the same at par at any time after three years from the date of its issue." *Held*, that such right of redemption was not only expressly given by statute, but was also a matter of contract between the company and each stockholder, common and preferred, and one which could be exercised by the board of directors as a part of the corporate business which devolved on them without reference to the provisions of Rev. St. Ohio, § 3264 (Gen. Code, § 8700), relating to the reduction of capital stock.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 31; Dec. Dig. § 15.*]

6. EVIDENCE (§ 73*)—DIRECTORS—PRESUMPTION IN FAVOR OF LEGALITY AND GOOD FAITH OF ACTS.

In the absence of a showing of the votes cast at a corporate election, the presumption is that the board of directors of a corporation were elected by all of the stockholders, and that the stockholders in so doing acted in their own interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 94; Dec. Dig. § 73.*]

7. CORPORATIONS (§ 506*)—SUIT INVOLVING RIGHTS OF STOCKHOLDERS—PARTIES.

Where it is claimed that one corporation cannot under the statute lawfully own the stock of another, a court cannot, in a suit to which such stockholding corporation is not a party, adjudge the constitution of the board of directors of the corporation issuing the stock illegal, on the ground that certain of its stock was held and voted at the corporate election by such stockholding corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1959; Dec. Dig. § 506.*]

8. CORPORATIONS (§ 389*)—POWERS—HOLDING STOCK IN OTHER CORPORATIONS—BURDEN OF PROOF.

When a corporation asserts that it is clothed with a given power, such as the power to acquire and hold stock in another corporation, the burden rests upon it to show whence such power and right are derived.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1570; Dec. Dig. § 389.*]

9. RAILROADS (§ 13*)—PUBLIC OR PRIVATE CORPORATIONS.

A railroad company is a private corporation, but not in the strict sense of the ordinary business corporation, because it is charged with duties of a public nature which distinguish it from the purely and strictly private corporation. In many respects it is a private corporation in all that the term implies; its foundation is private, it is organized for gain, and its strictly private rights are as much beyond legislative control as are the rights of the purely private corporation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 26; Dec. Dig. § 13.*]

10. STATUTES (§ 214*)—CONSTRUCTION—LEGISLATIVE INTENT.

In the construction of statutes the intent of the lawmakers must be found in the statutes themselves. The presumption is that language has been employed with sufficient precision to disclose the intent, and, un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

less an examination overthrows the presumption, nothing remains but to enforce the statute as written.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 290; Dec. Dig. § 214.*]

11. STATUTES (§ 217*)—CONSTRUCTION—EXTRINSIC AIDS TO CONSTRUCTION.

In construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

12. RAILROADS (§ 121*)—PURCHASE OF STOCK OF OTHER COMPANIES—OHIO STATUTE.

The amendment of May 6, 1902 to Rev. St. Ohio, § 3256 (95 Ohio Laws, p. 390), now section 8606, Gen. Code, which provides that "private corporation may purchase or otherwise acquire and hold shares of stock in other kindred but not competing corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition," applies to railroad corporations, such provisions and those of Rev. St. Ohio, § 3300 (Gen. Code, §§ 8806, 8807, 8809), which specifically authorizes railroad companies to subscribe for stock in other companies under certain conditions, being cumulative.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 381-385; Dec. Dig. § 121.*]

13. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.

The mere ownership of stock by a foreign corporation in a domestic corporation, even if it be a controlling interest, does not constitute the doing of business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

Foreign corporations "doing business" in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke Collender Co.*, 72 C. C. A. 622.]

14. CORPORATIONS (§§ 376, 440, 460*)—AUTHORITY TO BORROW MONEY—PURPOSE.

Where a corporation has power to purchase its own shares, it may buy them on credit, or may borrow money on mortgage or otherwise to pay for them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1530, 1775-1777, 1813; Dec. Dig. §§ 376, 440, 460.*]

15. WORDS AND PHRASES—"REDEEM."

The word "redeem," as used in statutory provisions authorizing a party to redeem, means "repurchase."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6022, 6023.]

16. RAILROADS (§ 121*)—PURCHASE OF STOCK IN OTHER CORPORATION—"COMPETING LINE."

By the terms of section 8806, Gen. Code Ohio, allowing a railroad to acquire stock in another line, no road or line may be termed competing until it is constructed. Competition as between railroads necessarily relates to transportation, and, in respect to transportation, the term "competing" signifies a road complete and ready for operation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 381-385; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1362, 1363.]

17. STATUTES (§ 162*)—REPEAL OF SPECIAL BY GENERAL ACT—RAILROAD COMPANIES—PURCHASE OF STOCK OF OTHER COMPANIES—OHIO STATUTE—"CLEARLY"—"CUMULATIVE."

The provisions of the amendment to Rev. St. Ohio, § 3256, and of section 3300, now sections 8806, 8807, and 8809, Gen. Code, relating to stock purchases and holdings, are clearly cumulative and meet the requirements of section 3209, now section 8733, Gen. Code, reciting that a "special provision shall govern unless it clearly appear that the provisions are cumulative"—the word "clearly" meaning in a clear manner, without obscurity, without entanglement or confusion, without uncertainty; and "cumulative" meaning "additional," that which is superadded to another thing of the same character and not substituted for it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1223, 1783.]

18. CORPORATIONS (§ 631*)—FOREIGN CORPORATIONS—EXERCISE OF CHARTER POWERS—RULE OF COMITY.

In Ohio, as in other states and territories, in harmony with the general rule of comity, the presumption is indulged that a corporation of a foreign state, not forbidden by the law of its being, may exercise within the state the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct legislative enactments of the state, or by its public policy as deduced from the general course of legislation, or from the settled adjudications of its highest court.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 631.*]

In Equity. Suit by Howard D. Mannington, Fred H. Schoedinger, and Ralph E. Westfall, against the Hocking Valley Railway Company and the Chesapeake & Ohio Railway Company. On motion by defendants to dissolve temporary restraining order and by complainants for preliminary injunction. Order modified, and injunction granted in modified form.

This case is here on removal. The defendant, an Ohio corporation, was organized in 1899 to take over the Columbus, Hocking Valley & Toledo Railway Company, then under foreclosure, and all of its property of whatever kind. To reduce the fixed charges, the plan of reorganization provided for a reduction of the indebtedness to be cared for and for the issue of preferred stock as compensation for such reduction. It also provided that: "The preferred stock will be entitled, out of any and all surplus net profits, to non-cumulative dividends, whenever declared by the board of directors, at the rate of, but not exceeding four per cent. per annum, for the fiscal year beginning on the first day of January, 1899, and for each and every fiscal year thereafter, payable in preference and priority to any payment of any dividends on the common stock for such fiscal year; in addition thereto, in the event of the dissolution of the corporation, the holders of the preferred stock shall be entitled to receive the par value of the preferred shares out of the surplus funds of the corporation before anything shall be paid therefrom to the holders of the common stock."

The defendant was authorized, under section 3309b, Rev. St. Ohio, chapter on Railroad Corporations (section 8805, Gen. Code), to issue preferred as well as common stock and to provide in its articles of incorporation "terms and conditions of such preferred stock in addition to and not inconsistent with the provisions of section 3309" (section 8817, Gen. Code). Section 3309 provides that: "If preferred stock be issued, the company may guarantee to the holders thereof semiannual or quarterly dividends to an amount not exceeding six per cent. per annum, payable at its office, or at such other place as the directors may designate; the stock may be sold at such time and place, either within or without the state, as may be deemed advisable, and the proceeds thereof applied to the purpose for which it is issued; the unpreferred

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stock of the company shall be entitled to dividends only out of the surplus of the profits, after setting apart a sum sufficient to pay the dividends upon the preferred stock, and the company which issues such preferred stock shall reserve the privilege of redeeming and canceling the same at par, at any time after three years from the date of its issue; and the preferred stock herein provided for may be convertible into bonds of the company at the option of the parties."

The defendant inserted in its articles of incorporation and in every certificate issued, both common and preferred, the following language: "All the preferred stock is and will be subject to the right of the company to redeem the same at par at any time after three years from the date of its issue." 260,000 shares of the par value of \$100 per share were issued, of which 110,000 shares were common and 150,000 shares were preferred. The voting power was given to both kinds of stock. The preferred stock was also given the right to receive out of the net surplus profits a 4 per cent. noncumulative dividend whenever declared by the directors, payable in preference and priority to the payment of any dividends on the common stock. In case of the dissolution of the corporation, the preferred shareholders were to receive the par value of their stock out of the surplus funds of the corporation before payment should be made to the holders of common stock. The defendant's board of directors on April 1, 1910, resolved to retire the preferred stock on April 30th, at par value, plus accrued interest at 4 per cent. from December 31, 1909, and deposited \$15,200,000 with J. P. Morgan & Co. of New York City, for that purpose. At the same time a resolution was adopted, calling a meeting of the stockholders for the purpose of increasing the common stock to the extent of \$15,000,000. Formal notice of such retirement and intended new issue was duly given in New York papers. The proposed changes were also conspicuously noticed in a leading Columbus newspaper. This stock, if issued, is first to be offered to the common shareholders (the number of which is not shown) according to their holdings. A pronounced majority of the preferred stock certificates have been deposited with Morgan & Co. for retirement, and stock to the amount of more than \$5,000,000 had been redeemed prior to the granting of the hereinafter mentioned restraining order prohibiting such retirement. The residue of the fund, amounting to about \$10,000,000, awaits the court's action. Section 3264, Rev. St., of the general incorporation act (section 8700, Gen. Code), provides: "The board of directors of any such corporation may, with the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on the books of the company, reduce the amount of its capital stock and the nominal value of all shares thereof, and issue certificates therefor, but the rights of creditors shall not be affected or impaired thereby; and a certificate of such action shall be filed with the secretary of state."

The defendant's line extends from Toledo, Ohio, through the coal fields of South Central Ohio to the Ohio river. The road of the Toledo & Ohio Central Railway Company, a competing and parallel line, extending from Toledo to the same coal fields, connects at Corning with the Kanawha & Michigan Railway Company, with which it forms a continuous line extending into the coal fields of West Virginia and terminating at Gauley Bridge in that state. The Zanesville & Western Railway Company also enters the Ohio coal fields. The defendant as contemplated by the reorganization plan, acquired control through stockholdings not only of various coal companies and large areas of coal lands, but also of the Kanawha & Michigan Railway Company, and the Toledo & Ohio Central Railway Company. The last-named company in turn owned the stock of the Zanesville & Western Railway Company. The defendant thus dominated three other coal roads.

In 1903 the Trunk Line Syndicate was formed, consisting of the Chesapeake & Ohio Railway Company, a Virginia corporation, the Baltimore & Ohio Railroad Company, the Lake Shore & Michigan Southern Railroad Company (a controlled line of the New York Central & Hudson River Railway Company), the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company (a controlled line of the Pennsylvania Company), and the Erie Railroad Company. The Chesapeake & Ohio Railway Company became the owner of 11,540 shares of the common stock of the defendant company. The other members of the syn-

dicate owned in the aggregate 57,702 shares of such stock. The syndicate company thus owned a majority of the defendant's common stock. Through an advisory committee they interfered in the management of the defendant's affairs. They did not, however, own any part of the defendant's preferred stock, which was held and owned by about 1,200 different persons. The roads comprising the Trunk Line Syndicate reach the coal fields of Southeastern Ohio, West Virginia, and the Pittsburg district. All of the hereinbefore named roads were interested and engaged in the transportation of coal from the coal fields reached by them respectively to the Upper Lakes and the Northwest. The defendant, in a quo warranto proceeding having been ousted from its stockholdings in coal companies and the railways controlled by it (12 Ohio Cir. Ct. R. [N. S.] 49, 145), proceeded to dispose of such holdings, and subsequent to such last annual election of directors the Chesapeake Company acquired the 57,702 shares of the defendant's common stock owned by the other members of the Trunk Line Syndicate. Certain of the directors of the defendant company resigned, whereupon as authorized by the rules and regulations of the company and by section 3248, Rev. St. (section 8662, Gen. Code), the remaining directors filled the vacancies so created for the unexpired term by appointment. The appointees were persons connected with the Chesapeake Company, who, it is asserted by the plaintiffs and denied by the defendant, were mere dummies, hostile to the interests of the Hocking Company, and will subject it to the domination of the Chesapeake Company. The Lake Shore & Michigan Southern Railway Company in the meantime acquired all of the stock of the Toledo & Ohio Central Railway Company and of the Zanesville & Western Railway Company, and a portion of that of the Kanawha & Michigan Railway Company, which connects with the Toledo & Ohio Central Railway Company at Corning, Ohio, and also touches the defendant company's line at different points in Ohio. Another portion of the stock of the Kanawha & Michigan Railway Company was purchased by the Chesapeake Company, and a third portion is owned by parties other than the Lake Shore & Michigan Southern Railway Company and the Chesapeake Company. These two last-named companies have made, or are about to make, an arrangement whereby they will each have representation on the directory of the Kanawha & Michigan Railway Company's road and each have the use of its tracks for transporting coal from West Virginia to the Northwest; the loaded trains proceeding northward from its northern connections over the defendant's road, and the empty trains returning southward over the Toledo & Ohio Central Railway Company's road to its connection with the Kanawha & Michigan, and thence over its tracks to points in West Virginia. The Chesapeake Company, through proceeds derived from the sale of its bonds, intends to buy a majority of defendant's new common stock issue.

The plaintiffs, who are stockholders in the defendant company, in behalf of themselves and all other stockholders, filed a petition against the defendant—the Chesapeake Company not being made a party—in the state court April 27, 1910. They charge that the defendant and its controlled roads and the Trunk Line Syndicate entered into an unlawful combination and conspiracy to stifle competition and restrain trade in the mining and shipping of coal from the coal fields of Ohio, West Virginia, and Pennsylvania to the Upper Lakes and the Northwest. Many specific acts of wrongdoing in the way of discrimination in rates against independent coal operators and against the rights of stockholders, and in violation of the state and federal laws, are alleged, which acts are claimed to work direct, actual, specific personal injury to the plaintiffs and the other stockholders. They allege that the purchase of the defendant's stock by the Chesapeake Company from the other members of the Trunk Line Syndicate and the sale by the defendant company of its stockholdings were a mere device to evade the decree of the state court; that the defendant and the roads formerly controlled by it, the Chesapeake Company, and the Lake Shore & Michigan Southern Railway Company, intend to perpetuate the course of wrongful conduct pursued while the Trunk Line Syndicate was in existence and the defendant company controlled the roads whose stock it owned; that the board of directors of the Hocking Company is not a legal board; that the proposed retirement of its preferred stock and the issuing of common stock is illegal; that such preferred stock can-

not be retired except by vote of the stockholders; that the funds of the defendant cannot be applied to the retirement of the preferred stock—such funds so deposited with J. P. Morgan & Co. consisting of the proceeds of the sale of its former stockholdings in other roads and coal companies and \$2,500,000 of borrowed money; that it cannot legally borrow money for the retirement of preferred stock; that the Chesapeake Company cannot lawfully acquire and hold stock in the defendant company; and that the Chesapeake Company, which has transported West Virginia coal to the Upper Lakes by carrying it to Cincinnati and Ironton, Ohio, and thence shipping it over the Cincinnati, Hamilton & Dayton Railway Company and the Detroit, Toledo & Ironton Railway Company, respectively, to Toledo and the Northwest, is a competitor of the defendant in the shipment of coal. All these things were denied by the defendant, and, after the Chesapeake Company was made a party, by it also. For the purposes of this opinion a more detailed statement of the petition is unnecessary.

On an ex parte hearing an order issued from the state court restraining the defendant, among other things, from retiring its preferred stock, from taking any action in that behalf, and from using or disbursing any of its assets or funds for that purpose; from increasing its common stock or taking any action in regard thereto in consequence of any direction, authority, or alleged action of its common stockholders, and from calling or holding any meeting of such common stockholders; from recognizing the Chesapeake Company as a stockholder and permitting it or any one acting in its behalf to vote any stock held by it directly or indirectly in the defendant company; from borrowing any money for the retirement of preferred stock; and from doing any of the threatened illegal and unlawful acts alleged in the petition. Thereafter the defendant moved to modify the restraining order so as to permit the retirement of its preferred stock to proceed and the use and disbursement of the funds held and deposited for that purpose, and also to permit the holding of meetings of its common stockholders. The motion to modify the restraining order was heard and submitted. Counsel are not agreed, and the record is not clear, as to whether a motion for a temporary injunction was submitted at the same time or not. On the morning of May 16th the court announced a denial of the motion to modify and granted a temporary injunction. Shortly thereafter a sufficient petition and bond for removal to this court were filed, and the court's attention was directed to that fact. A few minutes later the order for removal was submitted for its allowance. Thereafter, and before taking any other action, the court appointed receivers for the defendant company. Nearly three hours later, after the noon recess, the court approved an entry overruling the motion to modify the restraining order, granting an injunction, fixing the injunction bond, appointing receivers, and fixing their bond, which entry was journalized and such bonds given. The court also approved an entry declining "to make any order one way or the other" as to the removal of the cause to this court, for the reason that it had "no jurisdiction or power to decide the question involved by the petition for removal." The intervenor, Stanton, has for some years past owned 500 shares of the defendant's stock. The plaintiffs own in the aggregate 150 shares of the preferred stock, of which 125 shares were purchased shortly prior to the last October corporate election, and 25 shares shortly subsequent thereto. They also own 90 shares of the common stock, which were acquired after the redemption of the preferred stock had been ordered by the defendant's board of directors. Certified copies of the proceedings in the state court have been filed in this court. The case is submitted on the pleadings, affidavits, and records and documents offered as exhibits.

Cyrus Huling, Smith W. Bennett, and W. H. Jones, for plaintiffs.
Lawrence Maxwell, for Chesapeake & O. Ry. Co.

Wilson & West, James H. Hoyt, and Lawrence Maxwell, for defendant company.

Wade H. Ellis and Challen B. Ellis, for Stanton.

SATER, District Judge (after stating the facts as above). The petition and bond for removal to this court, which were filed and

brought to the state court's attention soon after it rendered its opinion refusing to modify the restraining order and granting a temporary injunction, are, and are conceded to be, sufficient in substance and form. An order for removal was presented to it for allowance; but, instead of allowing such order or determining the sufficiency of the petition and bond, the court proceeded to appoint receivers for the defendant, the Hocking Valley Railway Company. The entry overruling the motion to modify the restraining order, allowing a temporary injunction, fixing the amount of the injunction bond, appointing receivers, and fixing their bond, was not approved, filed, or journalized until nearly three hours later. The petition charges a violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), whereby certain direct, actual, and special injuries are inflicted on and threatened to the plaintiffs and interveners, independent of those caused to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the states. This court, therefore, has jurisdiction. *Bigelow v. Calumet & Hecla Min. Co.* (C. C.) 155 Fed. 869, and 167 Fed. 721, 94 C. C. A. 13; *Merz Capsule Co. v. U. S. Capsule Co.* (C. C.) 67 Fed. 414; *A. Booth & Co. v. Davis* (C. C.) 127 Fed. 875, and 131 Fed. 31, 65 C. C. A. 269; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484; *Leonard v. Abner-Drury Brewing Co.*, 25 App. D. C. 161; *Chalmers Chemical Co. v. Chadeloid Chemical Co.* (C. C.) 175 Fed. 995; *Union Trust Co. v. Atchison, T. & S. F. R. Co.* (C. C.) 64 Fed. 724; *In re Debs*, 158 U. S. 564, 600, 15 Sup. Ct. 900, 39 L. Ed. 1092.

It consequently follows that on the filing of the petition and bond, the case being removable, it was, by the terms of section 3, c. 866, Act Aug. 13, 1888, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), "the duty of the state court to accept said petition and bond and proceed no further in such suit." Its authority to take any further proceedings in the case, except to examine into the legal sufficiency of the removal papers, ceased, ipso facto (*Black's Dillon on Removal of Causes*, § 189; *Railroad Co. v. Koontz*, 104 U. S. 14, 26 L. Ed. 643; *Foster's Fed. Pr.* [4th Ed.] 1586, 1587), and that of this court attached (18 Ency. Pl. & Pr. 347; *Marshall v. Holmes*, 141 U. S. 594, 12 Sup. Ct. 62, 35 L. Ed. 870; *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 58, 27 L. Ed. 87; *Monroe v. Williamson* [C. C.] 81 Fed. 977; *Probst v. Cowen* [C. C.] 91 Fed. 931; *Foster's Fed. Pr.* [4th Ed.] 1585, 1586). A formal order of removal is usual; but such order by the state court was not necessary to confer jurisdiction on this court, nor could it by declining to make such order prevent jurisdiction from attaching here. *Kern v. Huidekoper*, 103 U. S. 490, 26 L. Ed. 354; *Hubbard v. Chicago, M. & St. P. Ry. Co.* (C. C.) 176 Fed. 994; *Railroad Co. v. Koontz*. Its authority to proceed further in the case having ended, all subsequent action had therein, including the appointment of receivers and approval of entries, was coram non iudice and absolutely void. *Flint v. Coffin* (C. C. A.) 176 Fed. 872, 874; *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900; *Virginia v. Rives*, 100 U. S. 313, 317, 25 L. Ed. 667; *Railroad Co. v. Koontz*.

The plaintiffs assert that the state court's announcement of the granting of a temporary injunction has, nevertheless, all the force and effect of a judgment, and cite *State v. Meacham*, 6 Ohio Cir. Ct. R. 31, and *Black on Judgments*, § 106. Their position is that a judgment, though not entered, is still a judgment, that the omission to enter it does not destroy it, and that its vitality does not remain in abeyance until it is recorded. The defendant company appeals to the Ohio statutes and asserts that the court's announcement of its conclusions does not rise to the dignity of a judgment and is wholly ineffective, and that it is entitled to a hearing in this court on its motion to modify the restraining order filed in the state court. The General Code classifies injunctions under "provisional remedies." It does not designate a temporary injunction as a judgment. A temporary injunction is a provisional remedy (section 11,875), a temporary order (section 11,876), and when granted is allowed as a temporary remedy (section 11,879). It is not a judgment. The judgment in an injunction suit is the final order rendered in the court in which the trial of the action is had. Sections 11,879, 11,875. This is in harmony with section 11,582, which declares that "a judgment is the final determination of the rights of the parties in action," and defines an order to be "a direction of a court or judge, made or rendered in writing and not included in a judgment." An order does not become effective until it is entered on the journal. It lacks finality, and hence the qualities or the consequences of a judgment. 23 Cyc. 667; *Finnell v. Burt*, 2 Handy, 202. Section 11,882 provides that:

"Unless otherwise provided by special statute, no injunction shall operate until the party obtaining it gives a bond executed by sufficient surety, to be approved by the clerk of the court granting the injunction, in an amount to be fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to have been granted."

As the bond was not executed until after the court had approved the entry fixing the amount, at which time it had lost jurisdiction of the case, the bond is void. The temporary injunction authorized by the court consequently never became operative or binding on the defendant. Section 11,885. The status of the state judge's orally expressed determination allowing the temporary injunction, as fixed by the state statute, accords with the federal rule. *Judson v. Gage*, 98 Fed. 540, 542, 39 C. C. A. 156. The views above expressed also find support in *Coe v. Erb*, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764.

The case, therefore, came into this court with the defendant's motion to modify the restraining order still standing. The much-discussed question of the right of this court, under the facts presented, to review the action of the state court, and the propriety of its so doing, does not arise. Section 4 of the Judiciary act (Act March 3, 1875, c. 137, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511]), relating to the removal of causes, among other things, provides that:

"All injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

The power to modify or dissolve the order made by the state court is thus expressly conferred. The federal courts have always, after the removal of a case, exercised the right to hear and act on a motion filed in the state court to modify or vacate a restraining order or a temporary injunction. But two cases, decided, however, by distinguished and discriminating judges, will be cited in support of the rule, *Board of Com'rs v. Peirce* (C. C.) 90 Fed. 764, decided by Judge Taft, and *Perry v. Sharpe* (C. C.) 8 Fed. 15, decided by Mr. Justice Matthews sitting on the circuit in this district.

The plaintiffs deny that the power to redeem and cancel the preferred stock is conferred on the directors, and assert that the resolution for its retirement adopted by them is wholly ineffectual, and will not only constitute a purchase by the corporation of its own shares, but will also operate as a reduction of the capital stock, and that such reduction can be lawfully made only as provided by section 3264 of the general corporation act (section 8700, Gen. Code). That section requires the written consent of the persons in whose names a majority of the shares of the capital stock stands on the books of the company, and the filing of a certificate of such action with the Secretary of State. The defendant disputes the correctness of their position.

A permanent reduction of stock or diminution of assets is not purposed. The resolution which provides for the redemption of the preferred stock also calls for a meeting of the stockholders, as required by section 3308, Rev. St. (section 8816, Gen. Code), to vote upon an issue of common stock to take the place of that redeemed and canceled. In the reorganization of the Hocking Valley & Toledo Railway Company and the acquisition of its property by the defendant, in 1899, the preferred stock was issued by the defendant company to reduce fixed charges and to lift some of the indebtedness for which it was required to provide in taking over its predecessor's property. The railway act not only authorized the issue of preferred stock, but its mandate was that the defendant company "shall reserve the privilege of redeeming and canceling the same at par at any time after three years from the date of its issue." To avoid misapprehension on the part of any one subsequently dealing with the stock, not only was the right of redemption thus exacted reserved in the articles of incorporation, but into every certificate of stock, common and preferred, there was written:

"All the preferred stock is and will be subject to the right of the company to redeem the same at par at any time after three years from the date of its issue."

The statute, as did the defendant, contemplated that the preferred stock should be, or at least might be, of a temporary character. Its holders are in fact stockholders and not creditors (*Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496), and yet, as was said in the case of *Weidenfeld v. Northern Pacific Ry. Co.*, 129 Fed. 305, 63 C. C. A. 537, the facts of which in many respects resemble those of this case, the preferred stock retains to some degree the quality of the original indebtedness which it succeeded. The issue of preferred shares by a

corporation, it is true, increases the capital stock; but it is also frequently the means, as every experienced lawyer knows, of raising money by pledge of the company's income. *Morawetz, Corp.* § 463. The holders of the defendant's preferred shares as against the holders of its common shares were given a preferential right in the payment of dividends, and, in case of the dissolution of the corporation, in the distribution of its assets. That the redemption of the preferred stock, whether common stock be substituted in its stead or not, would be advantageous to the holders of the common stock, is apparent. As against the advantages conferred on the holders of preferred stock, the right to redeem it was by unanimous consent reserved. It is unquestioned law that the defendant's charter constitutes a contract between the corporation and its stockholders. *Cook, Corp.* (4th Ed.) § 493. Stock in the railway company is held by contract between the corporation and its stockholders. *Toledo Bank v. Bond*, 1 Ohio St. 649. A certificate of stock is the muniment of the stockholder's title and evidence of his right, and in this case it also substantially expresses the contract between the corporation and his co-stockholders and himself. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 180. The recitals in the articles of incorporation and the stock certificates, to borrow the language of Chancellor Kent, "are of the character and authority of permanent constitutional provisions, binding upon all the members, when adopted by all, as a solemn contract, and * * * they can only be abolished by the like concurrent will by which they were adopted." *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573, 595. The provision relating to the redemption of preferred stock inserted in the articles of incorporation and in the stock certificates was within the terms of the statute, and each stockholder, by his purchase and acceptance of stock, assented to such provision and became bound thereby as a part of a valid and enforceable contract between himself and the corporation. *Hackett v. Northern Pac. Ry. Co.*, 36 Misc. Rep. 583, 73 N. Y. Supp. 1087; *Weidenfeld v. Northern Pac. Ry. Co.*, 129 Fed. 305, 63 C. C. A. 537; *Hackett v. Northern Pac. Ry. Co.* (C. C.) 140 Fed. 717; *Thompson on Corp.* (2d Ed.) § 3600; *Cook, Corp.* (6th Ed.) pp. 742, 745, and Note; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 672, 24 C. C. A. 271, 36 L. R. A. 826; *Clark & Marshall on Corp.*, pp. 3476, 3480, 1311, 1312; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

In *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 425, it is said that the decided weight of authority, both in England and in the United States, is against the existence of the power of a corporation to buy and sell its own stock, unless such power is conferred by express grant. The foundation principle, upon which such cases rest, and which has been frequently and emphatically declared by the Supreme Court of Ohio, is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication. Under the Ohio rule the law of the case is stated in the syllabus, and what was actually decided was:

"An executory agreement between a manufacturing corporation of this state and one of its stockholders, for the purchase of the stock of such cor-

poration, by the former from the latter, cannot be enforced either by action for specific performance or for damages."

The denial of the right to purchase its own stock was based on the absence of a grant of power so to do and the constitutional provision which imposed a double statutory liability on stockholders for the satisfaction of debts due corporate creditors. But in this case the grant of power exists, and the double statutory liability has been abrogated by constitutional amendment. I have been cited to no Ohio case, and I have found none, which announces, as an inflexible rule, that a corporation may not purchase its own stock, or that the mode prescribed by section 8700, Gen. Code, for the reduction of capital stock, is exclusive. In the Coppin Case it is said:

"If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise."

If the corporation could have purchased its stock by virtue of an agreement that it should buy the same whenever the stockholder chose to quit its employment, and such is apparently the inference to be drawn from the court's language, and such it was held in *Fremont Carriage Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376, a corporation may lawfully bind itself to do, it must follow that it could have purchased the stock if the contract had been that it should so do whenever it exercised the privilege of discharging him. The Coppin Case dealt with an executory contract. This is a case of executed contract of sale, but unexecuted as to the surrender of stock for redemption and cancellation at the stipulated price. The defendant has performed its part of the contract to the extent of tendering the agreed price for redemption. The plaintiff's refusal to perform rests on a denial of the regularity of the manner in which the redemption is ordered, although it is manifest that the redemption and cancellation ordered by the directors, and heretofore unanimously agreed upon, would receive the approval of a large majority of the shareholders were the question submitted to them for action or their reaffirmance of their contract necessary. In *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558, the plaintiff sold certain real estate to the corporation and was paid in corporate stock. Subsequently, differences having arisen, an exchange back was made in settlement. The corporation had no debts, and no one was injured by the transaction. It was held:

"That no inflexible rule has been recognized by this court that a corporation may not in any case, nor for any purpose, receive its own stock. * * * It being the law of our state that there are exceptions to the general rule that corporations may not deal in their own stock, all persons dealing with this company must be held to have done so in the light of this state of the law."

The stock, it is true, was held not to be canceled; but it was nevertheless so far canceled that it was nonassessable for the benefit of creditors who enforced the double statutory liability when the corporation subsequently became insolvent. Other cases illustrating excep-

tions to the general rule are *Taylor v. Miami Exporting Co.*, 6 Ohio, 176, *State v. Franklin Bank*, 10 Ohio, 92, 97, *Cincinnati, etc., R. Co. v. Duckworth*, 2 Ohio Cir. Ct. R. 518, *Sanderson v. Aetna Iron Co.*, 34 Ohio St. 442. In all of the above-cited Ohio cases the stock purchases were made by the executive officers of the corporation, and not on a vote of the stockholders. In many of the states, in the absence of charter restrictions against the redemption or repurchase of its shares, where the provision therefor is not kept secret, shares may be issued subject to the stipulation that they may be bought back at the option of the corporation. *Machen, Corp.* §§ 640, 625; *Cook, Corp.* (4th Ed.) §§ 311, 312; note to *Hall v. Henderson*, 61 L. R. A. 621; *In re Castle Braid Co.* (D. C.) 145 Fed. 224; *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357; *U. S. Mineral Co. v. Driscoll*, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028; 7 Am. & Eng. Ency. Law (2d Ed.) 818; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307, 67 N. W. 70. And in such instances such power may be exercised by the board of directors. *Lumber Co. v. Telephone Co.*, 127 Iowa, 350, 101 N. W. 742; *Chicago, etc., R. R. v. Marseilles*, 84 Ill. 643; *First Nat. Bank v. Salem Capital Flour-Mills Co.* (C. C.) 39 Fed. 89, 96.

This case, however, rests, not on an exception to a general rule, but on a specific legislative grant of power to redeem and cancel. "To redeem," it is said in *Miller v. Ratterman*, supra, "is to purchase back; to regain as mortgaged property by paying what is due; to receive back by paying the obligation." The word "redeem," as used in statutory provisions authorizing a party to redeem, means "repurchase." *Robinson v. Cropsey* (N. Y.) 2 Edw. Ch. 138, 146; *Pace v. Bartles*, 47 N. J. Eq. (2 Dick.) 170, 20 Atl. 352. Section 3380a, Rev. St. (section 9027, Gen. Code), which authorizes consolidating companies to "fix by the agreement for consolidation the terms and conditions upon which it is to be made, which terms and conditions may include the payment or retirement of the preferred stock of either or any of the constituent companies, if they have such," uses the words "payment" and "retirement" as equivalents. Every stockholder, therefore, at the time he acquired his stock and in advance of the earliest date at which it might be redeemed, agreed that the defendant might purchase it back, might regain it by paying the stipulated price therefor, just as it might repossess itself of mortgaged property which it had pledged to secure a debt. His agreement to sell his preferred stock is a continuing obligation whose performance the corporation, through its board of directors, can at the appropriate time enforce as fully as it can carry out, through the same board, an agreement to retire its corporate bonds at their maturity. The corporate powers, business, and property of the defendant company are exercised, conducted, and controlled by its board of directors. Section 3248, Rev. St. (section 8660, Gen. Code); *Sims v. Street Ry. Co.*, 37 Ohio St. 565; *Goodin v. Evans*, 18 Ohio St. 167. The redemption of its preferred stock is a part of its corporate business, the transaction of which devolves on its directors. They cannot make organic or fundamental changes in the composition or business of the corporation (*Railway Co.*

v. Allerton, 18 Wall. 233, 21 L. Ed. 902); but the retirement of preferred stock is not such a change, when unanimously agreed upon by the stockholders and authorized by statute, and the rights of creditors are not prejudiced thereby (*Weidenfeld v. Northern Pac. Ry. Co.*; *Hackett v. Northern Pac. Ry. Co.*, 36 Misc. Rep. 583, 73 N. Y. Supp. 1087; *Clark & Marshall on Corp.* p. 3480; 2 *Purdy's Beach on Private Corp.* pp. 1284, 1285). If the directors may not redeem the stock, then, by reason of the superior voting power of the preferred shareholders, stock of a temporary character may remain outstanding during the life of the corporation.

Each shareholder in the purchase of his stock dealt with the corporation at arm's length as a distinct and artificial entity or person. In entering into its contractual relation with him, the corporation reserved to itself the option of redeeming or repurchasing his stock after a specified date. The preponderance of the voting power has always been with the preferred shareholders. They could at all times have named the board of directors and controlled the corporate policy. A large majority of them, by depositing their certificates of stock for redemption, have expressed their willingness to abide by the contract. None of the petitioners, as a party to an option contract freely made, may decide that the corporation, the other party thereto, through its duly chosen business representatives, in so long as it acts within the terms of such contract, shall not exercise the option reserved therein to buy back the property sold. *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Johnston v. Trippe* (C. C.) 33 Fed. 530; *Hackett v. Northern Pac. Ry. Co.*, 36 Misc. Rep. 583, 73 N. Y. Supp. 1087. A statute should not be so construed as to sanction the repudiation of a legally authorized contract by one of the parties thereto, or as to require so useless a thing as his ratification of it, or as to permit him to deprive the other party from exercising his reserved right to enforce one of its provisions at a time which by its very terms such other party may himself designate. Section 3264 undoubtedly applies where there is no legally authorized contractual relation between the corporation and its several stockholders as to the redemption of stock, such as is here shown to exist. By limiting its application to cases of that character, inconsistency between it and the sections which authorize the issuing of preferred shares, and direct that the right of buying them back after a specified date shall be reserved, is obviated.

The controversy in this case is wholly between the corporation and four of its stockholders. No creditor is complaining, and no one can complain, because the recitals in the articles of incorporation were notice to him of the reserved right to redeem. Future creditors cannot complain, because they will be held to have given credit upon the amount of the stock then outstanding. They cannot even claim that the repurchase was irregularly made. *Cook, Corp.* (4th Ed.) § 289. Even prior to the abrogation of the constitutional provision imposing a double statutory liability on stockholders for the payment of corporate debts, the requirement of section 3264, Rev. St. (section 8700, Gen. Code), that a certificate of the reduction of capital stock shall be filed with the Secretary of State, accomplished little more than the maintenance of a record in his office of the authorized capital at any

given time. Actual and prospective creditors could not safely rely on such record as indicative of the amount of stock subject to the double liability, because such record did not disclose the amount of stock subscribed. Section 251, Rev. St., however, exacted that the defendant should file with the Commissioner of Railroads an annual report specifically stating the amount of capital stock subscribed and paid for. That section has been supplanted by section 605 of the General Code, which provides that the statement submitted shall be similar in character and detail to the annual report required to be made to the Interstate Commerce Commission. The report in use requires a statement of the number of shares authorized, outstanding, in the treasury, and issued within the year. Section 2780—24, Rev. St. (now sections 5522, 5523, 5524, Gen. Code), the excise or franchise tax law, requires every corporation for profit to report annually to the secretary of state, among other things, the amount of its capital stock as authorized, subscribed for, issued, outstanding, and paid up, and the change or changes, if any, in any of these respects subsequent to the filing of the preceding annual report. Aside from the fact that it is somewhat difficult to see how the defendant can report to the Secretary of State the increase of common stock without disclosing the redemption of its preferred shares, its next annual report to the Railway Commission and to the Secretary of State must show the retirement of such preferred shares and the issue of common stock in their stead. The abolishment of the double statutory liability has remitted creditors to the actual corporate assets as a basis of credit and for the payment of claims due them; but they will still have the same means of knowledge as heretofore as to such assets and authorized, subscribed for, and paid-up capital stock. The petitioners and intervenor cannot complain of want of publicity as to any of these matters, because they have knowledge of them and have assented to the reduction.

As justifying a conclusion different from that above announced, plaintiffs' counsel cite *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *McNulta v. Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; *Leather Co. v. Kurtz*, 34 Mich. 89; *Railway Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902; and perhaps other cases. Their facts readily distinguish them from the case at bar.

The restraining order was granted on the theory that, as in Ohio one railroad corporation cannot purchase and own the stock of a competing company, the defendant's board of directors is illegally constituted because about 70,000 shares of its common stock, now held by the Chesapeake & Ohio Railway Company, were illegally voted at the last annual election of directors, and that, when resignations occurred in the board, the vacancies were filled by persons interested in and friendly to that road, whereby it was given the domination and control of the defendant. In the absence of a showing of the vote cast, the presumption is that the directors owed their election to all of the stockholders, representing all of the stock, and that the stockholders aimed to benefit the corporation and acted as their interests prompted. *Memphis & Charleston R. Co. v. Woods*, 88 Ala. 642, 645, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81. At the last election only

about 27 per cent. of the defendant's stock was owned by railroad companies. They owned none of the 150,000 shares of preferred stock, nor is it claimed that they in any manner sought to control the conduct or vote of any of the 1,200 persons who held such shares. As vacancies occurred in the board, they were filled in the manner prescribed by statute and the corporate regulations. As the Chesapeake Company is not a party to this suit, the court may not now adjudge its stockholdings in the defendant unlawful, or the defendant's board of directors illegally constituted. In *Taylor & Co. v. Southern Pac. Ry. Co.*, 122 Fed. 147, Judge (now Mr. Justice) Lurton, said:

"It must be accepted as altogether fundamental that no court can adjudicate upon the rights, or interests, of one who is neither actually nor constructively before the court. The principle of due process of law unconditionally compels observance of the rule which limits the just jurisdiction of every court to a determination only of the rights of persons who are parties to the litigation. *N. O. Waterworks v. N. O.*, 164 U. S. 471, 480 [17 Sup. Ct. 161, 41 L. Ed. 518]. In *Mallow v. Hinde*, 12 Wheat. 193, 198 [6 L. Ed. 599], where the court found itself unable to proceed for the want of an indispensable party, it was said: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever be their structure, as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court.' This doctrine has over and over again been announced by the Supreme Court, and in no case more emphatically than in *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 237 [22 Sup. Ct. 308, 46 L. Ed. 499]."

Other authorities to the same point are *Weidenfeld v. Northern Pac. Ry. Co.*, supra; *Arkansas Valley Sugar B. & Irr. L. Co. v. Ft. Lyon Canal Co.*, 173 Fed. 601, 604, 97 C. C. A. 551; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Board v. Walbridge*, 38 Wis. 179, 188; *Kinkead's Code* Pl. p. 12, § 14; *Fergus v. City of Columbus*, 6 Ohio N. P. 82; *Osterhoudt v. Supervisors*, 98 N. Y. 239; *Bates, Pl., Pr. & Forms*, 1791; *Whittaker's Anno. Code* (6th Ed.) 102; *Stone v. Viele*, 38 Ohio St. 314, 318; *Daum v. Kehnast*, 18 Ohio Cir. Ct. R. 4; *Fertel v. Sampliner*, 18 Ohio Cir. Ct. R. 744; *Executors v. Young*, 72 Ohio St. 510, 76 N. E. 1132. The restraining order, except in so far as it prohibits the defendant from holding a stockholders' meeting to consider and vote upon the issue of additional stock and the sale and disposition of the same, is vacated. The point excepted is held for further consideration.

On Motion for Temporary Injunction and Further Hearing to Vacate Restraining Order.

The complainants have filed an amended bill, making the Chesapeake & Ohio Railway Company (hereinafter called the Chesapeake Company) a defendant. Additional affidavits and exhibits have been offered in evidence, and the complainants now ask for a temporary injunction. The Chesapeake Company and the Hocking Valley Railway Company (hereinafter called the Hocking Company) resist the application, and the latter asks for the vacation of the restraining order in so far as it yet remains in force.

The Chesapeake Company is by its charter authorized to purchase, own, and hold shares of capital stock of any corporation or corpora-

tions organized under the laws of the state of Virginia, in which such company is incorporated, or of any other state, for the construction or operation of any railroad or railroads or other means of transportation. For some years past it has owned 11,540 shares of common stock of the Hocking Company. In March last it paid for and became the owner of 57,702 additional shares, whereby its holdings became a majority of the 110,000 shares outstanding.

Was the Chesapeake Company, under the circumstances of the case, lawfully authorized to purchase, and may it lawfully hold, stock in the Hocking Company, is the principal point in controversy, about which all others cluster. The complainants maintain the negative, and the companies the affirmative, of that question. Its answer involves a construction of Ohio statutes. Although the question has been fully argued, the court approaches it with reluctance, because there has been no opinion touching it rendered by the state's highest court.

When a corporation asserts that it is clothed with a given power and the right to exercise it, the burden is on it to show whence such power and right are derived. *State v. Vanderbilt*, 37 Ohio St. 591. The burden, therefore, of showing the existence of the power and right of the Chesapeake Company to acquire and hold stock in the Hocking Company is on such companies. If, under given circumstances, an Ohio railroad corporation may acquire and hold stock in another, then it is conceded that a foreign corporation of the same character may, under the same circumstances, do likewise. When, if at all, may one railroad corporation, chartered in Ohio, purchase and hold stock in another like Ohio corporation? A review of legislation and of the state of decision in Ohio as regards the right of one corporation to acquire stockholdings in another will be helpful.

The act of March 29, 1867 (64 Ohio Laws, p. 85; sections 10,172, 10,173, Gen. Code), provides that should an incorporated elevator company erect or own an elevator building and use it for the purpose of receiving or delivering grain from or to any railroad company, as freight carried or to be carried over its road, or any part thereof, the railroad company may subscribe for or purchase not more than one-third of its entire capital stock.

On April 3, 1868 (65 Ohio Laws, p. 55; sections 9313, 9315, Gen. Code), it was enacted that any railroad company, or any other private corporation, organized under the laws of the state, may subscribe for or purchase the stock of a bridge company to an amount not exceeding one-third of the whole thereof, if such bridge company by the laying of tracks has prepared the bridge for railroad uses.

Each of the two above-mentioned acts fixes the limit of stockholding of the purchasing company at less than a controlling interest.

The act of April 3, 1868 (65 Ohio Laws, p. 63; sections 9160, 9163, Gen. Code), provides that railroad companies may own stock in union depot companies and in a union railroad connecting the companies using the depot.

Under the act of April 13, 1874 (71 Ohio Laws, p. 69; sections 10,137, 10,138, Gen. Code), certain mining and manufacturing corporations may purchase or subscribe for such an amount of stock of any railroad or other transportation company as its directors may deem

necessary in order to procure proper facilities for transportation for the factories, mines, or other works of the companies, if the holders of two-thirds of the capital stock consent to such subscription or purchase. Under the provisions of this somewhat comprehensive act, the directors, having first obtained the requisite consent of the purchasing company's stockholders, may, in the exercise of a sound discretion, determine what amount of stock it is necessary to subscribe for or purchase, whether that amount be a controlling or a less interest.

The act of April 12, 1877 (74 Ohio Laws, p. 84; sections 10,170, 10,171, Gen. Code), which provides that any company incorporated and organized under the laws of the state may, by the vote of a majority in interest of its stockholders, subscribe for or become the owner of stock in an incorporated common carrier company, imposes no limitation on the amount of stock that any corporation may purchase in a company of the character named, and no restriction as to the kind of corporation that may make such purchase.

Section 3300, Rev. St. (sections 8806, 8807, 8809, Gen. Code), originally enacted in 1852 (50 Ohio Laws, p. 274), but frequently amended, provides that any railroad company, "may aid another in the construction of its road by means of a subscription to the capital stock of such company, or otherwise, for the purpose of forming a connection of the roads of the companies, when the road of the company so aided does not, and will not when constructed, form a competing line." By another provision of the same act (section 8809, Gen. Code), such aid shall not be furnished unless the holders of at least two-thirds of the capital stock of each company first assent thereto.

A railroad company may, therefore, under the conditions named, subscribe for and acquire stock in another under the power conferred by section 8806, on the following conditions only: (1) To aid such other company in the construction of its road; (2) for the purpose of forming a connection of the roads of the two companies; (3) the road whose stock is purchased must not form, when constructed, a competing line as against that of the purchasing company. By the terms of this section, no road or line may be termed "competing" until it is constructed. Competition as between railroads necessarily relates to transportation, and, in respect to transportation, the term "competing" signifies a road complete and ready for operation. 8 Cyc. 405; *Penn. Co. v. Commonwealth* (Pa.) 7 Atl. 368. The section does not confer the power on a railroad company to purchase stock in another, if the road or line of the other is completed. Its purpose is to foster competition, to encourage the development of the state and its industries, and to accommodate and supply the wants of the public by permitting one road to aid in the construction of another extending into communities destitute of or having limited railroad facilities. It contemplates that shippers and the traveling public along the lines of the purchasing road and the road which is about to be constructed or is in process of construction, or who, wherever dwelling, may have occasion to use such roads, shall be afforded transportation facilities back and forth without the purchasing company being subjected possibly to the entire burden of constructing a new line of its own into the territory which will be accommodated by the aided road.

The only other corporations, in so far as I have been able to discover, which were, prior to 1902, expressly authorized by statute to invest in the stock of other companies, are safe deposit and trust companies (Act May 4, 1894; 91 Ohio Laws, p. 201; sections 9840, 9841, Gen. Code), and incorporated religious, scientific, and beneficial associations not having a capital stock, but desirous of securing a lodge room, chapel, or regular place of meeting (Act April 18, 1883; 80 Ohio Laws, p. 177; section 10,196, Gen. Code).

Of the first six acts above mentioned, three authorize railroad corporations alone to acquire stock in another corporation, two confer the power on railroad and other private corporations alike, and one vests the power in given corporations to purchase and subscribe for stock of a railroad company. All of such acts contemplate increased transportation facilities. This, too, is the object of the provisions of section 8807, Gen. Code, which authorize one railroad company to acquire the control of another by leasing or purchasing any part of such railroad constructed or in the course of construction, if the two roads are continuous or connected and not competing, and of the act of March 30, 1877 (74 Ohio Laws, p. 71; section 9025, Gen. Code, and succeeding sections), which permit a consolidation of railroad companies into a single company, if their lines or any portion of them have been or are so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously without any break or interruption, and which also authorize consolidated roads in turn to consolidate with each other. As regards stock-holding by one corporation in another, railroad companies have been favored corporations.

Such was the condition of legislation on May 6, 1902, when section 3256, Rev. St., was amended (95 Ohio Laws, p. 390; section 8683, Gen. Code) by adding thereto the following:

"A private corporation may purchase, or otherwise acquire, and hold, shares of stock in other kindred but not competing corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition."

Original section 3256 specifically conferred the power on private corporations to borrow money, fixed the limitation on the amount to be borrowed and the rate of interest to be paid, and authorized the execution of a mortgage to secure the payment of both principal and interest. It did not control the conduct of railroad corporations in the borrowing of money, because their power to borrow was found in the succeeding chapter. The amendatory provision relates wholly to the purchase by one private corporation of the stock of another. The codifying commission, recognizing the want of connection between the powers conferred by the first and last portions of the section, placed the portion which constituted the original section under the subdivision of chapter 1, div. 1, tit. 2, relating to private corporations, entitled "Borrowing Money," and designated it in the General Code as section 8705. It located the portion added by the amendment in the subdivision of chapter 1, entitled "Capital Stock," and gave it the sectional number 8603 in the General Code. The Legislature, by its adoption of the General Code in February, 1910, approved the ac-

tion of the commission. The mere fact that the power of one private corporation to buy stock in another was tacked to the section of the general corporation act, which authorized private corporations other than railway companies to borrow money, did not, in and of itself, limit the new power to such other corporations.

By the express provisions of the amendment, one private corporation may buy stock in another under the following conditions only: (1) The corporations must be kindred; (2) they must not be competing; (3) the result of the purchase must not be the formation of a trust or combination to restrict trade or competition. At the time of the passage of the amendatory act of 1902, there was an increased demand for larger units of organization in the transportation, industrial, and business world. It was an era of consolidation and combination of business enterprises, of a pronounced policy of expansion. Reduction in the cost of production or the transaction of business was thought to lie in the centralization of capital and the conduct of business on a large scale. Enlarged enterprises were established by the purchase of others, or by their consolidation into a single company, or, when permitted by law, by the purchase by some one of the stock of another. In fact, one of the favorite methods, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. *U. S. v. Northern Securities Co.* (C. C.) 120 Fed. 721, 725. The then existing and prior tendency as regards railway companies is forcibly set forth in *Cook on Corp.* (6th Ed.) §§ 892, 314. While it has been the declared policy of the state to prohibit railroads from purchasing or controlling competitive or rival lines, it has also been its declared policy to encourage the formation of trunk lines and their buying, building, and operating branch or feeding lines. The Supreme Court of Georgia, in speaking of consolidations and the acquisition of such branch or feeding lines (*State v. Central Ga. Ry. Co.*, 109 Ga. 716, 35 S. E. 37, 48 L. R. A. 351), said:

"The general effect of these consolidations and connections has really been to increase competition, has added greatly to the public convenience, and furnished greater and more commodious facilities for traveling; has operated to reduce the cost of transportation; has brought remote parts of the country into close proximity, as it were, to each other; has developed resources that would otherwise have remained dormant, by opening up the markets of the world to the products of the land; and has generally contributed to work to the welfare and prosperity of the people."

The Legislature of Ohio in 1902, while it enacted new and amended existing laws taxing private corporations and erected barriers against the formation of unlawful combinations, inaugurated a new policy enlarging greatly their powers and relieving them from some of the more onerous provisions found in the statutes and the Constitution. It so amended section 3258 as to limit the bringing of actions upon the liability of stockholders to 18 months after any debt or obligation shall become enforceable against them. It caused an amendment to the Constitution to be submitted for adoption by the electors, abolishing the double statutory liability of stockholders. The proposed amendment became a part of the Constitution. It extended the privilege of issuing preferred stock with a right of redemption to such

corporations as had not previously had it, and so amended section 3256 as to confer, within the limitations imposed, a power not previously conferred by statute on private corporations, of purchasing each other's stock. All of this legislation was in line with that of various other states.

At the time section 3256 was amended, section 3269, found in the chapter on General Corporation Law, and preceding the chapter on Railroads, recited that:

"The provisions of this chapter do not apply when special provision is made in the subsequent chapters of this title, but the special provision shall govern unless it clearly appear that the provisions are cumulative."

The complainants claim that this section, which is still in force, forbids the application of the provisions of the amendment to section 3256 to railroad corporations. The contention cannot successfully rest on the ground that a railroad corporation is not a private corporation, because it is recognized as such both by the statute and the Supreme Court. See title 9 of the General Code and its subdivisions, and section 9315. In *Toledo Bank v. Bond*, 1 Ohio St. 623, 643, it was said:

"Private institutions are those which are created or established by private individuals for their own private purposes. Public institutions are those which are created and exist by law or public authority. Some public benefits or rights may result from the institutions of private individuals or associations. So also some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions is to be found in the authority by which, and the purpose for which, they are created and exist. Because, therefore, a corporation may fall under the denomination of private corporations, in the artificial distinction between public and private corporations, it is none the less a public or political institution. The distinction between public and private corporations is somewhat arbitrary, and by no means determines whether the corporation is a public or private institution. If the stock in a banking, railroad, or insurance corporation be exclusively owned by the government, the institution is denominated a 'public corporation'; but if a private individual be allowed to own a single share of the stock, in common with the government, it is said that it becomes a 'private corporation.'"

Railroad companies are private corporations, but not in the strict sense of the ordinary business corporation, because they are charged with duties of a public nature which distinguish them from the purely and strictly private corporation; but in many respects they are private corporations in all that the term implies. They cannot be treated as public corporations, such as cities, counties, townships, and other like governmental subdivisions. Their foundation is private. They are organized for gain, and their strictly private rights are as much beyond legislative control as are the rights of the purely private corporation. 7 Am. & Eng. Ency. Law, 637, 638; *Elliott on Railroads*, § 2; *Cook on Corp.* § 891; *Morawetz on Private Corp.* § 3; *Hale v. County Com'rs*, 137 Mass. 111, 114; *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 668, 669, 4 L. Ed. 629; *Rundle v. D. & R. Canal*, 21 Fed. Cas. 11.

The contention is that the provisions of the amendment to section 3256 and of section 3300, now sections 8806, 8807, and 8809, Gen. Code, relating to stock purchases and holdings, are not clearly cumulative, and that therefore the amendatory act, not meeting the require-

ments of section 3269, now section 8733, Gen. Code, conferred no additional power on railroad companies, and the special provisions in the chapter on Railroads govern. The word "clearly," according to Webster's definition of it, means, "in a clear manner; without obscurity; without entanglement or confusion; without uncertainty." "Cumulative," as defined by the legal lexicographers, means "additional; that which is superadded to another thing of the same character and not substituted for it." Abbott's, Black's, and Anderson's Law Dictionaries. The amendment to section 3256 is applicable to railroad corporations, if it appears in a clear manner and without uncertainty that the power given by such amendment is additional and superadded to, is not substituted for, and was of the same nature as that conferred by section 3300.

Section 3256, like section 3300, authorized stockholding in one corporation by another, when the effect thereof was to increase, or at least was not to diminish, competition. Each granted a power of the same kind—the power to purchase stock. Each prohibited a corporation from holding stock in another, if the purpose or effect of such holding was to restrict trade or competition. The stockholding in each case must be in a kindred corporation. Under each the purchasing corporation may hold and vote a majority of the stock of another, select the directory of such other, and, consequently, through such directory, manage such other corporation's business affairs. Each recognizes that all this may be done without in any wise restricting trade or competition, or constituting a trust or unlawful combination. There are, however, marked differences as between the two sections. Under the first, one corporation may, within the limitations imposed, purchase the stock of another in an operating company. It may purchase for the purposes of investment, or lawfully to acquire a controlling interest. The power is general and does not require the assent of stockholders for its exercise. Under it stock may be bought in the open market as well as by subscription, and without reference to aiding the corporation whose stock is purchased. Section 3300 was designed to meet the specific condition therein named. Under it one railroad company may, only with the consent of two-thirds of its stockholders, acquire stock in a connecting uncompleted road only, by subscription only, and not in the open market, for the purpose of aiding the latter. If a controlling interest be acquired, such control is incidental to the main purpose of furnishing aid. The subject-matter and purposes of the amendment to section 3256 were original and novel, and the power conferred by it is a different and broader power than that given by section 3300. The amendment conferred a new power and did not repeal or negative, expressly or impliedly, any provision found in any section of any subsequent chapter on corporations. It contains no proviso or exception, is not a substitute for, the equivalent of, or in conflict with, any prior legislative enactment. Its language is unambiguous. Given its ordinary and familiar signification, it embraces all private corporations. It contains no suggestion of discrimination against any class or classes of corporations, and no hint that the friendly policy theretofore manifested toward railroad corporations to secure increased transportation facilities was reversed, or

that in such facilities the acme had been attained. It is said that the previously expressed policy of the state had been to disable railroad corporations from holding stock in any but connecting aided roads, but, if that be so, it is also true that, with but few exceptions, all Ohio corporations, in so far as express legislative enactment is concerned, were disabled from holding and owning the stock of others. The history of the country and of the law, and the public and business necessities then felt, point with no uncertainty to the conclusion that it was the purpose on the part of the lawmakers in the use of the language employed, and that the precise language of the act means, that all private corporations should enjoy the new power conferred. That the act did not repeal any prior statutes upon the same subject-matter, embraces cases not covered by former legislation, and is not inconsistent with any law theretofore enacted, makes it a cumulative act within the definition given by Endlich on Statutory Interpretation, § 218.

In the construction of statutes the intent of the lawmakers must be found in the statutes themselves. The first resort in all cases is to the natural, ordinary, familiar signification of the words employed. The presumption is that language has been employed with sufficient precision to disclose the intent, and, unless an examination overthrows the presumption, nothing remains but to enforce the statute as written. If a law is plain and unambiguous, there is no room for construction, and it must be held that the lawmaking body meant what it plainly expressed, whether the expression be in general or limited terms. All of the provisions of the statute touching upon the subject-matter under consideration are to be examined, and in the comparison of sections it is not to be supposed that any words have been needlessly employed. Effect should be given, if possible, to the entire statute and to every section and clause, and one part should not be allowed to defeat another, if by any reasonable construction the two can stand together. Moreover, in construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment. *Cooley's Const. Lim.* (6th Ed.) 69-74; 24 *Am. & Eng. Ency. Law*, 597, 605, 611, 616, 618; *State v. Vanderbilt*, 37 *Ohio St.* 643; *In re Hathaway's Will*, 4 *Ohio St.* 385; *State v. Schlatterbeck*, 39 *Ohio St.* 268, 271.

Having regard to the canons of construction, the powers conferred by sections 3256 (as amended in 1902) and 3300, are consistent, may be exercised by the same corporation, and are clearly cumulative. The Chesapeake Company was authorized to acquire and may hold the stock of the Hocking Company, providing the latter is noncompeting and the result and purpose are not the formation of a trust or combination to restrict trade or competition.

Section 3256 was not construed in *State v. Railway Co.*, 12 *Ohio Cir. Ct. R.* (N. S.) 49, 59, nor was a construction of it necessary in that case. The court assumed that it applied to railroad corporations.

The complainants further contend that the Chesapeake Company

cannot lawfully acquire and hold stock in an Ohio corporation, because section 148d, Rev. St. (section 178, Gen. Code), does not permit the issuance of a certificate by the Secretary of State to a foreign corporation to do business in this state, unless the business of such corporation to be carried on is such as can be lawfully carried on by a corporation incorporated under the laws of this state for such or a similar business, and because the purchase and holding of stock by one corporation in another, it is claimed, is in violation of the public policy of the state. The mere ownership of stock by a foreign corporation in a domestic corporation, even if it be a controlling interest, does not constitute the transaction of business. *Peterson v. Chicago, R. I. & P. Ry. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841. It has been held that, without legal sanction, one corporation cannot subscribe for stock in another. *Railway Co. v. Iron Co.*, 46 Ohio St. 44, 18 N. E. 486, decided in 1888. In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 354, 355, 38 Am. Rep. 594, decided in 1881, it was said that one corporation cannot become the owner of any portion of the capital stock of another corporation unless authority to become such is clearly conferred by statute. That point, however, was not before the court for decision, and the case has never been cited by the Supreme Court. Only Ohio corporations were involved in those cases. In the *Franklin Bank Case*, the right to deal in shares of stock in other corporations was not found in the powers enumerated in the act under whose provisions the bank was organized; but, on the contrary, the power, in language of undoubted import, was denied and its exercise expressly prohibited.

The announcements made in the above cases are subject to the exception that to compromise a doubtful debt, or, if necessary, to save itself from loss, a corporation may become the owner of the stock of another, with a view to its subsequent sale and conversion into money. *First Nat. Bank v. Nat. Exchange Bank*, 92 U. S. 122, 128, 23 L. Ed. 679; *Armstrong v. Brewing Co.*, 26 Wkly. Law Bul. 39, 40; *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 425; *Lamprecht v. Kehrwicher*, 40 Ohio St. 646. And from language employed in *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 425, and *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558, it seems that still other exceptions are recognized. No case has been found in which there has been a ruling that a foreign corporation may not own stock in one incorporated within the state. The complainants contend, however, that this is immaterial. *Railway Co. v. Iron Co.*, and the *Franklin Bank Case* were invoked in *Hafer v. Railroad Co.*, 14 Wkly. Law Bul. 68, 70; but in that case the foreign corporation did not own the stock of the Ohio company, although it dictated how the stock should be voted. In *Smith v. Railroad Co.*, 8 Ohio Cir. Ct. R. 583, 591, it appears that the *Baltimore & Ohio R. R. Co.* owned stock in the insolvent defendant company and defended against the double statutory liability on the ground that it could not legally hold the stock and that what it did or attempted to do was ultra vires and void. As to this contention the court said:

"In *Railroad Co. v. Iron Co.*, 46 Ohio St. 44 [18 N. E. 486], it is held by the Supreme Court that: 'An incorporated company cannot, unless authorized by

statute, subscribe to the capital stock of another; a subscription so made is ultra vires and void.' Reading this proposition of the syllabus in connection with the quotation from Morawetz, p. 49, cited in support of it, and we think it is clear that the Supreme Court only intended to hold that a corporation cannot be an original subscriber or one of the incorporators of another corporation. If the Baltimore & Ohio Company cannot hold this 'Drexel, Morgan & Co.' stock, neither could it hold any of the common or preferred stock, which it is admitted it did own. Certainly a railroad company, without express authority in its charter, may invest its idle money in the dividend-paying stock of another corporation, and if it may do that, and enjoy the benefit of the dividends while paid, may it not be liable to assessment, the same as an individual, if from any cause the corporation becomes insolvent? We think the Baltimore & Ohio Company are liable to assessment on this stock as owners."

On review of the case in the Supreme Court the Baltimore & Ohio Company claimed that it was incapacitated to hold stock in the insolvent corporation, and was therefore not subject to assessment for the payment of its debts. On the other side it was asserted that that claim had been decided adversely to the Baltimore & Ohio Company when the case was previously before the circuit and Supreme Courts. 48 Ohio St. 219, 31 N. E. 743. The court held that the question was involved in the earlier hearing and had there been determined against the company. The language of the circuit court, however, regarding the investment of idle funds, went further, I think, than the circumstances of the case required.

Foreign corporations can exercise none of their franchises or powers within this state except by comity or legislative consent (*Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521; *State v. Life Ins. Co.*, 47 Ohio St. 179, 24 N. E. 392, 8 L. R. A. 129), and may be ousted by proceedings in quo warranto, if in doing their business here they exercise franchises in contravention of local law (*State v. Life Ins. Co.*, supra; *State v. Ins. Co.*, 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573). If the rule announced in the *Smith Case* and the construction hereinbefore placed on section 3256 are both unsound, the Chesapeake Company's right to purchase stock in the Hocking Company, if it exists, rests on the rule of comity. In *Cowell v. Springs Co.*, 100 U. S. 55, 59, 25 L. Ed. 547, it was argued that, if a domestic corporation could not be created with given powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise such powers in the state or territory. Mr. Justice Field, holding against that contention, said:

"The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the states and territories of the United States, by which corporations created in one state or territory are permitted to carry on any lawful business in another state or territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the state or territory does not permit the business of the foreign corporation in its limits or allow a corporation to acquire or hold real property, it must be expressed in some affirmative way. It cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations or allows corporations to be formed only by general law. Telegraph companies did business in several states before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one state are now engaged, without question, in business in states where the creation of corporations by special enactment is forbidden."

Mr. Justice Harlan held, in *Christian Union v. Yount*, 101 U. S. 352, 356, 25 L. Ed. 888, that:

"In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court. There was here no such direct legislation during or prior to the year 1870, nor can the existence of such a public policy be inferred from the general course of legislation or judicial decisions in Illinois up to and including that year, in relation to religious, benevolent, charitable, or missionary societies created in other states."

The rule in Ohio is in accord with that announced in the above cases. *State v. Ætna Life Ins. Co.*, 69 Ohio St. 327, 69 N. E. 608; *Ewing v. Bank*, 43 Ohio St. 31, 37, 1 N. E. 138.

On April 19, 1894 (91 Ohio Laws, p. 154; section 250—1, Rev. St.), it was enacted that every railroad company shall make out, under oath, and file with the Commissioner of Railroads and Telegraphs, on or before September 1st of each year, a true list of the names of each and every stockholder, giving the number of shares owned by him. A blank form of the reports to the Railway Commission now and in 1909 in use, affidavits showing the various railroad companies' ownership of stock in other companies in the years 1900, 1905, and 1910, a printed copy of the Railway Commission's report for 1909, and also certain portions of the Manual of Statistics for 1910, are offered in evidence. The blank form of report requires a disclosure of what the stockholding of each company is in another, what companies are controlled through stock ownership solely or jointly by the reporting company, and what lines have been practically absorbed or joined for operating purposes. As far back as 1900, the official published reports of the Commissioner of Railroads and Telegraphs show that railroad corporations, foreign and domestic, had holdings in Ohio companies so extensive, and approximately so nearly the aggregate issue of all of the stock of the controlled roads, and so shifting in amounts or from one owner to another, as to suggest that such holdings could not have resulted from the mere aiding of roads in process of construction. What the reports show prior to that date is not in evidence. The right to acquire and continue such holdings, in so far as the record discloses, has not been challenged except as to the domestic companies whose roads extend into the Hocking Valley coal fields. It is also shown that the Attorney General and certain prosecuting attorneys have, by the planting of suits, attacked such substantially or actually competing domestic coal roads and disputed the right of any of them to purchase stock in another, except as authorized by section 3300. It is also true that able lawyers have resisted such suits, and asserted, and still assert, the right of one of such companies to control another through stock purchases. Nor is it to be presumed that any of the railroad corporations have purchased the stock of others, except on legal advice.

Under the above-mentioned practice, in which it must be presumed the companies believed they had a right to indulge, vast sums (in one case alone more than \$92,000,000) have been expended by foreign railroad corporations in acquiring the stock of others chartered and operating in Ohio. The questions raised as to the rule of comity and the effect of such practices need not now be finally determined. My excuse for considering them is the earnestness with which they were presented by counsel. The situation is such that this court can well afford to await, if it be practicable to do so, the action of the state's highest court, before declaring the Chesapeake Company's stockholdings not warranted by the rule of comity, and may well refuse to award an injunction on that ground until a full and final hearing.

I think it must follow, from the evidence submitted, that the use by the Chesapeake Company of the Hocking Company's line as an outlet to the Great Lakes will result in some interference with interstate commerce; but whether such interference will be insignificant, or merely incidental, and is not a dominant purpose of the company (*Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428), or whether the necessary effect of the Chesapeake Company's control of the Hocking Company will be to stifle or directly and substantially restrict free competition, or whether such effect will be but incidentally and indirectly to restrict competition, while its chief result will be to foster the trade and increase the business of all the roads concerned (*Union Pacific Coal Co. v. U. S.*, 173 Fed. 737, 740, 97 C. C. A. 578), are questions which ought not to be, and, I think, cannot satisfactorily be, determined on the evidence submitted, and should await a final hearing, at which all the facts may be developed and the witnesses subjected to the test of cross-examination. The evidence before me on this point and as to the arrangements made or to be made with the Lake Shore & Michigan Southern Railway Company, in my judgment, justifies further investigation and a full hearing.

If an additional issue of the Hocking Company's common stock be had, the Chesapeake Company will have the privilege of acquiring its proportionate share of it. Before its holdings are increased, it should be finally determined whether, under the facts of this case, it may lawfully acquire and hold any of the Hocking Company's stock.

Additional affidavits concerning the board of directors of the Hocking Company have been offered. At the last annual election of directors there were 213,631 votes cast out of a total of 260,000. No candidate received less than 213,619 votes. There were manifestly no contests. No protest or objection was made as to the conduct or validity of the election. As the shares held by the Trunk Line Syndicate numbered approximately only 70,000, it was impossible for their holders unaided to select directors. Had the 70,000 votes been rejected, the directors would still have received a majority not only of all the votes cast, but of all of the votes, had every share of stock issued been voted. If the complaining parties voted at that election—on this the record is silent—they cast their votes for the board which was declared elected. As vacancies occurred in the board, they were

filled in the manner prescribed by law and the regulations of the company. It will not, therefore, be enjoined from discharging the duties lawfully devolving on it.

The Hocking Company is paying interest at the rate of 5 per cent. on \$2,500,000, borrowed for the purpose of retiring its preferred stock. Having express statutory authority to redeem or purchase back its preferred stock, it had the right to borrow money for that purpose, for, where a corporation has power to purchase its own shares, it may buy them on credit or may borrow money on mortgage, or otherwise, to pay for them. *Machen on Corp.* § 630; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. 89, 95, 96; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, 53 Atl. 68. Other items of expenditure to a considerable amount are shown, for which provision must be made. The Chesapeake Company is also paying interest on a large sum expended in stock purchases and is entitled to protection in a reasonable amount for such inconvenience and loss as it may sustain. The fact is not overlooked that, if common stock should issue, it would receive dividends, if they were earned. The bond should not be prohibitive to the prosecution of the suit, and yet should be adequate to reimburse the defendant companies should they prevail on the final hearing. I have concluded that, if a sufficient bond in the sum of \$75,000, properly conditioned, be given within 10 days from the filing hereof, an injunction may go, until further order, enjoining the Hocking Company from issuing additional common stock and the Chesapeake Company from voting its stockholdings in such company for any purpose. On the failure to give such bond within the time named, the existing restraining order will stand dissolved.

The motion for a temporary injunction is granted to the extent above indicated. The motion to vacate the restraining order is overruled.

In re CHARLES TOWN LIGHT & POWER CO.

(District Court, N. D. West Virginia. November 23, 1910.)

1. BANKRUPTCY (§ 88*)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.

Under Bankruptcy Act July 1, 1898, c. 541, § 59f, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), which provides that "creditors other than original petitioners may at any time enter their appearance and join in the petition," creditors may join at any time before adjudication, even though it be more than four months after the act of bankruptcy was committed, and will be counted to make up the requisite number of creditors and the amount of claims required by the act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 88.*]

2. BANKRUPTCY (§ 72*)—PERSONS SUBJECT TO ACT—"TRADING" CORPORATIONS—"MANUFACTURE."

Electricity generated for the purpose of furnishing light, heat, and power is a product of "manufacture" and a commercial commodity, and a corporation whose business it is to buy electricity and resell it to consumers for such purposes at a profit is engaged principally in "trading,"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), and may be adjudged an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 5, pp. 4344-4346; vol. 8, p. 7716; vol. 8, p. 7053.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

3. BANKRUPTCY (§ 72*)—"TRADE."

"Trade," within the bankruptcy act (Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), is the buying and selling of merchandise or any class of goods, deriving a profit therefrom.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 8, pp. 7037-7042.]

4. WORDS AND PHRASES—"DYNAMO"—"GENERATOR."

A "dynamo" or "generator" is a mechanism which generates electromotive force by moving a closed circuit in a magnetic field.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2298.]

5. WORDS AND PHRASES—"PRIMARY BATTERY"—"SECONDARY BATTERY"—"STORAGE BATTERY."

A "primary battery" is one in which chemical action takes place directly to produce electromotive force, while in a "secondary battery" the electromotive force is produced by a chemical action set up after a current of electricity has been passed through the cell for some time. Secondary batteries are commonly called "storage batteries."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5550; vol. 7, p. 6378.]

6. WORDS AND PHRASES—"SAL AMMONIAC."

The electrolyte commonly known as "sal ammoniac" is a solution of chloride of ammonium.

In the matter of the Charles Town Light & Power Company, alleged bankrupt. On petition in involuntary bankruptcy. Order of adjudication.

A petition in involuntary bankruptcy was filed herein by C. J. Devore, a single creditor, alleging defendant to be a corporation, principally engaged in trading and mercantile pursuits, owing petitioner a debt of over \$2,600, having less than 12 creditors, and with having committed acts of bankruptcy: (a) By causing to be recorded within four months of the filing of the petition a conveyance by mortgage or deed of trust all of its property to secure \$18,000 of bonds; and (b) by suffering a receiver to be appointed for it by a state court. To this petition answer has been filed by the alleged bankrupt, averring itself to be a corporation chartered for the purpose of "supplying light and power by electricity to the public at Charles Town, Jefferson county, W. Va., and to such persons, partnerships, and corporations residing therein or adjacent thereto as may desire the same," denying that it is "engaged principally in trading and mercantile pursuits," denying that its creditors are less than 12, but alleging their numbers to be between 17 and 20, and setting forth the names and addresses of some 17 of such creditors. It admits that it executed the deed of trust to secure \$18,000 of bonds on November 18, 1904, for the purpose of betterment of its plant, to which it alleges the money was applied, and admits that such deed of trust was not admitted to record until within four months of the filing of this petition, but why not, was, it alleges, for reasons known to the trustee and not to it. It denies the execution and recordation of this deed of trust to be an act of bankruptcy. It admits its assent to the appointment of a receiver for it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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"because, for prudential business reasons, it was deemed better that any conflicting claims of creditors could be more easily and with more rapidity adjudicated and arranged." It avers that it owes debts not exceeding \$30,000 and owns a plant and property that cost between \$35,000 and \$45,000 and has contracts with the town of Charles Town and with other corporations and individuals, and the "question of its insolvency would depend upon the market value of this plant and property * * * and the value of its contracts."

Pending consideration of this petition, the Shenandoah Valley Bank and the Winchester & Washington City Railway Company, as creditors, have entered appearances and joined in the petition, as provided in section 59f of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and some 12 other creditors have also appeared and expressed opposition to the adjudication of the defendant as bankrupt. By order, the issue raised by petition and answer was referred to a referee "to ascertain and report the facts"; but since the entry of this order counsel have agreed certain facts and submitted the cause to this court for decision.

The agreed facts substantially are: That prior to March 26, 1906, the alleged bankrupt company generated electricity by its own power at its plant in Charles Town, and still has in possession this plant and electric equipment; that on said 26th day of March, 1906, it entered into a contract with the Winchester & Washington City Railway Company whereby it contracted to buy from the latter, under certain terms and conditions set forth in the contract, its entire supply of electricity to be supplied over the alleged bankrupt's lines by the railway company from its power plant on the Shenandoah river three miles from Charles Town; that since the execution of said contract it has not been generating electricity at its own plant, but has been selling and delivering over its own lines the electricity so purchased by it from the railway company to its patrons in Charles Town, including the town itself, under a contract exhibited, its profit being the difference between the price at which it so purchased this electricity and the higher price at which it sells it, delivered to its customers in Charles Town.

George M. Beltzhoover, Jr., for petitioners.
Forrest W. Brown, for defendant.

DAYTON, District Judge (after stating the facts as above). Counsel for the alleged bankrupt in argument now insists that this petition must be dismissed for two reasons: First, the petition is filed by a single creditor when more than 12 creditors are shown to exist. Second, because the alleged bankrupt corporation is not a trading company within the meaning and intent of the bankrupt act.

The first proposition can be readily disposed of. Section 59f of the act provides:

"Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

Under this provision it is now well settled that creditors may join at any time before adjudication, even though it be more than four months after the act of bankruptcy was committed, and will be counted to make up the number of creditors and the amount of claims required by the act. In *re Stein* (Second Circuit) 105 Fed. 749, 45 C. C. A. 29; In *re Plymouth Cordage Co.* (Eighth Circuit) 135 Fed. 1000, 68 C. C. A. 434; In *re Romanow* (D. C.) 92 Fed. 510, 512; In *re Mercur* (D. C.) 95 Fed. 634. In these cases, and especially in the *Plymouth Cordage* one, the exact questions involved in this proposition here are determined. Therefore the two intervening creditors,

recognized and set forth as such in the answer of the alleged bankrupt, having joined in the prayer of Devore's original petition before adjudication, and the debts due these three together being sufficient to give jurisdiction, I must overrule the motion to dismiss on this first ground assigned.

The second ground for dismissal presents a far more difficult and perplexing question. The petition alleges the defendant to be "engaged principally in trading and mercantile pursuits." The defendant by its answer denies its business to be of this character.

In ordinary language the word "trade" is employed in three different senses: First, in that of the business of buying and selling; second, in that of an occupation generally; and, third, in that of a mechanical employment, in contradistinction to agriculture and the liberal arts. Ordinarily, when we speak of "trade," we mean commerce or something of that nature; when we speak of "a trade," we mean an occupation, in the more general or the limited sense. As used in a statute seeking to make unlawful combinations to create or carry out "restrictions in trade," the word is used as the mere equivalent of commerce or traffic. Citing *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397, 400, 22 L. R. A. 483; *United States v. Patterson* (C. C.) 55 Fed. 605, 639; 8 Words and Phrases, 7038.

It is very clear that the bankrupt act uses the word in the first sense; that of buying and selling merchandise or any class of goods, deriving a profit therefrom.

The fact is undisputed that this company is buying, selling, and delivering electricity to its patrons for profit. Therefore the question resolves itself into whether electricity is a commercial commodity that can be "manufactured," "produced," "generated" in form to be bought and sold in commerce, or is it a natural force, like water and air, that can only be confined and directed? Loveland, in his work on Bankruptcy (3d Ed. 178), cites in a note the only case I have been able to find where the question has been directly passed upon by a court of bankruptcy. This is the case of *In re Suburban Electric Co.*, decided by one of the District Courts of Kentucky, where an electric light company, furnishing power and light, was adjudged bankrupt. Unfortunately, as Loveland says, the case was never reported, and we are therefore deprived of the court's reasoning upon which such adjudication was made. On the other hand, in *Re New York & W. Water Co.* (D. C.) 98 Fed. 711, it is held that a water supply company transporting and supplying water to its patrons was not "engaged in trading" within the meaning of the bankruptcy act.

In construing certain tax laws, generally, having for their purpose the favoring of manufacturing industries by relieving them of taxation, the question has several times arisen whether electric companies are "manufacturing" ones within the meaning of such acts. Up to this date there is direct conflict in the decisions with the appellate courts of New York (*People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708) and of Alabama (*Beggs v. Edison Electric Illuminating Co.*, 96 Ala. 295, 11 South. 381, 38 Am. St. Rep. 94), asserting the affirmative, while those of Maryland (*Frederick Electric Light & Power Co. v. Mayor, etc.*,

of Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130) and New Hampshire (*Williams v. Warren*, 72 N. H. 305, 56 Atl. 463, 64 L. R. A. 33) hold the negative. The Supreme Court of Pennsylvania has had trouble with the question. In *Com. v. Northern Electric Light & P. Co.*, 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107, while affirming the judge below in holding, under the terms of its statute, the electric company to be subject to taxation, it expressly registered its dissent to his reasoning whereby he determined that such companies were not engaged in manufacture; but the force of this dissent was subsequently greatly weakened by other decisions. *Com. v. Keystone Electric L. H. & P. Co.*, 193 Pa. 245, 44 Atl. 326; *Southern E. L. & P. Co. v. Philadelphia*, 191 Pa. 170, 43 Atl. 123.

It has been repeatedly held that gas companies are strictly manufacturing corporations, within both the letter and the spirit of such tax laws favoring manufacturing industries. *Dudley v. Jamaica Pond A. Corp.*, 100 Mass. 183; *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409; *Schuylkill County v. Citizens' Gas Co.*, 148 Pa. 162, 23 Atl. 1055. But, on the other hand, the impounding and supplying of natural gas for fuel has been held not to be manufacturing. *Emerson v. Com.*, 108 Pa. 111; *Com. v. Northern E. L. & P. Co.*, 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107.

The Supreme Court of Maine, in *Edison United Mfg. Co. v. Farmington Electric L. & P. Co.*, 82 Me. 464, 19 Atl. 859, has held an electric light company to be just like a gas company. "Each," it says, "supplies a town with artificial light. Each manufactures its power." The Supreme Court of Maryland, having decided, in the Frederick City Case, as stated above, that electric companies were not "manufacturing" ones, in the more recent case of *Purnell v. McLane*, 98 Md. 589, 56 Atl. 830, holds that the "right to produce and sell electricity as a commercial product without legislative authority is open to all." The justices of the Supreme Court of Massachusetts in an opinion to the Legislature of the state (*Opinion of the Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487), repeatedly use expressions indicating their belief that generating and supplying electricity are manufacturing. In *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291, the Supreme Court of South Carolina asks this question:

"The city has the express power to own property, and it also has the implied right to light the city. Do these powers necessarily imply the right to make the city the owner of the plant and a manufacturer of electricity?"

But it is needless to pursue further the decisions of the courts touching directly and indirectly this question. Those who may be curious to know what difficulty the courts have had in defining what "manufacture" means can find the authorities fully collated in a very able and exhaustive note to the case of *Williams v. Warren*, *supra*, as reported in 64 L. R. A. 33.

It is clear to my mind that all judicial definitions must necessarily change and enlarge to an extent in order to conform to new and changed conditions.

Electricity, whatever it may be, exhibiting itself in its free state in the form of lightning's bolt, ought in reason to be distinguished from

that, which, under perfect control, runs the electric car, the automobile, furnishes artificial light and heat, or conveys the messages by telegraph and telephone wires. Nature makes the one; man "generates" or "manufactures" the other by combination or contact of elements that nature furnishes. The one may be well termed natural or free electricity; the other commercial electricity.

From the text-books on the subject we learn that man "generates" or produces electricity, or electromotive force in three ways: First, by chemical action between two or more bodies; second, by the heating of the junction point of two dissimilar metals; third, by the movement of a closed circuit in a magnetic field. For commercial purposes the first and third methods only are common. The second method is used only in laboratory experiments. A mechanism which is used to generate electromotive force by moving a closed circuit in a magnetic field is called a "dynamo" or "generator." This is the method adopted to secure such electricity for heat, light, and power, and, as the New York court says, renders it necessary to invest large capital in a plant, which might be, appropriately enough, called a factory, to purchase and consume vast stores of coal (or other fuel or force) to make steam and furnish power to operate a complicated system of machinery, boilers, engines, dynamos, shafting, belting, and other things common in manufacturing establishments.

Then, too, the apparatus by means of which the electric current which conveys messages is generated is known as a "battery." Batteries are primary and secondary. A "primary battery" is defined as one in which chemical action takes place directly to produce the electromotive force, while in a "secondary battery" the electromotive force is produced by the chemical action set up after a current of electricity has been passed through the cell for some time. Secondary batteries are commonly called "storage batteries." There are many types of primary batteries; each possessing peculiar features. In all forms, however, the electromotive force is generated by chemical action, taking place between two dissimilar bodies called the "elements," which are surrounded by a liquid called the "electrolyte." The electrical potential generated depends on the nature of the substances used as elements. In telephone practice, for example, besides some forms of dry batteries, four types of batteries are available: First, the gravity battery, in which the elements are metallic zinc and metallic copper, and the electrolyte is a solution of copper sulphate in water. Second, the Le Clanche cell battery, in which the elements are zinc and carbon, and the electrolyte is a solution of chloride of ammonium, commonly known as "sal ammoniac." Third, the Fuller cell, in which the elements are zinc and carbon, and the electrolyte consists of a solution of three parts bichromate of potash, 1 part sulphuric acid, and 9 parts water. Fourth, the Edison-Lalade cell, in which the elements are zinc and copper oxide, and the electrolyte is oxide of potassium or caustic potash dissolved in water.

Thus it is seen that, unlike the utilization of water and air by simple control and guidance of them to the desired end, commercial electricity is produced by labor, machinery, and by chemical combination of various different elements. To do this is the very essence of man-

ufacture—"the making of something from raw materials by hand, by machinery, or by art." And, when so manufactured, it cannot be denied that electricity can be bought, sold, measured, and delivered. Therefore companies like the defendant here may make it their principal business to so buy, sell, measure, and deliver electricity and in doing so become "trading companies" within the meaning of the bankrupt act.

The defendant, the Charles Town Light & Power Company, will be adjudicated bankrupt.

COMPAGNIE DE NAVIGATION FRANÇAISE v. BURLEY et al.

(District Court, W. D. Washington, W. D. October 3, 1910.)

No. 604.

1. INDEMNITY (§ 14*)—CONCLUSIVENESS AS AGAINST INDEMNITOR OF FORMER ADJUDICATION AGAINST INDEMNITEE.

Where a person is responsible over to another for whatever may be justly recovered in a suit against such other and he is duly notified of the pendency of the suit, requested to defend, and given an opportunity to do so, the judgment therein, in the absence of fraud or collusion, will be conclusive in a subsequent suit against him for indemnity.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. 14.*]

2. PILOTS (§ 16*)—HARBOR PILOTS—DEGREE OF CARE AND SKILL REQUIRED.

A harbor pilot is selected largely for his knowledge of local conditions affecting the safety of the vessel. He must be familiar with all such conditions, and must not only remember and avoid all the dangers of a physical nature, but must also know and observe all the lawful regulations of the local authorities affecting the conduct of the ship. If, through his negligence the ship suffer loss, either directly or because it commits injury to others, he is liable for indemnity.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. § 19; Dec. Dig. § 16.*]

3. TOWAGE (§ 11*)—NEGLIGENT ANCHORAGE OF TOW—RECOVERY OF DAMAGES AGAINST TOW FOR COLLISION—LIABILITY OF TUG FOR INDEMNITY.

A French bark having taken on her cargo at Tacoma, with which port her officers were unacquainted, employed respondents who were engaged in the towage and pilotage business to tow her to an anchorage in the harbor. A fog settled down after they started and respondents' tug anchored the bark in a part of the harbor where such anchorage was prohibited by the local regulations without a permit from the harbor master which was not obtained. The officers of the bark had no knowledge of such regulation, and she remained there until the evening of the following day when a steamer leaving the port, the weather being then foggy, came into collision with her and was injured. The owners of the steamer brought suit and recovered half damages, the bark being held in fault and liable for anchoring in the fairway in violation of the regulations. Respondents were notified of the suit and requested to defend, but did not, and the owners of the bark paid the damages adjudged against her, and brought suit against respondents for indemnity. *Held*, that it was the duty of respondents to anchor the bark in a lawful place, and their negligence in failing to do so having been the ground of the recovery against her they were liable over for the amount of the damages paid by her, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

disbursements and proctor's fees paid, and also for demurrage for the time she was necessarily delayed by the suit, to be computed at the rate stipulated for in the charter under which she was operating in the absence of other evidence.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

In Admiralty. Suit by *Compagnie de Navigation Française*, as owner of the French bark *Amiral Cecille*, against *Thomas S. Burley* and *Robert McCullough*, doing business under the firm name of the *Tacoma Tug & Barge Company*. Decree for libellant.

Hughes, McMicken, Dovell & Ramsey, for libellant.
James M. Ashton, for respondents.

DONWORTH, District Judge. On the evening of November 9, 1904, during a heavy fog the French bark *Amiral Cecille*, lying at anchor in *Tacoma Harbor* was struck by the steamer *Multnomah* which had just left her berth at *Tacoma* bound for *Seattle* on one of her regular trips. The *Multnomah* suffered damage but the bark was uninjured. On a libel filed in this court by the owner of the *Multnomah* against the bark, Judge *Hanford* decided both vessels to be at fault, the *Multnomah* in failing to steer with proper care and in failing in other respects to exercise the vigilance demanded by the existing circumstances, and the bark by reason of the fact that she was anchored without a written permit from the harbor master, in a location where such anchoring was prohibited by city ordinance. The damages were accordingly divided, and a decree for one-half damages and one-half costs in favor of the owner of the *Multnomah* was entered against the bark. The *Amiral Cecille* (D. C.) 134 Fed. 673. In holding the bark at fault, Judge *Hanford* said (134 Fed 676):

"The evidence introduced in behalf of the respondent locates the bark at the time of the collision approximately 400 feet from the place indicated by 'H. 2' upon libellant's Exhibit 1. Both locations are unnecessarily near to the track of vessels entering and leaving the waterway, and this is so because there is in the harbor of *Tacoma* an abundance of room for anchorage at a safe distance from the track of vessels coming into and leaving the wharves and docks; and the circumstances above narrated do not, in my opinion, afford a reasonable excuse for the action of the tugboat manager in anchoring the bark within the prohibited zone. He knowingly violated a reasonable regulation prescribed by lawful authority, and for the consequences of his act while in the service of the bark as a local pilot the bark is liable to respond in damages. The *Robert Rickmers* (D. C.) 131 Fed. 638. There is no probability whatever that the accident would have happened if the ordinance had not been violated by anchoring the bark in that part of the harbor which I have referred to as the prohibited zone. It is true, that if a permit had been applied for, it might have been granted by the harbor master; but it is not fair to assume that he would have granted such an application, and it is sufficient for the purpose of this case to find that the permit was not obtained, and without it the bark was prohibited from anchoring at the place where she was anchored. It is my opinion that the mere failure of the harbor master to exert his authority to enforce the city ordinance is not the equivalent of a permit in writing, and does not condone the offense. * * * In the case of *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148, the Supreme Court declared the law as follows: 'But when, as in this case, a ship at the time of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such cases the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.' This was repeated and declared to be the settled rule in collision cases by the Supreme Court in *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U. S. 422, 10 Sup. Ct. 934, 34 L. Ed. 398. The same rule was again reiterated in the case of *Belden v. Chase*, 150 U. S. 699, 14 Sup. Ct. 264, 37 L. Ed. 1218. And in the case of the *United States v. St. Louis & Miss. Transportation Co.*, 184 U. S. 255, 22 Sup. Ct. 350, 46 L. Ed. 520, the Supreme Court held that local harbor regulations are necessary aids to commerce, and must be obeyed, like other statutory requirements, and that, where a vessel 'anchors in an unlawful position, or fails to observe the statutory requirements and such other precautions as good seamanship would suggest, it must suffer the consequences attending a violation of the law.' In this the court quotes with approval *Spencer on Marine Collisions*, §§ 99, 106."

Capt. Burley, one of the respondents here, was the tug boat manager and pilot under whose guidance the bark was towed and anchored on the occasion in question. The present libel, filed by the owner of the bark charges the respondents (who were copartners, jointly engaged in the business of harbor towage and pilotage) with violation of duty in negligently and wrongfully causing the bark to be anchored in the fairway directly in the course of vessels bound in and out of Tacoma Harbor and at a point forbidden to be used for anchorage of vessels by the city ordinance, alleges the proceedings in the former suit, and seeks to recover from respondents the amount paid by libelant in discharge of the decree in that cause, together with certain sums expended for proctors' fees and costs in defending the same, and also damages for the detention of the bark caused by the litigation.

During the progress of the former suit the present libelant served notice upon the present respondents of the pendency thereof and the nature of the claim asserted by the owner of the *Multnomah*, and called upon respondents to make defense, stating that the libelant would look to them for reimbursement of any moneys which it should be compelled to pay in consequence of the collision. Respondents took no action in response to this notice. Libelant now asks that the decision in the former case be held to be *res judicata* against respondents on the ground that where a person is responsible over to another for whatever may be justly recovered in a suit against such other, and he is duly notified of the pendency of the suit, requested to defend and given an opportunity to do so, the judgment therein, in the absence of fraud or collusion, will be conclusive in a subsequent suit against him for indemnity. Under the authorities this contention must be sustained. *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712. By stipulation of the parties, a great part of the evidence taken in the former case has been made a part of the record in this case, and there is also additional evidence not offered before. Aside from the binding effect of the former decision, I fully concur in the above-quoted conclusions expressed by Judge Hanford,

both as to the law and facts, so far as the issues in the two cases are the same.

The question of fact which is most seriously contested on the present hearing is whether at the time of the collision the bark was in the same place at which she dropped anchor by order of Capt. Burley the day before. On this point Judge Hanford found (134 Fed. 674):

"For the convenience of shipping, the city of Tacoma provided several buoys in the harbor for mooring ocean-going vessels, and the ordinance referred to contains a section authorizing ships to moor at said buoys by permission of the harbor master and upon payment of a fee of \$10 for 15 days' use; one of said buoys, commonly called the 'government buoy' being situated within the zone in which vessels are prohibited from anchoring without a permit, and which, for convenience, will be hereafter referred to as the 'prohibited zone.' On the 9th day of November, 1904, the bark, having completed the taking on board of her cargo from her berth in the waterway was towed by a local tug to the place where she was anchored at the time of the collision on the evening of the following day, the towage service being performed under the personal direction of the manager of the tugboat company, and the bark dropped her anchor by his direction at a place selected by him within the prohibited zone near the location of the government buoy."

If the question whether the bark changed her location after anchoring and before the collision is still an open one, I have no hesitation in concluding that the weight of the evidence indicates that she did not. A number of witnesses so testify. The bark's log makes no mention of a dragging of the anchor or other change of location until after the collision. There is no claim of high wind or severe weather and no ground on which to base a finding that the bark's ground tackle was defective. Capt. Burley learned of the collision a day or two after it occurred and as the bark remained at Tacoma for a month thereafter, he could have investigated the condition of the bark's ground tackle and procured evidence to disprove the correctness of the log entries, if they were wrong. It must have been apparent to him, before he was given notice to defend the suit, that his action in anchoring the bark in that location was likely to become the ground of a claim against his firm. On the whole evidence it seems reasonable to conclude that Capt. Burley is mistaken in estimating the distance from the point where the anchor was dropped to the site of the government buoy (at or near which he found a pile driver grappling for the chains of the buoy which had broken its mooring and disappeared). The bark's log states that she anchored in 40 fathoms, while the evidence for respondents gives only 22 fathoms of water at the government buoy. If the log is correct, she must have anchored outside of the site of the buoy. Everything indicates that the mention of 40 fathoms in the log is a genuine entry made at the time. There is no dispute, but that the soundings taken from the vessel in the location which she occupied at the time of the collision, showed from 38 to 48 fathoms, depending upon the direction in which she was tailing. Her location was then approximately 700 feet outside of the position fixed by a number of respondents' witnesses as the site of the buoy, and I am of the opinion that if these witnesses are correct, she anchored at that distance rather than within 200 feet as estimated by Capt. Burley. However that may be, it is not disputed

that the vessel was anchored within the limits of the zone prohibited by the ordinance and without a written permit from the harbor master, and it was on that ground that she was held liable by the court. I find nothing in the evidence which would justify me in holding that the officers or crew of the vessel committed any fault which contributed to the collision.

The respondents had been engaged for several years in the towage and pilotage business at Tacoma, and had towed to anchorage 99 per cent. of the vessels going out of the harbor. They did not usually tow or pilot ships to sea, but took them to anchorage in the harbor where they remained until taken in tow by a sea-going tug. This was the function for which respondents were employed by the Amiral Cecille. A dense fog having settled down shortly after Capt. Burley started with the bark, he concluded that he could not safely take her to the usual anchorage across the bay which he had in mind at the time of starting. He defends his action in anchoring at a location prohibited by the ordinance on the ground that it was dangerous to navigate in the fog, as the bark might collide with vessels at anchor or moored in that part of the harbor extending toward the anchorage grounds. It is urged that he acted under necessity and in extremis. But even if it be conceded that he was justified in temporarily anchoring the bark, he was not justified in assuming that his employment and duty then terminated. Having a business engagement down the sound, he left Tacoma within a few hours after anchoring the bark and was absent several days. On the day following the anchoring the fog lifted for an hour or two about noon, and during that time it would have been possible to remove the bark from her unlawful location. The officers of the bark, however, were at no time told by Capt. Burley that he considered the action which he had taken as one of necessity. He did not inform them of the ordinance or of any other fact which would lead them to conclude that their position was in any way dangerous or that they were not at the usual harbor anchorage for which they started. The second mate was the only person on board who spoke or understood both English and French and his knowledge of English was limited. The officers had a right to rely upon the services of Capt. Burley for getting the bark to a safe and lawful anchorage. The language of the Circuit Court of Appeals of this circuit in a case involving the same principle is in point:

"The master of the tug undertook a certain towage service. He was prevented from the continuous performance of that service by the condition of the tide. But the duty of the tug to the schooner was a continuous one from the time when she was taken in tow until the completion of the towage contract. The tug's duty did not end with letting go the tow line at the anchorage grounds. Its obligation of reasonable care continued at least until the schooner was safely anchored." *The Printer*, 164 Fed. 314, 90 C. C. A. 246.

A harbor pilot is selected largely on account of his personal knowledge of the local conditions affecting the safety of the vessel. He must be familiar with all such conditions. He must not only remember and avoid all the dangers of a physical nature, but he must also know and observe all the lawful regulations of the local authorities affecting the conduct of the ship. In commenting upon the duties

of river and harbor pilots, Mr. Justice Miller, speaking for the court in *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619, says:

"It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control (for in this they are absolute masters) the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses this very class of skill, we do not think we fix the standard too high."

If, through the negligence of the pilot the ship suffer loss, either directly or because it commits injury to others, the pilot is liable for indemnity. *Wilson v. Charleston Pilot Association* (D. C.) 57 Fed. 227; *Donald v. Guy* (D. C.) 127 Fed. 229.

It is admitted that the present libellant paid into the registry of the court on May 8, 1907, the sum of \$4,339.90 in satisfaction of the decree against the *Amiral Cecille* and incurred further taxable costs in defending the former suit amounting to \$670.02; also that it paid out \$1,000 for proctors' fees in that suit. It is clear that these amounts are recoverable against respondents. The authorities cited by counsel for respondents against the allowance of proctors' or attorneys' fees are not in point where they have been incurred in another suit, and their recovery is sought as damages against one who is liable over. *N. Y. State Ins. Co. v. Protection Ins. Co.*, Fed. Cas. No. 10,216; 8 Am. & Eng. Enc. Law (2d Ed.) 674. Referring to the damages claimed for 30 days' detention of the ship by reason of the admiralty proceedings against her, the record shows an agreement of counsel to the effect that the French consul at Seattle shall be considered as having testified "that the master of the *Amiral Cecille* was unacquainted in this port, and the ship and its owners had no agents or factors at any American port; that it was necessary to communicate with the owners and with the French and English insurers, which communications were carried on by the French consul and covered a period of 30 days before the necessary arrangements could be made and security furnished to enable the owners to obtain release of the vessel; and that the ship was detained by the marshal, and unable to depart until after the furnishing of such security." There is no evidence in any way tending to qualify or rebut this statement. While a detention for 30 days seems entirely unnecessary in these days of almost instantaneous communication throughout the important cities and ports of the world, I feel bound by this evidence to hold that the libeling of *Amiral Cecille* by the owners of the *Multnomah* necessarily caused a detention of 30 days. The bark's tonnage is 1,874 and the charter party under which she was working at the time provided for demurrage at three pence per registered ton per day. The demurrage for 30 days would amount to \$3,422.39. In stating the effect of such a stipulation in a charter party as bearing upon the damages recoverable for the ship's detention, the Circuit Court of Appeals of this circuit has said:

"Conceding that it may not be conclusive in all cases, it nevertheless makes out a *prima facie* case, which, in the absence of any proof to the contrary, justifies the rendition of a decree in accordance therewith." *The Columbia*, 109 Fed. 660, 48 C. C. A. 596.

Here there is no evidence other than the stipulation of the charter party as to the actual loss which the owners sustained by reason of the detention. The amount stipulated in the charter party is therefore the only basis on which the court can act. It follows that libellant is entitled to recover the several amounts hereinbefore stated, aggregating \$9,432.31. It is not clear under the circumstances of the case whether libellant should recover interest on any part of this award. "Whether interest on damages ought to be allowed depends upon the circumstances of each case and rests very much in the discretion of the tribunal, which has to pass upon the subject, whether it be a court or jury." *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153; *Lincoln v. Claffin*, 7 Wall. 132, 19 L. Ed. 106.

As to whether interest in any amount will be allowed to libellant the parties will be heard at the time of the presentation of the decree for signature.

NOTE.—After the filing of this opinion, the respondents applied for and obtained leave to submit further proofs relating to the length of time for which demurrage should be allowed and the actual loss sustained by the bark's detention. On a subsequent hearing the foregoing decision was modified in this respect, and the damages for detention limited to five days.

In re ALLEN.

In re HEIM BREWERY CO.

(District Court, E. D. Arkansas, W. D. November 23, 1910.)

No. 1,249.

1. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—CONSTRUCTION OF CONTRACT—BAILMENT OR SALE.

Bankrupt, a liquor dealer, purchased bottled beer in cases, in car load lots, from petitioner, a brewing company, under a written contract fixing the price per case, including the bottles and cases, but providing that petitioner should "allow a rebate of \$1.50" for each case of empty bottles returned; that the bankrupt should pay the net price for the beer only, but should "pay cash for all cases or bottles not returned." *Held*, that such contract was not one of bailment as to the cases and bottles, but of sale and return, under which the title passed to the bankrupt and as to cases and bottles on hand to his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. BAILMENT (§ 1*)—DEFINITION.

A "bailment" is a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be served.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 1-12; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, pp. 673-676.]

3. SALES (§§ 1, 24*)—"CONTRACT OF SALE"—"OPTION TO PURCHASE"—"OPTION TO RETURN."

A "contract of sale" is when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price. An "option to pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"chase" is merely an agreement whereby the vendee may, upon compliance with certain terms and conditions, become the owner of the property; the vendor giving him that option. An "option to purchase" differs from an "option to return" in that in the former the property does not pass, while it does pass in the latter subject to the right to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 49-51; Dec. Dig. §§ 1, 24.*

For other definitions, see Words and Phrases, vol. 2, pp. 1531-1534; vol. 8, p. 7616; vol. 6, pp. 5000-5002; vol. 8, p. 7739; vol. 2, p. 929.]

4. SALES (§ 4*)—"BAILEMENT" DISTINGUISHED.

A transaction is a "sale," as distinguished from a "bailment," when there is no obligation to return the specified article.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 7-11; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

In the matter of John Q. Allen, bankrupt. On review of order of referee sustaining the petition of the Heim Brewery Company to reclaim property. Reversed.

The Heim Brewery Company filed its intervention for a number of casks and cases containing empty beer bottles in the possession of the trustee of the estate of the bankrupt, claiming to be the owner thereof and entitled to the immediate possession. The claim is based upon the following contract:

"Contract.

"Little Rock, Ark., April 22, 1910.

"This contract is entered into on this date between the Heim Brewery of Kansas City, Mo., and Allen & Kirkland, liquor dealers, Little Rock, Ark. Allen & Kirkland agree to purchase bottled beer in car load lots, f. o. b. Kansas City, Mo., at the following prices: Kyffhauser beer, 4 doz. small bottles in cases, \$3.10. Kyffhauser beer, 2 doz. large bottles in cases, \$3.10. Heim Brewery agrees to allow a rebate of \$1.50 for each case of empty bottles returned to the Heim Brewery, containing either 4 dozen small, or 2 dozen large bottles, and pay return freight charges on all empty bottles to the Brewery in car load lots. It is mutually agreed that Allen & Kirkland are to pay the net price only on the bottled beer, but it is distinctly understood and agreed to by Allen & Kirkland that they pay cash for all cases or bottles not returned to the Heim Brewery, at the rate of \$1.50 per case for either large or small bottles. It is further agreed that the dating on the first car of beer shipped to Allen & Kirkland is for sixty (60) days' credit, and every car thereafter is to be paid for in thirty days from date of the arrival of the beer in Little Rock. Heim Brewery agrees to give Allen & Kirkland five cases of pints free in each car to aid in drayage and advertising same, and also a two per cent. discount on all cars of beer they pay for in thirty days from the arrival of said beer in Little Rock, which includes the first car shipped.

"[Signed]

John Q. Allen.
"D. O. Kirkland."

The trustee denied that under the contract the intervener was the owner of the property, but insists that the property claimed belongs to the bankrupt's estate.

The cause was submitted upon an agreed statement of facts, which shows that under that contract the bankrupt bought large quantities of beer from the intervener; that the beer was delivered in cases containing bottles and in casks containing bottles bearing the individual brand and registered copyright of the intervener; that a part of said casks, cases, and bottles have been returned; but that the trustee is now in possession of a number claimed by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the intervener. Upon a hearing before the referee, he found in favor of the intervener. The cause now comes before the court on petition for review by the trustee.

William H. Rector, for intervener.

G. A. McConnell, for trustee.

TRIEBER, District Judge (after stating the facts as above). On behalf of the intervener, it is claimed that, until the articles claimed are paid for by the vendee, it is merely a bailment, and he is entitled to a return of them, or, at most, that it was an option to purchase. On the other hand, it is claimed on the part of the trustee that it was a contract of "sale and return."

A "bailment" is properly defined as being a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be served. 2 Kent, Com. 558.

On the other hand, a "contract of sale" is when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price. An "option to purchase" is merely an agreement whereby the vendee may, upon compliance with certain terms and conditions, become the owner of the property; the vendor giving him that option.

The leading case upon which the intervener relies is *Westcott v. Thompson*, 18 N. Y. 363. In that case the contract was for the sale of beer and provided for the sale of the beer to the vendee at a certain price. The beer was to be shipped in barrels and the barrels to be returned to the plaintiff when emptied of the beer, and if not returned the vendee was to pay for every barrel not returned the sum of \$2, and thereupon become the owner thereof. On the other hand, in the case at bar, the contract provides that the vendee is to be charged and pay for the cases and bottles, but in case he wishes to return any of the cases and empty bottles he is to be allowed a rebate on his bill of \$1.50 for each case of empty bottles returned to the intervener.

Is this an option to purchase or a contract of sale and return? The distinction between these two forms of agreement has been aptly pointed out in *Hunt v. Wyman*, 100 Mass. 198, as follows:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title would not pass until the option is determined; on the other hand, the property passes at once, subject to the right to rescind and return."

See, also, *Guss v. Nelson*, 200 U. S. 298, 26 Sup. Ct. 260, 50 L. Ed. 489; *In re Schindler* (D. C.) 158 Fed. 458; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Martin v. Adams*, 104 Mass. 262.

Applying this rule to the contract between the intervener and the bankrupt, it clearly appears that it was not an option to purchase, but a contract of sale and return, while, on the other hand, the contract in *Westcott v. Thompson* was merely an option to purchase. In the latter case it was optionary with the vendee to keep the empty barrels

and pay the sum of \$2 for each barrel kept by him or to return them. In the case at bar the bankrupt was charged and promised to pay for the cases and bottles unless he desired to return the same, and if he did he was to be paid or given credit on his account therefor the sum of \$1.50 for each case and bottles therein.

Great stress is laid upon the fact that under the contract the bankrupt was to pay the net price only on the bottled beer, still the charge was made against him, and until he returned them he was liable to the intervener who had a cause of action against him. In *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160, the contract between the parties spoke of the cars sold as being leased until paid for, but notes were executed by the vendee for the full purchase money. The cars, before they were paid for, having been seized under execution, the vendor claimed them as his property, but the court held that calling it a lease did not make it so, nor was it a conditional sale, but merely an attempt to retain a lien for the purchase money, and, the same not having been recorded as required by the laws of the state of Missouri, it was void as against creditors.

In *Re Rahilly v. Wilson*, 3 Dill. 420, Fed. Cas. No. 11,532, grain was stored in a warehouse with the understanding that it should be sold by the warehouseman, and when the depositor would surrender the receipt therefor the warehouseman had the right to return an equal amount of grain of equal quality or pay the then market price of the grain. Upon these facts it was held by Judge Dillon that it was a sale and not a bailment. The distinction between bailments and sales is clearly shown by the opinion of that eminent jurist, who carefully reviews the authorities on that subject.

In *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093, the court held that "a transaction is a 'sale,' as distinguished from a 'bailment,' when there is no obligation to return the specified article." In this case there was no obligation on the part of the bankrupt to return the property claimed by the intervener; but, if he saw proper, he had the right to do so and receive a credit for the amount specified in the agreement. If the property had been destroyed by fire or by any other cause, even if without any fault or negligence on the part of the bankrupt, the loss or destruction would still have fallen on him. This is the rule applicable to contracts of sale and return. *Moss v. Sweet*, 16 Q. B. 493; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Schlesinger v. Stratton*, 9 R. I. 578.

As this was a contract of sale and return and not a mere option to purchase, nor a bailment in any sense, the title passed to the bankrupt, and the trustee is entitled to the possession of the property.

The finding of the referee will be set aside, and judgment entered dismissing the intervention, with costs.

CITY REALTY CO. v. S. R. H. ROBINSON CONTRACTING CO.

(Circuit Court, E. D. Arkansas, W. D. November 18, 1910.)

No. 5,519.

1. DRAINS (§ 2*)—ARKANSAS STATUTE AUTHORIZING ESTABLISHMENT BY COUNTY—REPEAL BY IMPLICATION.

Acts Ark. 1903, p. 278 (Kirby's Dig. Ark. §§ 1414-1450), authorizing any county court to construct a drainage ditch on petition in case after a hearing it approves the report of viewers previously appointed to condemn right of way and assess the damages and benefits, subject to the approval of the court and right of appeal, the lands assessed for the work to constitute a drainage district designated by number, was not repealed by implication by Acts Ark. 1905, p. 143, providing a method for the exercise of the right of eminent domain by levee and drainage districts organized under the laws of the state, by commissioners appointed by the judge of the circuit court on application of the president or secretary of such district, which act applies only to districts created by law having officers and corporate powers; whereas, under the act of 1903 the entire business is done by the county court, which merely lays off the districts for assessment purposes, such districts having no organization nor officers.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 2.*]

2. STATUTES (§ 161*)—REPEAL BY IMPLICATION—GENERAL RULES.

Where two statutes cover, in whole or in part, the same matter and are not wholly irreconcilable, no purpose to repeal being clearly expressed or indicated, effect is to be given to both, and the former statute will not be considered as repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

Repeal of statutes by implication, see note to First Nat. Bank v. Weidenbeck, 38 C. C. A. 136.]

At Law. Action by the City Realty Company against the S. R. H. Robinson Contracting Company. On demurrer to amendment to answer. Overruled.

Bradshaw, Rhoton & Helm, for plaintiff.
John McClure, for defendant.

TRIEBER, District Judge. The plaintiff sued the defendant, who had a contract from the county court of Pulaski county to build a drainage ditch in that county, designated by the court as "drainage district No. 1 of Pulaski county," for trespass in cutting the ditch on the lands of plaintiff. An amendment to the answer sets up as a plea in bar to the action that the drainage district was so designated by the county court of Pulaski county under an act of the General Assembly of the state of Arkansas of April 23, 1903, entitled "An act to enable the owners of swamp and marshy lands to drain and reclaim them, when the same cannot be done without affecting the lands of others, prescribing the duties of county courts and other officers in the premises, and to provide for the repair and enlargement of such drains." Acts Ark. 1903, p. 278. This act is digested in Kirby's Digest of the Statutes of Arkansas, 1904, as sections 1414 to 1450.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plea sets up fully all the steps that were taken for the laying off of the district and shows a strict compliance with all the provisions of that act, including the condemnation of the lands belonging to the plaintiff. The plaintiff demurred to this amendment to the answer upon the ground that the act of 1903, in so far as it provides for the assessment of damages and condemnation of lands necessary for the building of the ditch, was repealed by an act of the General Assembly of the state of Arkansas of February 24, 1905, entitled, "An act to provide a method for the exercise of the right of eminent domain by levee drainage and ditching districts." Acts Ark. 1905, p. 143. The proceedings for the laying off of this drainage district were begun in the county court of Pulaski county in June, 1905, after the passage of the latter act. This act does not in specific terms repeal the act of 1903, but it is claimed on behalf of the plaintiff that the later act covers the entire subject regulating the exercise of the right of eminent domain for drainage and levee districts and the assessment of damages, and therefore repeals the former act by implication.

The law governing repeals by implication is well settled by the decisions of the highest court of the state of Arkansas and may be stated to be as follows: Repeals of statutes by implication are not favored, and, unless it clearly appears that the two acts are so inconsistent that they cannot be reconciled and stand together, the former act will not be deemed as having been repealed. Also, that when the Legislature takes up the whole subject anew and covers the entire subject-matter of the former statute, and evidently intends it as a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new act.

Assuming for the present that the act of 1905 was intended as a substitute for all prior acts on that subject, does it include drainage districts laid off under the provisions of the act of 1903? A careful examination of the legislation of the state shows that a large majority of the levee and drainage districts in the state have been created by special acts of the Legislature, although there has been for over 30 years a general act for the creation of levee districts, which is digested in Kirby's Digest of the Statutes of Arkansas as chapter 100, sections 4927 to 4964. The subject of drainage was taken up by the General Assembly at a much later date than that of levees, and the first acts on the subject were special acts for the benefit of certain counties enumerated in each act. In 1903 the Legislature saw proper to enact a general act which differs in many respects from all previous special acts as well as the special acts enacted since then. In that act there is no provision for the creation or even organization of a district; no officers for such districts are provided for by this act, but the entire matter is left to the county court of each county, to be set in motion by a petition filed with the clerk of that court, signed by one or more landowners if the improvement is less than five miles in length, and by five or more landowners if it be more than five miles in length, whose lands will be liable to be affected by or assessed for the construction of the same.

In this connection it is proper to call attention to the fact that under the Constitution of the state the county court has administrative powers as well as being a court of record. Its administrative powers are the control of all the affairs of the county. Upon a petition being filed by resident landowners of the lands to be affected, the county court is authorized to appoint resident freeholders of the county, not interested in the construction of the work, as viewers, and also a competent civil engineer to assist them, and they are to make a report of their findings to the county court who would then, after a hearing, determine whether the work should be undertaken or not. Notice of the appointment of the viewers and a hearing on the report are provided for in the act, and any person interested can file a remonstrance or objection to the work being done. Thereupon a hearing is to be had by the county court and the petition either granted or denied. If the petition is granted, then the lands affected and assessed for the payment of the cost of the work are to constitute a drainage district to be designated by number, and the viewers are directed, with the aid of a civil engineer, to lay out the route of the ditch and estimate the probable cost thereof. They are also to report what lands or railroads would be benefited by the improvement and apportion the cost to each in proportion to the benefit or damages which would result therefrom. The viewers are empowered to condemn the right of way and assess all damages to the owners for the appropriation of their lands, and other damages sustained, which shall be credited on their assessments as a payment, and file a report of their findings with the county court. Thereafter a day is to be set for a hearing and notice provided to the owners by the service of a summons on each of them by the sheriff, or, if they are nonresidents, by publication in a newspaper. If the court at the time set for the hearing finds that due notice had been given to all the parties, a hearing shall then be had, otherwise the cause shall be continued until each landowner has been served with notice as prescribed by the statute. At that hearing all acts of the viewers and the assessments are to be reviewed, and evidence of the objecting landowners heard by the court and a final judgment entered in accordance with the conclusions of the court. This judgment is subject to appeal to the circuit court, and from that court to the Supreme Court of the state. *Sharum v. Fry* (Ark.) 129 S. W. 818. There are other provisions in the act which are immaterial so far as the question now before the court is concerned and for this reason need not be referred to.

The act of 1905 seems to have been originally intended solely for the benefit of the board of directors of the St. Francis levee district, a district created by a special act with officers and full corporate powers, but was amended so as to include "all other levee and drainage districts organized under the laws of the state of Arkansas." That act provides that the exercise of the right of eminent domain by such levee or drainage district organized under the laws of the state of Arkansas is to be performed by commissioners appointed by the judge of the circuit court of the county in which it is situated, upon the application of the president or secretary of any levee or drainage dis-

trict, and this, it is claimed, applies to every drainage district whether created as a body corporate and politic by the act of the Legislature and designated as such, or merely laid off as a district by the county court under the provisions of the act of 1903.

A careful examination of the act of 1903 shows that there was no intention on the part of the Legislature to create drainage districts under that act which are to have the powers of bodies corporate, but that they were to be districts laid off by the county court under the absolute control of that court, with no officials nor any of the attributes of a corporation. It makes no provision for any officers whatever, while, on the other hand, all other districts have a board of directors, a collector, a treasurer, authority to borrow money and issue bonds therefor, levy its own assessments, collect them through its own officers, and when collected to be paid to its own treasurer and by him paid out again upon the orders of the board of directors of the district. They are also invested with the power to sue and be sued, and to pay all damages assessed out of its treasury under the order of the directors. On the other hand, under the act of 1903, it is the county court which levies the assessments and which issues the bonds or warrants; the assessment is placed upon the tax books by the county clerk in the same manner as other county taxes; they are collected by the collector of county taxes and the money paid into the county treasury and drawn out again by warrant of the clerk of the county court in pursuance of an order of that court. Section 1437 provides how bonds may be issued by order of the county court and what provision shall be made by that court for paying them. Section 1448 provides that all fees shall be paid out of the county treasury when claims therefor are allowed by the county court, and the general county fund shall be reimbursed out of the moneys realized from the sales of bonds or collection of taxes. Suits are to be brought in the name of the state of Arkansas at the relation and to the use of the collector of revenue of such county.

It will thus be seen that under the act of 1903 drainage districts are to be designated and laid out practically in the same manner as ordinary county roads, with this difference: That the cost thereof shall be paid by the owners of the lands according to the benefits derived after a hearing in a court of record, and whose judgment is subject to review by higher courts, including the Supreme Court of the state. No district under the act of 1903 can be said to be a district organized under the laws of the state, although laid off under its laws. If the act of 1905 repealed the act of 1903, how is a drainage district laid off under the act of 1903 to proceed in the condemnation of lands necessary to cut a ditch? The circuit judge can only act under that act upon application of the president or secretary of the district. See section 2. But these districts have no such officers, nor any other. A careful examination of the two acts, in view of the history of the legislation of the state for over 30 years, conclusively shows that the object of the act of 1905 was for those levee and drainage districts which had a corporate existence, of which there are probably over 50 now in existence in this state, all of them created by special acts of the

Legislature and clothed with corporate powers. No doubt, when this act of 1905 was introduced for the benefit of the board of directors of the St. Francis levee district, which is the largest in the state, it was thought best to make it apply to all districts similarly situated, instead of passing special acts for the benefit of each separate district. If the intention of the Legislature had been to make it apply to such districts as were laid off under the provisions of the act of 1903, it would have been an easy matter to use language to show that intent, and at the same time provide for some landowner affected by the cutting of the drainage ditch to make the application for condemnation. The proceedings in the circuit court under the act of 1905 are special statutory proceedings, not according to the course of the common law, nor in the exercise of the court's general jurisdiction, and for this reason a judgment rendered by the court, if the petition or record fail to show jurisdiction, its judgment would be absolutely void. As the jurisdiction of the circuit court can only be invoked by the president or secretary of a district, and there being no such officers in districts laid off under the act of 1903, how could that court obtain jurisdiction upon the petition of any other person? *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, and *Morris v. Dooley*, 59 Ark. 483, 28 S. W. 30, 430, are conclusive on that point.

But, even if it be conceded that it was the intention of the Legislature to have the provisions of the act of 1905 apply to districts laid off under the act of 1903, does the later act have the effect of repealing the former act in the absence of a special provision to that effect? That the Legislature has the power to invest the county court and the circuit court with jurisdiction to entertain condemnation proceedings is unquestioned, and for this reason it cannot be said that it clearly appears that the two acts cannot stand together. The Supreme Court of this state has in several well-considered cases held that a later act vesting jurisdiction in one court does not deprive any other court of jurisdiction of the same subject-matter which it possessed prior thereto. In *Patton v. Wagner*, 19 Ark. 233, it was held that a statute authorizing common-law courts to entertain jurisdiction of proceedings for the partition of real estate did not deprive courts of equity of their jurisdiction in cases of that nature. In *Jones v. Jones*, 28 Ark. 19, it was held that the jurisdiction granted to probate courts to assign dower did not deprive chancery courts of their jurisdiction to lay off dower. In *Murray v. Rapley*, 30 Ark. 569, and *Roberts v. Wilcoxson*, 36 Ark. 355, it was held that the statute conferring upon common-law courts jurisdiction to enforce mechanic's liens on real estate did not divest the chancery courts of the same jurisdiction.

Even if it be conceded that the act of 1905 does cover the entire subject of the exercise of the right of eminent domain for all levee and drainage districts, existing under the laws of the state of Arkansas, that would not justify the court in holding that the provisions of the act of 1903 on that subject are repealed thereby, for in order to have that effect it must be clear that the whole subject-matter is

covered, and that it was the intention of the Legislature that it should be the exclusive remedy. Or the rule may be stated as follows: Where two statutes cover, in whole or in part, the same matter and are not wholly irreconcilable, no purpose to repeal being clearly expressed or indicated, effect is to be given to both, and the former statute will not be considered as being repealed. *Frost v. Wenie*, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; *United States v. Healey*, 160 U. S. 136, 147, 16 Sup. Ct. 247, 40 L. Ed. 369; *United States v. Greathouse*, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130; *Stryker v. Board of Commissioners*, 77 Fed. 582, 23 C. C. A. 286; *Board of Commissioners v. Aetna Life Insurance Co.*, 90 Fed. 222, 32 C. C. A. 585; *City of Wichita v. Old Colony Trust Co.*, 132 Fed. 641, 66 C. C. A. 19; *Benton v. Willis*, 76 Ark. 443, 88 S. W. 1000.

That it was not the intention of the Legislature to repeal the act of 1903 is further shown by the fact that these provisions of the act of 1903 were amended by the General Assembly of the state by the act of March 26, 1907. Acts Ark. 1907, p. 276. The title of that act is "An act to amend sections 1414, 1415, 1416, 1424, 1434, 1435, 1436, 1437, 1438, 1442, and 1443 of Kirby's Digest of the Statutes of the State of Arkansas." If it had been the intention of the Legislature to repeal those sections by the act of 1905, it would have been, of course, impossible to have amended them in 1907, and, while the construction placed by the legislation upon prior statutes of a state is not conclusive on the courts, it is certainly entitled to consideration in determining the question whether the statute thus amended had before that time been repealed.

In the opinion of the court the act of 1903 was not repealed by the act of 1905, and the county court of Pulaski county had jurisdiction to lay off the district and have the damages assessed by viewers appointed under that act.

The demurrer to the amendment to the answer is overruled.

In re COTTON & PRESTON.

(District Court, S. D. Georgia, S. W. D. September 30, 1910.)

1. BANKRUPTCY (§ 407*)—DISCHARGE—GROUNDS FOR REFUSAL—OBTAINING PROPERTY ON FALSE STATEMENT.

A written statement, made by a bankrupt to a creditor, 18 months prior to the bankruptcy, on the occasion of the purchase of a considerable bill of merchandise on credit, afterward fully paid for, which statement was on a printed blank furnished by the creditor and filled out by him from answers to questions propounded to the bankrupt, although materially false and containing a provision that it was made as a basis for credit for purchases "now or hereafter made, unless changed by written authority from the undersigned," cannot be made the basis of an objection to the discharge of the bankrupt, under Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), making it a ground for refusal of a discharge that the bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit," be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause of another purchase from the same creditor a year afterward, and six months prior to the bankruptcy, of goods which remained unpaid for; the statement not having been made "for the purpose of obtaining such property on credit," within the fair intentment of the statute.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

2. BANKRUPTCY (§ 407*)—GROUNDS FOR REFUSAL OF DISCHARGE—OBTAINING PROPERTY ON FALSE STATEMENT—PARTNERSHIP.

A materially false statement, made by one member of a bankrupt partnership for the purpose of obtaining property for the partnership on credit, without the participation or knowledge of his partner, cannot be interposed as a bar to the discharge of the innocent partner.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

In the matter of Cotton & Preston, bankrupts. On exceptions by Ragan, Malone & Co. to report of referee as special master recommending discharge. Exceptions overruled, and discharge granted.

See, also, 183 Fed. 190.

The following is the report of Max Isaac, Special Master:

Ragan, Malone & Co. filed their appearance in opposition to the discharge applied for in this case by Cotton & Preston as a firm, and E. S. Cotton and F. F. Preston as individuals, and presented their objections thereto, as follows, to wit:

"(1) Because said bankrupts obtained property on credit from them upon a materially false statement in writing, made to them for the purpose of obtaining such property on credit; such statement being made to them August 5, 1907, and being, as therein shown, made for the purpose of obtaining credit and to be binding for such purchases 'now or hereafter made, unless changed by written authority from the undersigned.' A copy of such statement is hereto attached and made a part thereof, marked 'Exhibit A.' On such statements these debtors extended credit and sold said bankrupts goods from time to time, and at the time the petition in bankruptcy was filed said bankrupts were, and are, indebted to these debtors on account of such purchases as shown by statement of account hereto attached and made a part hereof, marked 'Exhibit B,' to which reference is prayed as often as may be necessary. Said statement was materially false, in that said bankrupts began business with a capital only of \$450. In said statement they say they began business with a capital of \$3,000.

"(2) On August 5, 1907, notes and accounts belonging to said bankrupts were about \$300 or \$400 in amount. In said statement they claim to be \$1,000 in amount.

"(3) On August 5, 1907, E. S. Cotton, one of said bankrupts, owed his wife some \$3,000. In said statement the claim is made that said bankrupts owed no money whatever to wives or relatives."

"(4) Said statement is in other particulars incorrect."

To these objections the bankrupts filed their general and special demurrers, in which they contend that no legal or statutory allegations are set forth in said specifications that would bar the discharge applied for; that said specifications do not allege that said false statement in writing, upon which the property was alleged to have been procured, was knowingly and falsely made by said bankrupts at the time it was so made; that said specifications do not allege that said statement was made for the purpose of procuring the specific property or credit for which debtors now contend that said bankrupts are indebted to them; that said specifications show that the copy written statement attached thereto as an exhibit and referred to therein and the copy account attached thereto and referred to therein, with the alleged statement, was executed on the 5th day of August, 1907, that the first line of credit extended or goods sold to said bankrupts was from August 6, 1907, to August 30, 1907, and that said bankrupts paid for all of said goods, property, or line of credit, and that the alleged written statement could not be the basis of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

credit for the particular goods for which bankrupts are now indebted to objectors as shown by said account attached; that neither said bankrupts, nor either of them, ever subsequent to August 5, 1907, made to objectors any other written statement, and that no new arrangements or no new statement was made upon which a future line of credit or future bill of goods was so procured from objectors; that said written statement recites no consideration or new promises of statements which could be the basis of credit for subsequent bills of goods, after the shipment and payment therefor of the original bill of goods shipped out to said bankrupts, made after the execution of said written statement; that the words "now or hereafter made, unless changed by written authority from the undersigned," incorporated in said written statement, are not binding upon bankrupts, for the reason that there was no consideration, nor new statement, nor new promise flowing to these bankrupts, or injury occurring to these objectors, moving the execution of such words or sentence contained therein, and that, after these bankrupts had paid for the original bill of goods shipped out immediately after said written statement was executed, said language seeking to bind these bankrupts for future purchases from objectors became nudum pactum and cannot be enforced; that said specifications did not allege that the goods or property for which objectors now claim these bankrupts are indebted to objectors were sold, or the credit extended, on the faith of said written statement; that is, that the said written statement was made prior to and for the purpose of procuring the identical credit for which objectors now claim these bankrupts are indebted to them. There are numerous other grounds of special demurrer, directed to the insufficiency of the objections referred to, which grounds of demurrer are mere amplifications of those already stated and need not be repeated here.

By agreement of counsel, the special master reserved his ruling on the demurrers, for the reason that his decision thereon would not finally end the matter in the event the District Judge differed with him, should he sustain the demurrer, and it was thought advisable to take the testimony and pass on the entire case. If the demurrer ought to be sustained, the special master would make his ruling on the demurrer alone. If he concluded to overrule the demurrer, he would then pass on the merits of the case.

Statement of Facts.

Evidence was heard in support of and in opposition to the said objections, a transcript of which is hereto attached, and respectfully referred to, and made a part of this report. From this evidence the special master finds as follows: Ragan, Malone & Co. are a firm of wholesale merchants doing business in Atlanta, Ga. Their salesman had called on Cotton & Preston, a firm then engaged in the mercantile business at Broxton, in Coffee county, Ga. He had endeavored to obtain their orders for goods; but, failing in this, his house made direct efforts to sell goods to Cotton & Preston, and on their own motion invited Cotton & Preston to come to Atlanta and call on them and purchase goods. To further carry out this effort to sell them goods, Ragan, Malone & Co. sent a check to Cotton & Preston to cover travelling expenses of one member of the firm to Atlanta and return, and F. F. Preston, a member of the firm of Cotton & Preston, proceeded to Atlanta to call on Ragan, Malone & Co. to look over their stock of goods with a view of making purchases.

Having selected goods aggregating \$821.68, Preston was invited into the office of this concern, and Mr. Ragan, the senior member of the firm and the credit man, asked Preston for a financial statement of Cotton & Preston. Preston, without having his books before him, merely from his recollection, then and there proceeded to furnish Ragan the figures which he (Ragan) filled in the blanks in the stereotyped printed form used by the firm for the purpose, which statement contains the following language: "Statement of Cotton & Preston, made to Ragan, Malone & Co., for the purpose of obtaining credit, and this statement shall be binding for each purchase now or hereafter made, unless changed by written authority from the undersigned." And again: "The above property in my [or our] name, and titles perfect, paid for, and no

mortgages or liens in any shape upon it. In consideration of credit extended or to be extended on the faith of my [or our] solvency as shown by this statement, I [or we] hereby waive and renounce for himself [or ourselves] and family any and all homestead exemption rights under the laws of the United States or of any state, as against the payment of any indebtedness now owing or hereafter existing in favor of said Ragan, Malone & Co., and this waiver shall apply for all property now owned or hereafter acquired by the undersigned."

The evidence touching the circumstances under which the statement aforesaid was made is not altogether in harmony. Mr. Ragan testified that Preston came to Atlanta to buy goods, and Ragan asked him if he wanted to buy for cash or on credit, and he said, "On time," and Ragan told him it was necessary for Ragan, Malone & Co. to have a statement of the financial condition of Cotton & Preston, and he said he would give him the statement. They went into Ragan's office, and the written statement was made as a basis of credit for what goods Preston might buy. Ragan also claims that he told him (Preston) that he could order goods at any time on this statement if satisfactory, could also buy from their traveling salesman, and that he called Preston's attention to the fact that this statement held good for future purchases.

On the other hand, Preston's version of this incident is that nothing was said to him about the "statement being binding for each purchase thereafter made, unless changed by written authority from the undersigned." After he went through the stock of goods, he went into the office of Mr. Ragan, and Mr. Ragan said that he (Preston) might make a statement of the financial condition of the firm, and Preston told him he was not prepared, and he said that he wanted some idea of the condition of the firm. He got the blank, and asked Preston the questions, and Preston answered them. Preston insists that the statement insisted upon is not the identical statement made by him while in Atlanta. He claims that the questions asked him by Ragan did not embody one to this effect, "Amount indebted to your wife or relatives." In this connection Mr. Rogers, a member of the firm of Rogers & Heath, representing the bankrupts, testified that he had examined the statement submitted here as a correct copy of the original, and another copy attached to certain criminal proceedings pending against F. F. Preston in Atlanta, which is said to be a correct copy of the original, and the copy in Atlanta does not contain the statement about the amount indebted to wife and relatives, and to whom indebted, and when due. Mr. Rogers testified that he had carefully examined the statement in Atlanta.

The specific grounds alleged by the objectors, wherein it is claimed that said statement was materially false, are as follows: On August 5, 1907, Preston stated to Ragan, Malone & Co. that Cotton & Preston began business with a capital of \$3,000. The facts are as follows: Cotton & Preston embarked in business September 1, 1905, at Broxton, Ga. Their capital stock and assets consisted of a bankrupt stock of goods, which they bought at private sale from one Mark Lott for \$1,294 in cash. This money was furnished by E. S. Cotton, the senior member of the firm, who had borrowed it from his wife in 1901, to whom he gave his note on September 14, 1905. Cotton testified at a previous examination that when the firm of Cotton & Preston was formed he had \$500 in the business of Cotton Bros., and that Preston had \$150; that neither of these amounts were applied to the purchase price of the bankrupt stock, or otherwise put into the business of Cotton & Preston, as Preston owed Cotton \$150, and it was applied accordingly. Neither of them had any other money. Preston testified that, when the firm of Cotton & Preston was founded in 1905, he put in as capital \$150 and Cotton put in \$1,250. He contends that the bankrupt stock, which was bought for \$1,295 at private sale, really amounted to \$2,500 or \$2,600.

The next charge made in the objections is that on August 5, 1907, Preston stated to Ragan, Malone & Co. that Cotton & Preston had notes and accounts amounting to \$1,000, whereas the evidence itself shows that the notes and accounts amounted to about \$300 or \$400. At the hearing of the objections to the discharge, Preston testified that the amount of solvent debts on April

5, 1907, amounted to \$1,000, as claimed by him, and since that time he has examined the books of the firm of Cotton & Preston, and that there were \$1,000 or more due them on that date.

The third charge made in the objections to the discharge is that on August 5, 1907, E. S. Cotton owed his wife some \$3,000. It is claimed that in the statement it is stated that said bankrupts owe no money whatever to wives or relatives. Inasmuch as the evidence positively shows that no such item appears in the copy of the original statement attached to the criminal proceedings in the criminal court of the city of Atlanta, as testified to by Mr. Rogers, and which is supported by the evidence of Preston to the effect that no such question was asked him, the special master feels that, in the absence of the original statement, these charges cannot be sustained.

Findings of Law.

The bankrupts in their demurrer raised an interesting question involving the construction of the amendatory act of 1903, now embodied in section 14b (3) of the bankruptcy law. The point arises: First. Because of the appearance in the alleged false statement of the following language: "This statement shall be binding for each purchase now or hereafter made, unless changed by written authority from the undersigned." Second. Because the account attached to the specifications of objections to the discharge shows that the purchases made by the bankrupts were all more than five months, and in some instances even longer than this, prior to the filing of the petition, and more than a year after the making of the alleged statement, and for these reasons that the objectors could not seriously contend that the said goods were sold upon the faith of the statement made more than a year prior to said purchases, and nearly six months before the filing of the petition in bankruptcy.

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard and investigate the merits of the application and discharge the applicant unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." Bankruptcy Act, § 14b.

"The effect of this new objection will be that every tradesman whose credit is not unquestioned will be asked to give a mercantile statement as a condition precedent to dealing, and, it may be suggested, a new statement with every transaction." Collier on Bankruptcy (7th Ed.) p. 284.

In construing the phrase "for the purpose of obtaining such property from the creditor," Mr. Collier says: "This element will presumably always exist where a sale results from the statement. At the same time there must be some proof of intention, though it need not amount to intent to defraud. This interesting question, as to how far a false statement once made may be availed of by a creditor, who subsequently sells a second or other bill of goods without asking a new statement or for a correction of the old, is not important, since the Senate's amendments to the Ray bill. The crucial words are 'such property.' They limit this objection in a way that will prove troublesome in practice. Statements made to mercantile agencies, unless, perhaps, in the form of special reports, the giving of which by the purchaser can be proven to have been 'for the purpose' of the identical creditor in question, will, it is thought, be of no value as objections to discharges, although it has been suggested that the statement need not be made directly to the person defrauded. The striking out from the Ray bill by the Senate of the words 'or of being communicated to the trade' is significant." Collier on Bankruptcy (7th Ed.) pp. 286, 287. See, also, as to the suggestions that a new statement must accompany each transaction, *In re Dresser & Co.*, 13 Am. Bankr. Rep. 620, 144 Fed. 318.

I have been unable to find any decisions directly in point as to the binding effect of the clause in the statement that it should cover future purchases. The bankruptcy act itself, as contained in the amendment, seems to negative such right. *In Re Shaffer*, 22 Am. Bankr. Rep. 150, 169 Fed. 726, Judge Day-

ton says: "Creditor must rely upon it (the statement) when parting with his property, and if he did so rely upon it, and it was materially false in fact, it is sufficient to defeat a discharge. If the creditor did not rely on it, or if the debtor did not make the statement for obtaining the property on credit, it will not bar a discharge, no matter how false the statement may be"—citing *Loveland on Bankruptcy* (3d Ed.) 809; *In re Scott*, 11 Am. Bankr. Rep. 327, 126 Fed. 981; *In re Harr*, 16 Am. Bankr. Rep. 213, 143 Fed. 421; *In re Peterson*, 10 Am. Bankr. Rep. 355; *In re Goodhile*, 12 Am. Bankr. Rep. 380, 130 Fed. 782; *In re Dresser*, 13 Am. Bankr. Rep. 616, 144 Fed. 318; *In re Pincus*, 17 Am. Bankr. Rep. 331, 147 Fed. 621. *In Re Terens*, 22 Am. Bankr. Rep. 897, 172 Fed. 939, Judge Quarles says: "It is matter of common knowledge that such statements are frequently intended as a continuing representation for indefinite periods of time. I am of opinion that the date of the statement is immaterial, if property has in fact been obtained upon the strength of it within the four-months period, as is the case here. We are not called upon to decide whether under any circumstances the four-months limitation can be read into the third subdivision of section 14b, and merely hold that, where goods have been furnished and credit has been extended on the faith of such statement within four months of the bankruptcy, the date of the property statement should be held immaterial."

In the case just cited, the bankrupt, in behalf of his firm, made a property statement to the International Harvester Company in writing, and signed the firm's name thereto and his own name as a member of the firm, representing certain facts as to the financial standing of the partnership, "for the purpose of obtaining credit from you, or as a basis for credit for future business or extending past-due indebtedness." This statement was made upon a printed blank furnished by the Harvester Company. Opposite the printed interrogatory, "Owe bank (loan or overdraft)," there was written in pencil the word "None." This blank was filled up by the agent of the Harvester Company from information given him by the bankrupt as the several questions were read and propounded to him. Evidence was then offered showing that this statement was relied upon in shipping the goods and extending the credit to the firm. Within four months of the bankruptcy goods were shipped by the Harvester Company to the firm, as it alleges, upon the strength of this continuing representation. At the time this statement was made the firm did owe a certain bank \$5,000. The trial judge held that, inasmuch as this statement was made within four months of the filing of the petition in bankruptcy, the date of the property statement should be held immaterial. In the case at bar, however, the statement was made fully a year and six months before the filing of the petition in bankruptcy, and more than a year before the last items of credit extended thereon; the last item of credit being extended nearly six months before the filing of the petition in bankruptcy.

The case most directly in point is *In re Allendorf*, 12 Am. Bankr. Rep. 321, 129 Fed. 981, in which it appears that some time prior to September 9, 1902, the bankrupt wrote one of the objecting creditors, requesting it to send him a bill of goods on credit. Before sending the goods the creditor requested a statement from the bankrupt of his financial condition. In response to this request the bankrupt, on September 9, 1902, sent the creditor a statement, from which it appears that he omitted to state that he was owing his wife's mother and another lady some \$800 or \$900, and this amount and about \$375 to another creditor are not stated in the list of his liabilities. Upon receipt of this letter and statement, the creditor shipped the goods. The testimony of the bankrupt shows that the credit so obtained was afterwards settled and paid by him in January and February following. Afterwards, and on May 15, 1903, the bankrupt ordered by letter from this creditor another bill of goods amounting to \$63, and on May 20th another order amounting to \$250, both of which were filled and the goods shipped to the bankrupt. The credit man of the objecting creditor testified that the order of May 15, 1903, was the first the firm had received from the bankrupt for several months, and before approving it he looked up their information on Allendorf, and read his statement of September 9, 1902, and on the strength of that statement approved the order and shipped the goods, and that the order of May 20th

was also approved and the goods shipped on the strength of such statement. On these facts Judge Reed says: "Conceding, without so deciding, that a materially false statement made prior to the amendment of February 5, 1903, to the bankruptcy law, may be shown to defeat a discharge in proceedings commenced since that amendment, do the facts shown sustain this specification? That the omission by the bankrupt from this statement of the amount owing by him to his relatives and to the other creditor, if knowingly or purposely done, would be a material false statement, may be conceded. Does it, however, fairly appear that such statement was made for the purpose of obtaining goods ordered May 15th and 20th, respectively? The statement was made at the request of the creditor, when it received the order for goods some time prior to September 9, 1902, and to induce it to fill that order. There is nothing in the statement, nor in the letter of the bankrupt inclosing it to the creditor, to show that it was to be a continuing statement or representation of the bankrupt's financial standing. In fact, the statement is expressly limited to his condition on September 9, 1902; and the testimony of the credit man of this creditor and the letter of the bankrupt conclusively show that it was made to secure the bill of goods prior to September 9th only. Between that date and May 15th following (more than eight months) there was no dealing between these parties, and there is no evidence from which it can be fairly inferred that the statement was made for the purpose of obtaining the goods shipped upon the orders of May 15th and May 20th. To defeat a discharge, the bankrupt must have obtained property upon a materially false statement made in writing for the purpose of obtaining such property. The statement in question was not made for the purpose of obtaining the goods shipped by the bankrupt to this creditor on May 15th and 20th, respectively, nor any other property for which he is now owing. It follows that the specifications of objection in opposition to the discharge are not sustained by the evidence, and the discharge must be granted; and it is so ordered."

It will be observed that in the Allendorf Case there was no clause in the statement making it a continuing one, while the statement involved in this proceeding does contain such a clause. The case is interesting from its bearing upon the time which elapsed from the date of the making of the statement to the time of the making of the last purchases, and its importance will become more apparent when considered in connection with the decisions hereinafter referred to.

Even if the clause in the statement that it should be regarded as continuing is binding upon the bankrupts, when offered in opposition to their discharge, the next question which arises is: How far can this statement be regarded as continuing? It must be borne in mind that the statement was made on August 5, 1907, and the bulk of the purchases were made about that time. The petition in bankruptcy was filed one year and six months after the making of the statement, and the last purchases were made nearly six months before the petition in bankruptcy was filed.

In discussing the question, in the case of *Mashburn v. Dannenberg*, 117 Ga. 573, 44 S. E. 100, the Supreme Court of Georgia says: "The only statement made prior to the sale of the goods contained in the invoice of May 1, 1897, was the one dated July 14, 1896, which was more than nine months before the date of the invoice. As to the sale of goods in this invoice, the right of the plaintiff to rescind depended upon whether the credit was actually given upon the faith of the statement made in the preceding year, and whether, under all the circumstances, the plaintiff had a right to act upon the faith of a statement made to a mercantile agency at such a distant day in the past, and whether a merchant making statements to such agencies intends for them to be relied upon after the lapse of such a time. No arbitrary time can be fixed when a statement to a mercantile agency will become 'stale' and persons should no longer act upon it; but whether such a time has elapsed must be determined by the jury according to the circumstances of each case." See, in this connection, *Waldrop v. Wolff*, 114 Ga. 613 (4), 40 S. E. 830; *Newman v. Claffin*, 107 Ga. 89, 32 S. E. 943; *In re Russell & Birkett*, 5 Am. Bankr. Rep. 608.

Of course, the longer the interval the weaker the cause that makes such representation the foundation for a rescission. *Newman v. Clafin*, supra. While there may have been a moral obligation upon Preston to advise Ragan, Malone & Co. of each and every change in the financial condition of the firm of Cotton & Preston, if it is accepted as true that he understood this clause in the contract, no legal obligation arose whereby he was compelled or required to keep Ragan, Malone & Co. posted as to every material or immaterial change in the condition of the mercantile life of his firm. And it is probably this very idea which actuated the Senate in striking so much of the proposed amendment of 1903 as would by implication justify these continuing statements. In fact, it appears to me that this blank or statement prepared by Ragan, Malone & Co. is a contrivance arranged to protect them in all cases against loss by reason of persons going into bankruptcy who may be indebted to them in any amount for goods sold by them, regardless of the length of time which may elapse from the time of such sale to the time of bankruptcy, by filing objections to discharge and urging this statement as the grounds therefor.

While creditors are always a favored class in courts of equity, they are not to be encouraged in the embarrassment and harassment of debtors who have been so unfortunate as to be forced to take advantage of the bankruptcy act. "The release of the honest, unfortunate, and insolvent debtor from the burden of his debts and his restoration to business activity, in the interest of his family and the general public, are the main, if not the most important, objects of the bankruptcy act; and the burden of proof is upon creditors opposing the granting of a discharge to bring the inculpatory facts alleged by them strictly within the meaning of the exceptions enumerated within said statute." *Hardie v. Swafford Bros. Co.*, 21 Am. Bankr. Rep. 457, 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785.

While the testimony of Mr. Ragan, of Ragan, Malone & Co., is positive that his firm extended credit in each instance upon the faith of the financial statement made to him by Preston, who can say that they did not act largely upon their past experience with Cotton & Preston, and not entirely upon the financial statement alone? This idea is very much supported by the fact, which appears in the exhibit attached to the objections, that the bankrupts made large payments, at times as much as \$500 in cash, and at other times \$300, \$200, and \$100 to Ragan, Malone & Co. on account of the purchases made by them. Indeed, their gross purchases from August, 1907, to August, 1908, amounted to \$2,969.24, and their credits for cash payments made and merchandise returned aggregated \$2,186.89. The purchases which remain unpaid for amount to less than \$800. These items were purchased between May 12, 1908, and August 25, 1908, at a time when it cannot be presumed, without doing violence to one's conscience, that these bankrupts had formed the intention to file a petition in bankruptcy.

Finally, the making of the false statement by F. F. Preston, one of the partners, even in the regular course of the partnership business, cannot be interposed as a bar to the discharge of the firm, or of a partner who did not participate in the wrongful act and had no knowledge thereof. The testimony in this case shows that Cotton, one of the bankrupts, knew nothing of the statement, and, regardless of what conclusions may be reached as to Preston, Cotton cannot be denied his discharge. The Circuit Court of Appeals of the Fifth Circuit has held that there is no reason in law, and certainly none in business or morals, why an honest bankrupt should not be discharged, and that, when a partner who has no knowledge of the making of the false statement applies for his discharge, the same should be granted. *Hardie v. Swafford Bros. Co.*, 21 Am. Bankr. Rep. 457, 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785.

Conclusions of the Master.

I conclude that the third ground of the bankrupt's special demurrer, which raised the point that this statement could not be the basis of the credit for the particular goods for which the bankrupts are now indebted to objectors, should be sustained. The uncontradicted evidence showing that the goods

were obtained from six to nine months prior to the filing of the petition in bankruptcy, on a statement made a year and six months before the filing of the petition in bankruptcy, I conclude that these are not such goods as were obtained on a false statement in writing, such as is contemplated by section 14b (3) of the bankruptcy act. The only remaining charge against the bankrupts being founded purely on a difference of opinion as to the value of the merchandise comprising the capital with which this firm began business, I do not think that this is such a material discrepancy as would justify this court in declining to grant a discharge to these bankrupts.

The special master ascertains from the record before him that these bankrupts were allowed an exemption by the trustee, to which Ragan, Malone & Co. filed their exceptions, which were overruled, and the exemption allowed. An appeal was taken to this decision of the referee, and the District Judge has affirmed the decision of the homestead matters. Ragan, Malone & Co. then filed their intervening petition to recover certain goods found in the possession of the bankrupts, alleging that they were obtained by fraud; the identical statement herein involved being used as a basis for the claim of fraud. This intervening petition was denied by the referee, to which decision an appeal was entered to the District Judge, and the decision of the referee has also been sustained. Criminal proceedings have also been brought in the criminal court of the city of Atlanta against F. F. Preston, and charges are now pending against him there, and it appears on the very statement involved here. The bankrupts have filed their applications for discharge, and Ragan, Malone & Co. are found opposing their applications. While every legal advantage should be taken by the creditor to bring his guilty debtor to justice, the special master cannot refrain from expressing the opinion that this case has assumed more the attitude of an oppression than of a just prosecution. I therefore recommend that the objections filed by Ragan, Malone & Co. to the application of these bankrupts for their discharge should be overruled and dismissed.

The special master further reports that in and about this reference he has incurred an expense of \$21 for stenographic services in reporting and transcribing the evidence and this report, and he prays that this amount may be allowed him, in addition to such allowance as may be made to him for his services in this reference, and that the amounts thereof be taxed by the court against the party cast in the suit.

Eason & Bull and Smith, Hammond & Smith, for objecting creditor.

Rogers & Heath, for bankrupts.

SPEER, District Judge. After hearing the arguments of counsel, and reading and considering the complete and learned report of Hon. Max Isaac, Special Master, and the exceptions thereto, and the record in the cause, it is, upon consideration, adjudged and decreed that the findings of the master are in all respects in accordance with the law, and his conclusions are affirmed, and his report is adopted as the opinion, conclusions, and judgment of the court.

It is further ordered, adjudged, and decreed that Max Isaac, Special Master, be and he is hereby allowed the sum of \$50 for his services as special master in this reference, and the further sum of \$21, costs incurred by him for stenographic services in said reference. Let said sums, together with all court costs occasioned because of said objections, be taxed by the clerk against the objecting creditors; i. e., Ragan, Malone & Co.

In re COTTON & PRESTON.

(District Court, S. D. Georgia, S. W. D. September 30, 1910.)

1. BANKRUPTCY (§ 400*)—EXEMPTIONS—TRUSTEES' REPORT SETTING APART—OBJECTIONS.

A creditor of a bankrupt, desiring to object to the trustees' report setting apart the bankrupt's exemption, should file all of his objections within the 20 days prescribed by General Order 17 (89 Fed. viii, 32 C. C. A. xix), and can neither file his original objections nor amend to add new and additional grounds after that time.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 399*)—EXEMPTIONS—GROUNDS FOR REFUSING.

A bankrupt is not deprived of his right to exemptions under the exemption statute of Georgia because of a fraudulent transfer of real estate made more than four months prior to his bankruptcy, nor because of false statements in writing made to obtain credit; and fraudulent concealment of assets, if relied on to defeat such right, must be proved with reasonable certainty.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

In the matter of Cotton & Preston, bankrupts. On petition for review of order of referee setting apart homestead exemptions. Affirmed.

See, also, 183 Fed. 181.

The following is the report of Isaac, Referee:

The trustee set apart to the bankrupt E. S. Cotton wearing apparel valued at \$30, cash derived from the sale of the property of the bankrupts, after deducting the costs and expenses of the proceeding, \$784.55, or a total exemption of \$814.55. He likewise set apart to the bankrupt F. F. Preston wearing apparel and other personal property amounting to \$50, and cash derived from the sale of the assets of said bankrupts, after the payment of the costs and expenses of the proceeding, \$784.55, or a total exemption of \$834.55.

Certain creditors have filed exceptions to the trustee's report, those of Ragan, Malone & Co. presenting substantially the following grounds, viz.: That the bankrupts had not made a full and fair disclosure of their property; had drawn out of bank several sums of money before and after the filing of their petition in bankruptcy, which had not been accounted for; had made false statements of their indebtedness for the purpose of obtaining credit; had conveyed to their wives all of their real estate for the purpose of defrauding their creditors; and are withholding large sums of money received from their business which should have been delivered to the trustee in bankruptcy. The objections of the Dannenberg Company were withdrawn before this opinion was rendered, and their objections will be omitted. The objections of Thomas G. Plant Company were that the bankrupts had concealed a part of their property, and had made false statements of their financial condition, and so much of the homestead set apart to said bankrupts as consisted of cash was illegal.

At the hearing of these objections the bankrupts moved to amend their schedules, so as to avoid the objections that the claim to homestead was for cash, and to show that the funds set apart were the proceeds of the sale of the goods and property of Cotton & Preston made without objection on the part of creditors of said bankrupts, etc.; but the court held that the claim to exemptions in the original schedules was sufficiently clear and specific, and amendments were unnecessary, and declined to allow the same. See Dunlap v. Huddleston, 21 Am. Bankr. Rep. 731, 167 Fed. 433, 93 C. C. A. 69. Motion was likewise made by the bankrupts to dismiss the objections of Thomas G.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Plant Company because the same were not filed within 20 days from the date of the filing of the trustee's report setting apart said exemptions. An amendment was also offered by the objector, Ragan, Malone & Co., adding several grounds of objection, not amplifications of the original grounds of objection, but setting forth new matter.

It appearing on the face of the record that the trustee's report setting apart the exemptions was filed on July 26, 1909, and that the exceptions of the Plant Company were not filed until August 26, 1909, more than 20 days after the filing of said report, said motion to dismiss was granted. General Order in Bankruptcy 17 (89 Fed. viii, 32 C. C. A. xix); *In re Amos*, 19 Am. Bankr. Rep. 804. The amendment of Ragan, Malone & Co., setting forth new grounds of objection, having been presented more than 20 days after the filing of the trustee's report setting apart the bankrupt's exemptions, said amendment was disallowed. A creditor, desiring to object to the trustee's report setting apart the bankrupt's exemption, should file all of his objections within the time fixed by law, and cannot come in after the expiration of that time, and add new and additional grounds to his objections already of file. It is otherwise as to the enlargement or amplification of grounds originally taken.

This leaves the case to be decided on the objections of Ragan, Malone & Co. alone. Demurrers were presented by the bankrupts to the grounds of these objections, having to do with the making of false statements in writing and the transfer of certain real estate by the bankrupts to their wives more than four months prior to the filing of the petition in bankruptcy by them. These demurrers were and are sustained, and these grounds have not been considered as valid objections to the homestead. It has been repeatedly held in Georgia that the fraudulent omission of real estate from the schedules claiming exemption will not operate to deprive the applicant of his exemption; "the full and fair disclosure" section of the Georgia Code referring only to personal property. See Civ. Code Ga. 1895, § 2830; *Torrance v. Boyd*, 63 Ga. 23 (3); *In re Castleberry*, 16 Am. Bankr. Rep. 159, 143 Fed. 1018. And, even if this were not true, the transfer of the real estate by the bankrupts to their wives more than four months prior to the filing of the petition in bankruptcy would not deprive them either of their exemptions or their discharges. *Fields v. Karter*, 8 Am. Bankr. Rep. 351, 115 Fed. 950, 53 C. C. A. 432. This decision is by the United States Circuit Court of Appeals of the Fifth Circuit.

The making of false statements in writing to their creditors to obtain credit, if true, would deprive the bankrupts of their discharges, but at no time has it been held a valid objection to the allowance of the homestead. Such statements may be material evidence showing the condition of the bankrupt's business at a given time (*In re Stephens*, 8 Am. Bankr. Rep. 53, 114 Fed. 192), and may without satisfactory explanation prove fraudulent concealment of assets, but it is not a ground of objection.

The evidence taken at the first meeting of creditors held at Brunswick, and at an adjourned meeting of creditors held at Douglas, containing, respectively, 14 and 25 pages of typewritten matter, was offered in evidence by the objectors, and as well a batch of 205 checks given by the bankrupts from time to time in the usual course of their business, to prove the concealment of large sums of money alleged to have been retained by the bankrupts. A careful consideration of this evidence, so far as the same is possible from the character of the proof, fails to satisfy the court that there has been a withholding of assets on the part of these applicants. The only transaction which needed explanation, and which the bankrupts satisfactorily explained, was the withdrawal of \$30 in cash on February 18, 1909, three days after the filing of the petition in bankruptcy, which the bankrupts testified was used by them to meet living expenses during the time their place of business was closed and they were forced to keep their families provided with the necessities of life. More especially is this small item to be overlooked, when it is considered that these bankrupts delivered in cash to the trustee in bankruptcy, as soon as he qualified, \$246.81, which was deposited to the credit of the firm in a Broxton bank, and which could have been easily withdrawn or with-

held by them until discovered by the trustee. The voluntary surrender of so much cash by a bankrupt to his trustee is so unusual as not to escape notice and consideration.

Fraud is not presumed or imputed to any one, but must be proved, and it was incumbent upon the objectors in this case to make out their proof of concealment, not by the wholesale introduction of records, checks, and papers, leaving it to the court to decipher and analyze them, but by proof of some act of concealment. The introduction of the checks shows the disbursement of \$8,503.87 in cash. Having been offered by the objectors, they are to be taken as prima facie proof of their correctness in favor of the bankrupts until shown to be irregular. The court has had the opportunity of seeing the witnesses and hearing their testimony, and of making deductions therefrom as to the truthfulness of their testimony. They have left the impression that they were telling the truth. If fraud exists in the case, it has not been proven to a reasonable certainty, and the bankrupts are entitled to the benefit of the doubt.

A liberal policy has always existed in this state in favor of the granting of exemptions, and in the absence of some direct evidence of fraud the wives and children of these bankrupts, and the bankrupts themselves, ought not to be stripped of all they possess, made destitute and penniless, and hopelessly "turned out in the big road." In re Hargraves, 20 Am. Bankr. Rep. 188, 160 Fed. 760.

For the reasons stated in this opinion, an order will be entered overruling the objections filed by Ragan, Malone & Co., and dismissing the objections of Thomas G. Plant Company; and, the objections of the Dannenberg Company having been voluntarily withdrawn, no further action will be taken on said objections. An order will be entered accordingly.

Eason & Bull, for Ragan, Malone & Co.

Hardeman, Jones & Johnston, for Dannenberg Co.

Levi O'Steen, for Thomas G. Plant Co.

Rogers & Heath, for bankrupts.

SPEER, District Judge. After hearing the arguments of counsel, and reading and considering the opinion filed in said cause by Hon. Max Isaac, Referee, and the exceptions thereto, and the record in the cause, it is upon consideration adjudged and decreed that the findings of the referee in favor of granting the homestead are in all respects in accordance with the law, and his conclusions and judgment are affirmed, and his opinion is adopted as the opinion, conclusions, and judgment of the court.

AMERICAN ICE CO. v. POCONO SPRING WATER ICE CO. et al.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 1,428.

1. LANDLORD AND TENANT (§ 130*)—BREACH OF COVENANT FOR QUIET ENJOYMENT—DAMAGES.

Under the law of Pennsylvania that a lease of lands implies a covenant for quiet possession, and that the measure of damages recoverable by a lessee for an eviction before the expiration of the term, in the absence of fraud or bad faith on the part of the lessor, is the consideration paid to the lessor and not the value of the unexpired term, the same rule of damages governs in a case where the lease contains an express covenant for quiet enjoyment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 479; Dec. Dig. § 130.*]

2. LANDLORD AND TENANT (§ 130*)—BREACH OF COVENANT FOR QUIET ENJOYMENT—DAMAGES.

Under the law of Pennsylvania, a lessee cannot recover as damages for breach of a covenant for quiet enjoyment the value of the unexpired term, nor the value of improvements made, nor the cost of removing from the demised premises in the absence of fraud or bad faith on the part of the lessor; and, where the lessor is a corporation, such damages are not recoverable against it on the ground that the lessee's eviction was brought about by the fraud of its officers for their individual benefit, and not that of the corporation.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 479; Dec. Dig. § 130.*]

3. LANDLORD AND TENANT (§ 130*)—BREACH OF COVENANT FOR QUIET ENJOYMENT—DAMAGES.

The lessee of an ice plant for a term of 16 years in the lease assumed a contract made by its lessor to furnish ice to a consumer during the next two seasons at a stated price. The market price of ice having advanced during the second season, it refused further performance of the contract, and the purchaser recovered judgment for damages for breach of the contract against the lessor, which, in turn, recovered over against the lessee. At the end of four years, the lessee was evicted on a sale of the plant under a prior mortgage. *Held*, that it was not entitled to recover as damages for the eviction any part of the amount it was compelled to pay on account of its own breach of the contract to furnish ice which it had assumed.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 479; Dec. Dig. § 130.*]

4. CORPORATIONS (§ 626*)—DISSOLUTION—DISTRIBUTION OF ASSETS—ALLOWANCE TO COUNSEL.

Counsel employed by the officers of a dissolved corporation charged under the Pennsylvania law with the winding up of its affairs, who successfully defended a suit brought to establish a claim against the fund arising from the sale of the corporation's property, are entitled to an allowance from the fund for their services.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2475; Dec. Dig. § 626.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the American Ice Company against the Pocono Spring Water Ice Company and others. Decree (179 Fed. 868) for complainant, and defendants appeal. Modified and affirmed.

Ira J. Williams, Aaron Goldsmith, and Simpson & Brown, for appellants.

John G. Johnson, Frank R. Savidge, and Henry R. Edmunds, for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. A brief statement of the essential facts contained in the large record of this case will be helpful to a clear understanding of it.

On October 7, 1895, the Pocono Spring Water Ice Company, hereinafter called the Pocono Company, was incorporated for a perpetual term under the laws of the state of Pennsylvania. On November 1, 1898, it gave to Henry Fulmer a mortgage on its real estate, being its ice plant, to secure the payment of its bond for \$25,000 in five years, with interest payable semiannually, and with power of attorney for the entry of judgment on the bond in case of default in the payment of the principal when due or of any installment of interest for six months after it should become due. On July 26, 1899, it entered into a written agreement with Van Orden Bros. of Paterson, N. J., to sell to Van Orden Bros. "in such quantities as they may need in their ice business up to 12,000 tons during each year during the term of this agreement, at the rate of \$1.30 per ton," which term was "for the ice season(s) of 1899 and 1900." On October 19, 1899, it leased its ice plant to the American Ice Company, hereinafter called the American Company, for a term of 10 years from November 1, 1899, with an option to the latter company for an additional term of six years, the lease containing a covenant by the Pocono Company for quiet possession and an assumption by the American Company of the contract with Van Orden Bros. The American Company failed to furnish any ice to Van Orden Bros. for the season of 1900, and on January 11, 1901, Van Orden Bros. commenced an action at law against the Pocono Company for breach of its contract with them. While this action was pending, on January 16, 1903, the administrator of the estate of Henry Fulmer, he being then dead, entered judgment against the Pocono Company on the bond secured by the Fulmer mortgage for \$28,153.12 (no interest having been paid for more than a year), and immediately caused a writ of fieri facias to be issued which was returned nulla bona on January 27, 1903. On February 26, 1903, the Pocono Company waived its right to inquisition proceedings and agreed to the sale of its property under the alias execution issued that day, and on the same day a levy on its property was made. On April 4, 1903, the property was sold to Aaron Goldsmith, trustee, for \$50,250. On April 27, 1903, Van Orden Bros. recovered judgment in their action against the Pocono Company for \$10,537.13, which judgment was paid out of the surplus moneys remaining in the hands of the

sheriff after the sale under the Fulmer execution. On June 1, 1903, the Pocono Company brought suit against the American Company to recover the amount which the Pocono Company had been compelled to pay to Van Orden Bros., and on September 28, 1904, recovered judgment against the American Company for principal, interest, and costs, being \$14,338.81. On April 9, 1906, the Supreme Court of the state of Pennsylvania affirmed the last-mentioned judgment.

On April 28, 1906, the American Company filed its bill in equity in the case now before this court. The bill sets out that by reason of the sale of the Pocono Company's property and franchises at judicial sale on April 4, 1903, that company became dissolved and incapable of being sued, and that it thereby became the duty of Snyder and Miller, president and secretary of the company, to wind up its affairs. It also sets out the provisions of the lease above mentioned, including the covenant for quiet possession, avers that, relying on the covenant, the American Company had expended \$17,000 in improvements; that Snyder and Miller fraudulently conspired to have the Pocono Company's property sold at judicial sale to Aaron Goldsmith, trustee; that on August 5, 1903, they caused a new corporation to be organized in which Snyder and Miller were stockholders and to which Goldsmith conveyed the property; that on or about October 1, 1905, they caused the American Company to be evicted from the demised premises; and that, by reason of the eviction, the American Company had lost and was deprived of the unexpired portion of its term which was of the value of \$12,000, and had also lost stored ice of the value of \$8,000. It further sets out the American Company's assumption of the contract with Van Orden Bros., the recovery of the judgment by Van Orden Bros. against the Pocono Company, and the obligation of the American Company to pay the amount of that judgment; and avers that, by reason of its eviction before four years of the term of sixteen years had expired, the consideration for the assumption of the Van Orden contract had failed, and that the American Company was entitled to demand and receive from the Pocono Company the sum of \$10,000 on account thereof, that the Pocono Company was indebted to it in the sum of \$43,000, that since April 4, 1903, there had been no person against whom the American Company could bring an action at law for the recovery of its damages, that the only assets of the Pocono Company were \$22,000 (being the proceeds of the sheriff's sale of the Pocono Company's property after satisfying the Fulmer and Van Orden judgments), and the judgment recovered by the Pocono Company against the American Company, and that the Pocono Company was insolvent. The prayer was for the appointment of a receiver of the Pocono Company, an accounting by Snyder and Miller, and an injunction to restrain the Pocono Company and Snyder and Miller from collecting the judgment of the Pocono Company against the American Company. The joint answer of the defendants denies the fraud charged in the bill, or that the American Company was evicted by the defendants, or that the American Company is entitled to anything from the Pocono Company on account of the former company's assumption of the Van Orden contract, or to the sum of \$43,000 or

any other sum, and avers that the subject-matter of the American Company's claim was litigated and adjudicated against that company in the former suit of the Pocono Company against the American Company.

On June 21, 1906, the answer having been filed and the American Company's motion for an injunction pendente lite having been denied, the American Company paid to Snyder and Miller, the officers representing the Pocono Company in winding up its affairs, the amount of the judgment due to the Pocono Company, which, as we have seen, had been previously affirmed by the Supreme Court of Pennsylvania. Thereupon the case went to an accounting. The Pocono Company proved to be insolvent. In its final decree the Circuit Court adjudged that the amount for distribution among the general creditors was \$21,552.36. Of this sum it directed \$4,858.77 to be paid to the American Company as its proportionate part of a claim of \$9,178.32 allowed in its favor. The claim of the American Company is (1) for the value of the portion of the term of the lease unexpired at the time of the eviction—that is, for 12 of the 16 years—\$30,000; (2) for the cost of removing from the leased premises at the time of the eviction its machinery and tools, \$1,275.47; and (3) for twelve-sixteenths of \$10,537.13, which was the amount of the judgment recovered by Van Orden Bros. against the Pocono Company, being \$7,902.85. The Circuit Court disallowed the first item of \$30,000, but allowed the second and third items, aggregating \$9,178.32. The American Company contends that the Circuit Court erred in not including in its claim the first item of \$30,000, and the Pocono Company and its representatives contend that the court erred in allowing the second and third items. These contentions present the first question for our consideration.

Counsel for the Pocono Company argue that it is a settled rule of law in Pennsylvania that a lessee evicted from the premises demised to him cannot recover from the lessor, upon a covenant for quiet enjoyment, for the value of his unexpired term except in a case where the eviction is the result of the lessor's fraud. In the absence of fraud by the lessor, the lessee, they say, is entitled to recover only the rent paid by him on account of the unexpired term, which sum is allowed to him as damages for the partial failure of the consideration for which the rent was paid. Counsel for the American Company, on the other hand, urge that, if an express covenant for quiet enjoyment be broken by eviction of the lessee, the lessor is liable for the value of the unexpired term, not only where the eviction is caused by his fraud, but where it has occurred through his fault or neglect without fraud.

In *Brown v. Dickerson*, 12 Pa. 372, where, on a breach of the covenant for quiet possession, the grantee, in order to retain possession, was compelled to purchase at a sale under a mortgage antedating the deed of conveyance which contained a covenant for quiet possession, it was held that the measure of damages was the value of the land at the time of making the contract or the price paid for it. In *McClure's Executor v. Gamble*, 27 Pa. 288, land was devised to Gamble for life. He was evicted under a superior title, and, in an action against the representatives of his devisor's predecessor in title, it was held that:

"The extreme limit of the damages in such a case is the purchase money and interest, and the tenant for life can have only his proportion of it according to the value of his estate as against that of the remainder, and the balance belongs to the remaindermen."

In *McClowry v. Croghan's Administrator*, 31 Pa. 22, it was held that the measure of damages for the breach of a contract to lease is the same as in the case of the breach of a contract to sell; that is, that, in the absence of fraud or bad faith on the part of the defendant, he may recover nothing for the loss of his bargain, but may recover back the purchase money he has paid. In *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797, there was a mining lease for 15 years executed to Lanigan. At the end of four years, Lanigan's assignee was evicted under a superior title. There was no express covenant for quiet enjoyment, and the action against the lessor was based on the breach of the implied covenant for quiet enjoyment. The court said that it is settled by abundant authority that the word "concessi" or "demisi" in a lease implies a covenant for quiet possession during the term. The only contention in the case was as to the proper measure of damages. Attention was called to the fact that the eviction was by a paramount title, and not by any fraud of the lessor. Conceding that in England the measure of damages for the breach of an express covenant for quiet possession in a lease is the value of the unexpired term at the time of the eviction, the court proceeds to consider whether the same rule applies in Pennsylvania. "Upon this point," says Mr. Justice Paxson, "the authorities are meager and by no means uniform. The true rule, however, would appear to be that, in an action by a lessee against his lessor for an eviction by a paramount title, the measure of damages is the consideration paid and such mesne profits as he has paid or may be liable for. The consideration for a lease is usually the rent reserved. If the tenant has enjoyed the possession of the demised premises, he has the precise equivalent for the rent. If he has paid the rent in advance, he is entitled to recover it back in the form of damages for the eviction."

Since it is the conceded law of the state of Pennsylvania that a lease of lands implies a covenant for quiet possession, and that in an action on such a covenant the measure of damages, in the absence of fraud or bad faith on the part of the lessor, is the consideration paid to the lessor and not the value of the term at the time of eviction, we can see no reason for adopting a different rule in the case of an express covenant for quiet possession. The express covenant is but a declaration of what the law would imply if the lease were silent on the subject of quiet possession. In the case in hand, the lessor was the Pocono Company. No fraud of any kind, as pointed out in the opinion of the Circuit Court (165 Fed. 714), is charged against it in the bill. The charge of fraud is against Snyder and Miller, as individuals, who, it is alleged, sought through a judicial sale to possess themselves of the Pocono Company's property. If they were guilty of fraud, the American Company had a remedy against them in an action at law. This was the conclusion of the Circuit Court, and we

concur, therefore, in its opinion that the first item of \$30,000 in the American Company's claim should be disallowed.

The same reason which leads us to the conclusion that the first item should be disallowed induces us to think the second item of \$1,275.47 for cost of removing machinery and tools should be disallowed. That cost no more represents an item which the lessee is entitled to recover than would the cost of improvements put on the lessor's property by the lessee. That there can be no recovery for the cost of such improvements, in the absence of fraud or bad faith on the part of the lessor, was expressly ruled in *Lanigan v. Kille*, and counsel for the American Company admit that for such cost there could be no recovery in the present case.

We also think the third item of \$7,902.85 should be disallowed. That item is twelve-sixteenths of the judgment which the Pocono Company was compelled to pay to Van Orden Bros., and which the American Company was compelled to refund to the Pocono Company. It was allowed by the Circuit Court on the theory that the assumption of the Van Orden contract by the American Company was a part of the consideration for the whole of the term of 16 years, and because 12 of the 16 years were lost to the lessee by reason of the eviction. But the Pocono Company's financial troubles were seriously increased by the highly culpable conduct of the American Company. In 1900 the price of ice had increased. It had previously covenanted with the Pocono Company to assume the Van Orden contract and to supply to Van Orden Bros. ice at \$1.30 per ton. It was a profitable contract even at that price. Its failure to furnish the ice can be explained by nothing but its avarice and dishonesty. It not only repudiated its contract with the Pocono Company to supply ice to Van Orden Bros. for the season of 1900, but refused for the two or three remaining years that the Pocono Company continued to own the demised property, and while the Van Orden suit was pending, to relieve the Pocono Company from the demands of Van Orden Bros. It was not until January 16, 1903, that the Fulmer suit, under which the property was sold, was commenced. The failure of the American Company to keep its contract with the Pocono Company was without doubt one of the causes of the Pocono Company's downfall. Furthermore, the American Company can certainly stand now in no better position than if it had kept its contract to furnish ice to Van Orden Bros., and then at the end of four years been evicted. In such case, what right of recovery from the Pocono Company would it have had? Could it successfully have maintained a claim that the \$10,537.13—which it must be assumed represents the difference between the general market price in 1900 of the ice that the Van Orden contract called for and its contract price at \$1.30 per ton—was paid by it as a part of the consideration for the lease for the full term of 16 years? Certainly not, for it would not have paid that sum. It would simply have failed to realize by that amount the full market value of the ice. Could it have recovered on the theory that by the eviction it lost the opportunity during the remaining 12 years to make profits that would have balanced

what, by reason of the Van Orden contract, it failed to realize in 1900? Certainly not, for that would be but allowing the American Company to recover a part of the value of the unexpired term. In any aspect of the matter, it is our opinion that the theory on which the Circuit Court allowed the item of \$7,902.85 is erroneous, and that the item should be rejected.

The decree of the Circuit Court directed each party to pay one-half of the costs. Error is assigned on that point. As this court finds the claim of the American Company to be wholly without merit, it should bear all the costs.

The decree made no allowance out of the funds of the Pocono Company to its counsel. Error is also assigned on that point. The American Company commenced this suit. Snyder, Miller, and Richards (the last brought in as a defendant after the suit was commenced), officers of the Pocono Company, whose duty it was to wind up that company's affairs, were compelled to employ counsel to defend the suit. They have defended it successfully, and are entitled to compensation. An allowance will be made to them for their services in the Circuit Court and in this court of \$2,000.

The decree sets out the total amount received by Snyder, Miller, and Richards, the preferred claims to be paid out of such receipts and the method of distributing the remainder amongst the general creditors. As so many parties not in this suit are interested in it, it should not be reversed. It should be amended by striking out the allowance of \$4,858.77 to the American Company by allowing \$2,000 to the counsel for the Pocono Company, by putting the costs in the Circuit Court and in this court (except the fees of the master for taking and stating the account, which should be directed to be paid out of the fund) upon the American Company, and by making the necessary changes in the distributive shares of the general creditors.

As thus modified and amended, the decree will be affirmed.

HILLEGASS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 1,366.

1. CRIMINAL LAW (§ 1149*)—APPEAL AND ERROR—REVIEW—RULING ON MOTION TO QUASH.

The general rule that a motion to quash an indictment is addressed to the discretion of the court and a refusal to grant it cannot be assigned as error, while subject to exception in some cases in the federal courts, will be followed where the motion is founded only on alleged defects appearing on the face of the indictment, since in such case the ruling could not finally determine any right of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3039; Dec. Dig. § 1149.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INDICTMENT AND INFORMATION (§ 197*)—RULING ON DEMURRER.

In the federal courts, the overruling of a demurrer to an indictment, where the defendant is allowed to plead over, is not properly assignable as error.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 636; Dec. Dig. § 197.*]

3. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—AIDING OFFICER IN MISAPPLICATION OF FUNDS—INDICTMENT.

An indictment for aiding and abetting an officer of a national bank in the misapplication of its funds, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), considered, and *held* sufficient.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 973; Dec. Dig. § 257.*]

4. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—TRIAL OF OFFENSES—EVIDENCE.

Rulings of the trial court in admitting and excluding evidence in a prosecution for aiding and abetting an officer of a national bank in the misapplication of its funds considered, and *held* to contain no error.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

5. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—TRIAL OF OFFENSES—INSTRUCTIONS.

Instructions considered given on the trial of a prosecution for aiding and abetting an officer of a national bank in the misapplication of its funds, and *held* without error.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

De Witt C. Hillegass was convicted of a criminal offense, and brings error. Affirmed.

For opinion below, see 176 Fed. 444.

John McClintoch, Jr., for plaintiff in error.

J. Whitaker Thompson, U. S. Atty., and Walter C. Douglas, Jr., Asst. U. S. Atty.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. The defendant, De Witt C. Hillegass, was convicted in the lower court under an indictment charging him with aiding and abetting the cashier of the Farmers' National Bank of Boyertown, Pa., in the misapplication of funds of the bank, contrary to the provisions of section 5209 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3497). Judgment having been pronounced against him, he now prosecutes this writ of error.

The first assignment of error is based on the refusal of the court to grant the defendant's motion to quash the indictment. A motion to quash is ordinarily addressed to the discretion of the court, and a refusal to grant it cannot generally be assigned for error. *Logan v. United States*, 144 U. S. 263, 282, 12 Sup. Ct. 617, 36 L. Ed. 429; *Durland v. United States*, 161 U. S. 306, 314, 16 Sup. Ct. 508, 40 L. Ed. 709; *Endleman v. United States*, 86 Fed. 456, 458, 30 C. C. A.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

186; *Radford v. United States*, 129 Fed. 49, 51, 63 C. C. A. 491; *Dillard v. United States*, 141 Fed. 303, 305, 72 C. C. A. 451. Where the objection goes to the constitution of the jury, the old common-law practice, if the ground of objection was discovered before the finding of the bill, was to challenge the jurors objected to, and, if it was discovered after such finding, to file a plea in abatement. That rule is generally applicable in this country. *Crowley v. United States*, 194 U. S. 462, 24 Sup. Ct. 731, 48 L. Ed. 1075. The Supreme Court of the United States, when reviewing a criminal conviction in a state court, is bound by the settled law of the state that an objection to an indictment based on the constitution of the grand jury returning the indictment shall be made by plea in abatement, and not by motion to quash. *Tarrance v. Florida*, 188 U. S. 519, 23 Sup. Ct. 402, 47 L. Ed. 572. In the federal courts, however, where objections to indictments by indicted negroes have been made on the ground that negroes have been excluded from the grand juries because of their race or color, contrary to the provisions of the fourteenth amendment of the Constitution of the United States, motions to quash, accompanied by offers of proof of the facts alleged in the objections, are allowed as substitutes for pleas in abatement. *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Charley Smith v. Mississippi*, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082; *Williams v. Mississippi*, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012; *Martin v. Texas*, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497. In *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857, it was said that, though the general rule as to the manner in which objection may be taken to the personnel of the grand jury is by challenge or by plea in abatement, in this country a motion to quash the indictment may be made instead of pleading specially in abatement, and in *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839, it was said that, when the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury may be taken either by plea in abatement or motion to quash before pleading in bar.

But in the present case the motion to quash was founded wholly on the defects alleged to appear on the face of the indictment. The refusal to quash could not finally determine any right of the defendant. Where an indictment is on its face manifestly defective in substance, and not in mere form, the motion to quash will usually be granted. But the motion, even in such a case, is not granted *ex debito iustitiæ*. It may be overruled, and the defendant be compelled to resort to his other remedies, such as demurrer, motion to direct a verdict, or motion in arrest of judgment. The first assignment of error is overruled.

The second assignment is based on an exception to the action of the trial court in overruling the defendant's demurrer to the indictment. At common law, where the indictment charged a felony, which was punishable with death, the defendant was allowed to plead over after his plea in abatement was found against him or after his demurrer was overruled, or even to demur and plead over at the same time.

This privilege was allowed in *favorem vitæ*, and did not formerly apply to cases where life was not in jeopardy. In misdemeanors no pleading over was allowed. In such cases, if the defendant's plea in abatement was found against him, or his demurrer was overruled, final judgment was entered against him. This was because by his plea in abatement he elected to stand on the defense made by it, and by his demurrer he admitted the facts pleaded in the indictment. 2 Hale's P. C. 257; *The King v. Gibson*, 8 East. 107; *Reg. v. Faderman*, 3 Car. & K. 353. Later cases allowed the same privilege in misdemeanors. *The Queen v. Adams*, 1 Car. & M. 299; *Reg. v. Purchase*, 1 Car. & M. 617. Mr. Bishop (2 Bish. Crim. Proc. § 784) says that "with us, in misdemeanor, the judgment against a defendant on his demurrer is final, unless he has leave to withdraw it or answer." The record of the present case shows that after the demurrer had been overruled the defendant was arraigned and pleaded "not guilty." The court, therefore, instead of entering final judgment on the demurrer, allowed the defendant to plead over. The court granted an exception to its action in overruling the demurrer, but, when the defendant pleaded "not guilty," the demurrer was, in legal effect, withdrawn from the record, and nothing remained upon which the exception could be founded. The overruling of a demurrer, like the overruling of a motion to quash, settles finally no question against the defendant, except where final judgment is entered on the demurrer. As a demurrer addresses itself to defects apparent on the face of the indictment, a ruling of the trial court on such defects may be had upon the trial by a motion to direct a verdict for the defendant, or, if the alleged defects be not mere defects or imperfections of form (Rev. St. § 1025 [U. S. Comp. St. 1901, p. 720]), or defects which are cured by verdict, by a motion in arrest of judgment, for, generally, whatever is fatal on demurrer is equally so on a motion in arrest of judgment (2 Bish. Crim. Proc. § 1286). We understand this to be the correct practice except in those jurisdictions where by statute defects apparent on the face of an indictment are required to be taken by demurrer or motion to quash before pleading, in order to avoid a waiver thereof, and where, in overruling the demurrer or motion to quash, the defendant may enter an exception on the record on which, in case of subsequent conviction and final judgment against him, he may assign error. Congress has passed no such statute. There are cases in which federal appellate courts have considered assignments of error on the overruling of demurrers to indictments where defendants have been allowed to plead over and go to trial. *Endleman v. United States*, 86 Fed. 456, 458, 30 C. C. A. 186, *McGregor v. United States*, 134 Fed. 187, 194, 69 C. C. A. 477, and *Dillard v. United States*, 141 Fed. 303, 72 C. C. A. 451, are three of such cases. In them, however, the question now considered was not mooted.

In the present case there was a motion for a new trial. The first two reasons on which the motion was based were the refusal of the court to quash the indictment and the overruling of the demurrer. In his opinion on the motion the learned trial judge said:

"The reasons for which a new trial is now urged are 33 in number, the first 2 of which, however, are more properly questions to be considered on a motion in arrest of judgment, and, as they are filed in due time, they may be so considered in this case."

They were so considered, and the conclusion was that "the motion in arrest of judgment is overruled and a new trial refused." The second error assigned, however, is not that the court erred in overruling the demurrer and refusing to arrest the judgment, as was the case in *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, but merely that it erred in overruling the demurrer. Nevertheless, as under the eleventh rule of this court we may reverse for a plain error not assigned, and as the reasons on which the second assignment are based have been fully argued, we have examined them, and are of the opinion that the indictment was not demurrable for any of the reasons set forth, and that the motion in arrest of judgment was properly refused on the grounds stated in the opinion of the trial judge.

The third assignment is that the court erred in admitting certain evidence of the cashier of the bank. It was a part of the evidence designed to show that the board of directors of the bank had no knowledge prior to April 10, 1906, of the defendant's overdrafts. It was properly admitted.

The fourth assignment is that the court erred in admitting in evidence a statement, made in the presence of the witness, showing the amount of the defendant's overdrafts on April 11, 1906. When the statement was handed to the witness as a paper from which to refresh his memory, counsel for the defendant expressly stated that he had no objection to such use of it. The facts disclosed by the paper were then given by the witness. Consequently the admission of the statement itself could do no possible harm to the defendant.

The ninth assignment relates to the exclusion of evidence offered by the defendant to show that on December 19, 1900, the bank received instructions from the Comptroller of the Currency that no dividends should be paid by the bank and that the instructions were not obeyed. This offer could not help the jury in determining whether the defendant aided the cashier to misapply the bank's funds.

The tenth assignment relates to the attempt of the defendant's counsel to cross-examine the cashier as to the items which made up the lump sums in the bank's account with the defendant which the cashier had spoken of in his direct examination. The court gave counsel the opportunity to examine the bank's books, with the cashier's aid, between the hour of adjournment of the court on the day when the cashier was testifying on this point and the hour of opening the court on the next day, and counsel expressed his satisfaction with that course.

The fourteenth, fifteenth, and sixteenth assignments relate to the action of the court in overruling the defendant's offer to show that, after having failed in business, the defendant had paid other creditors their claims. We find no error in any of these assignments.

The eighteenth, nineteenth, twentieth, twenty-first, twenty-second,

twenty-third, and twenty-sixth assignments relate to portions of the court's charge to the jury. The exceptions on which the eighteenth and nineteenth assignments are based are that the trial judge did not more fully charge the jury on certain points in the case; but no requests to charge on these points were made. These assignments are therefore overruled.

The twentieth assignment is based on exceptions that the trial judge in his charge said that the testimony of Bank Examiner Folds was corroborated by the cashier, that the judge declared that Folds had testified about a "manipulation of accounts," when, in fact, he had not done so, and that the judge had said to the jury, "You will say whether Mr. Folds, in his careful way, did or did not give us a correct result." Folds testified concerning the defendant's account in the bank's books and papers. The cashier testified concerning his transactions with the defendant. In a number of respects the testimony of the cashier corroborated that of Folds. There is nothing whatever in the portion of the charge objected to in this assignment concerning a "manipulation of accounts." And there was no impropriety in saying to the jury that they should decide whether Mr. Folds, "in his careful way," had given to the court a correct statement of the defendant's account.

The twenty-first assignment is based on three exceptions. One of them relates to what the court said about the effect of the statute of limitations. This point is not argued in the brief, and what was said by the judge was correct. Another of the exceptions is that the court failed to call the attention of the jury to the fact that the proceeds of certain notes discounted by the bank did not go to the credit of the defendant notwithstanding no request so to charge was made. The third exception was in this language:

"I also except to that portion of your honor's charge where you referred to a misunderstanding with respect to two accounts which the defendant furnished. One was an account beginning March 1st. and the other account was an account which was similar to the account which Mr. Folds prepared, and in the account which was similar to the one Mr. Folds prepared he assumed that Mr. Folds was right, and only supplemented it by two papers which are in evidence."

The court did not, in the language quoted in this assignment, refer to any misunderstanding whatever. He did refer to an account produced by the defendant, and he did state to the jury what credits he understood the defendant to claim by the account. The facts were complicated, and the judge told the jury regarding them, in express terms, that, if the defendant had established to their satisfaction that he had deposited within the period not barred by the statute of limitations more money than he had drawn out within the same period, there was no misapplication of the funds of the bank, and that the defendant could not be held guilty of having aided or abetted any misapplication. If there was any error in this statement, it was an error in favor of the defendant.

The twenty-second assignment relates to a portion of the judge's charge concerning the deposit with the bank by the defendant of certain worthless bonds of the Carrolton Coal Company as collateral se-

curity for certain of his notes, and as substitutes for certain of his overdraft checks which the bank had paid and was carrying as cash. It was not claimed by the government that the defendant received from the bank any moneys as the result of the bond transaction, nor do any of the counts of the indictment so charge. The evidence concerning the bond transaction was admitted only for the purpose of throwing light on the defendant's general course of business with the bank, and on the question of criminal intent as to the withdrawal of the funds of the bank mentioned in the indictment. For that purpose the evidence was competent. The defendant's transactions with the bank were large, amounting probably to hundreds of thousands of dollars every year. What the judge said to the jury concerning the bond transaction related wholly to the question of intent, and he closed what he had to say on this branch of the case with the express statement that it was for the jury to say whether the bond transaction threw any light upon the question of intent.

The twenty-third assignment relates to a portion of the judge's charge concerning a statement presented on the trial by Bank Examiner Folds showing the moneys actually deposited by the defendant in the bank, and the moneys actually paid out by the bank on the defendant's checks, after April 10, 1906. Concerning the statement, Mr. Folds said:

"The amount of money received by the bank on all deposits of Mr. Hillegass between the close of business April 10, 1906, and the closing of the bank, on good checks or cash deposited in Merchants', amounts to \$139,458.12. The amount of money paid out directly to Mr. Hillegass, or to other persons on his checks, not including reduction on notes, old items credited to his account prior to that date that came back unpaid after April 10th, and without including the protest fees paid out for the bank on the protested items—excluding all those items, simply taking money actually paid on his checks—amounted to \$148,919.17, or an increase in his overdrafts of \$9,461.05."

The defendant contends that he is entitled to credits not given him in the Folds statement, to the amount of \$12,207.07 for notes of good parties delivered by him to the bank after April 10, 1906, which were accepted and discounted by the bank and subsequently paid by the makers thereof. Had these credits been given, he argues that the statement would not have shown any overdrafts after April 10, 1906. It appears, however, by the evidence of the defendant himself that the proceeds of these notes were applied to the reduction of the defendant's overdue paper and to the payment of at least a part of his old overdraft checks. It also appears in evidence that the bank was carrying as cash on April 10, 1906, over \$3,500 of the defendant's overdraft checks. Whenever, after that date, the defendant deposited a sum of money to the credit of his account, it was the plain duty of the bank, until the deposits amounted to the sum of \$3,500, to take out of its cash from time to time enough of the overdraft checks to balance the deposits and to charge those checks against the defendant in his account. And as to the part of the proceeds of the notes for \$12,207.07 that was applied in reduction of the defendant's indebtedness on overdue paper, it was likewise the plain duty of the bank to make such application. Therefore, if the credits which the defendant

claims should be given to him in the Folds statement, he should also be charged therein with the same sums precisely as if he had actually given his checks after April 10, 1906, to the bank to pay the overdraft checks and the sums applied in reduction of his indebtedness on overdue paper. By either of the two methods of stating the account, the result is the same. In view of this fact, the objection to the part of the charge quoted in the twenty-third assignment is not sound.

The twenty-sixth assignment is too general, and the defendant's counsel concedes, in his brief, that it is covered by his argument on the other assignments.

All the other assignments were abandoned on the argument, and therefore need not be referred to.

We find no error in the record, and the judgment of the District Court is affirmed, with costs.

NATIONAL DISTILLING CO. v. CENTURY LIQUOR & CIGAR CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 3, 1910.)

No. 1,989.

1. TRADE-MARKS AND TRADE-NAMES (§ 10*)—MARKS SUBJECTS OF OWNERSHIP—INDIVIDUAL NAMES.

A corporation may adopt an individual surname as a trade-mark and is entitled to protection in its use, except as against persons of that name who have the right to use it in their own business.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 14; Dec. Dig. § 10.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 30*)—SEPARATION OF USE—VALIDITY.

A member of a partnership which deals in bottled whisky, and uses as a trade-mark a distinctive label containing the surname of the partners, although the firm may have the right to use such label, cannot also confer such right upon a corporation of which he is a stockholder and officer, but which has no connection with the business of the firm, as against another dealer which has used the same name as a brand and trade-mark for whisky for many years.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 33, 34; Dec. Dig. § 30.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 30*)—NAMES OF INDIVIDUALS—USE BY CORPORATION.

Stockholders and officers of a corporation who do not even own a controlling interest therein cannot confer on the corporation the right to use their surname as a trade-mark on goods it sells as against another dealer which has used the name as a trade-mark for many years.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 33, 34; Dec. Dig. § 30.*]

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

Suit in equity by the National Distilling Company against the Century Liquor & Cigar Company, Abe L. Livingston, W. Thomas Magee,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Alvin D. Martin, Gus Mueller, and Samuel G. Livingston. Decree for defendants, and complainant appeals. Reversed.

A. E. Wallace, for appellant.

H. S. Corbett, for appellees.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge. This suit was brought by appellant (in terms) as a distiller and rectifier of whisky and wholesale dealer therein, to enjoin an alleged infringement of its certain trade-mark by the appellee corporation as a vender of whisky at Memphis. The trade-mark is the name "Livingston," and was registered in the United States Patent Office February 20, 1905. The bill contains the ordinary averments respecting infringement and unfair trade competition, with a prayer for an injunction, an accounting, and damages. The appellant is a Wisconsin corporation. The appellee corporation was organized under the laws of Tennessee, and the other appellees are citizens of that state and domiciled there. The issues are made up in the usual way by answer and replication, except one defense which will be mentioned later. The case was heard on reference in the court below and resulted in certain findings of fact. Upon these findings the referee based conclusions of law against appellant, which, with the findings, were affirmed by the court. The matter is pending here on appeal.

It was found that appellant had used the name Livingston continuously since 1891 as a "brand, label and trade-mark on its packages containing rye and bourbon whisky"; but appellant does not seem to have commenced to bottle whisky and use the mark on those packages until 1896. Appellant has expended large sums of money in advertising its trade-mark and business and has established a trade in quite a number of the states. It is not necessary to set out either the findings of fact or the evidence. The issue at last is whether the appellee corporation has the right to use the name Livingston, as a conspicuous part of a trade-mark. Both companies are engaged in the sale of bottled whisky. The National Company, appellant, sells in cases or in wholesale lots, while the Century Company, one of the appellees, sells at retail upon mail orders. Both companies display the name Livingston conspicuously on labels placed on the bottles used in their trade. But there are such marked differences between these labels as to satisfy us that there is no probability of confusion or deception of customers, except through the use made of the name. Appellee company seeks under one of the defenses of its answer and by evidence to justify its use of the name by showing that the father of the two appellees named Livingston employed the word and name "Old Livingston" with his own photograph, as a trade-mark in a grocery business, which he conducted at Paducah, Ky., for a number of years and until his death. Certain of his sons thereafter succeeded to that business and began also to deal in whisky, adding to the mark of their father the word "Whisky." The father appears to have died in 1898. Abe L. Livingston, one of the sons, is interested in this grocery and whisky business at Paducah as a member of a firm, comprising two of his

brothers and himself. That firm has used the mark in its whisky trade ever since the change mentioned, and is still so using it. Abe L. Livingston is president of the Century Company, and is interested in it to the extent of one share of its stock of the par value of \$100; but he is the only Livingston who is interested in both the Century Company and the Livingston firm. Samuel G. Livingston, another brother and appellee, never had any pecuniary interest in the Livingston firm, but he is the secretary, treasurer, and manager of the Century Company, and the owner of 33 shares of its capital stock. The authorized capital stock of the company is \$8,000; the portion paid in is \$7,000.

The Century Company began the use of the label before mentioned in 1905. Abe L. Livingston, in answer to a question by what authority the Century Company "labeled the whiskies then offered for sale as Old Livingston whisky," testified: "By my authority. We were using this brand at Paducah and I gave them permission to use it at Memphis." Testimony was offered without contradiction that two concerns dealing in whisky at Memphis objected to dealing in appellant's whisky because the Century Company was advertising its mail order business and selling a "brand of Livingston" whisky through the South; one of the complaints being that the customer had been under the impression "that he was the one man handling it in Memphis at that time" and, further, that the action of the Century Company "interfered in his business, and he did not care to handle goods and go to the expense of advertising the same under a brand which his competitor handled." The other concern, according to the witness, objected to "pushing any brand any other jobber had in town, and when they spent their money to advertise a piece of goods, and got it introduced to the jobbing trade, they did not want anybody to come and cut prices on them." The National Company and the Century Company were not direct competitors in the trade because the one was selling at wholesale and the other at retail, but the interference came in the way indicated. The question is whether the National Company has such a right in the name Livingston as a trade-mark, as to entitle it to protection against the use made of the mark by the Century Company.

After finding as before pointed out that the National Company had used the word Livingston as a trade-mark continuously since June, 1891, and had "advertised its whisky in trade journals, signs, etc., under its trade-name Livingston," the referee further found that the company had "never discontinued the use of its trade-name nor given permission to any other firm, person or corporation to use the name Livingston." True, the evidence does not show why the National Company selected the name Livingston; but as observed by Judge Lowell in *William Rogers Manuf'g Co. v. Rogers & Spurr Manuf'g Co.* (C. C.) 11 Fed. 495, when speaking of the right to use a proper name as a trade-mark (498):

"Both parties have fallen into the mistake of supposing that it was important to have a Rogers and his son to authorize them to use the trade-mark Rogers & Son. The law is not so. Any one might use that trade-mark for the first time it was used, and if there was no Rogers in the same business

no Rogers could complain. *Levy v. Walker*, L. R. 10 Ch. D. 436; *Massam v. Thurley Co.*, L. R. 14 Ch. D. 748."

However, it is not claimed by appellees that the National Company did not rightfully adopt Livingston as a mark to identify the origin and quality of whisky it distilled and placed on the market; nor that the use which the company has made of the surname has not operated to invest it with the attributes of a trade-mark as far as under the law that could be done. The contention is that a surname cannot be exclusively appropriated against any one bearing the same name or otherwise having a right to use it. Reliance is placed on *Howe Scale Co. v. Wyckoff, Seamans, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481; *Herring, etc., Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616, and other kindred decisions. It must of course be conceded that the principle contended for has long been the settled law. But the essence of appellant's complaint is against the Century Company. It is true that individuals, among whom are the two Livingstons before mentioned, are also parties; but the charge made in the bill against them is that they "are directors and officers of said defendant corporation, and assist and take part in the aforesaid wrongful and unlawful acts." What right has the appellee corporation—the Century Liquor and Cigar Company—to use the name Livingston, is the inquiry; not what right the other appellees as individuals have to do so.

The precise claim made of the existence of such a right in the corporation is the authority given by Abe L. Livingston, as before pointed out. If it be assumed that the present Livingston firm is entitled to protection in the use of that trade-mark, it is because of the right of the members to use their own name in the conduct of their own business. But how could the mark be rightfully employed even with the sanction of the firm to distinguish its product or selection of whisky and also that of the Century Company? Plainly both of these things are not necessary to enable the firm to make fair and reasonable use of the name as a trade-mark; and to accord the firm such double privilege would at once allow it to impose a double burden on appellant and practice an obvious deception upon the public. There is nothing to show that this firm and the Century Company handle the same kind or quality of whisky; nor that the firm, as such, has given any sanction at all to the use of its mark by the Century Company; much less that it has sold its whisky business and good will to the Century Company. In alluding to the devices used as trade-marks by the Livingston firm and the Century Company, it is not meant to state that the name of the Century Company and its place of business are not shown on its label. But it is intended to point out the fact that the distinctive and most prominent features of the marks—Old Livingston and the photograph of the deceased Livingston—are displayed alike on both. Now it may well be that the appellant cannot be heard in defense of that firm's rights. But the relief sought by the appellant clearly extends to all interferences with its trade-mark, which are not traceable to persons having a right in common with ap-

pellant to the use of the name Livingston. And all consumers who may be influenced to purchase the article designed to be identified by the trade-mark of M. Livingston & Co., are entitled as members of the public to protection against the use of that mark to represent another and different dealer and article.

There are, however, the two Livingstons, who are connected with the Century Company. But these men are engaged in the business of that company in representative capacities as officers, not as individuals engaged in their own business. They act in the name of the company, not in their own names. True, these men are stockholders as well as officers and directors of the company; but they do not constitute a majority of the directors, nor do they own a majority of the stock paid in. They cannot therefore offer even the excuse of corporate control, if indeed that would shield them. The distinction between the rights of the Century Company and those of the two Livingstons, is substantial and cannot be ignored. In *Hall's Safe Co. v. Herring-Hall-Marvin Co.*, 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182, when it was sought to ignore the existence of the corporation and reach and control its officers and agents because of a sale the old company had made through them to the complaining party, Judge Severens said (41):

"If the purchaser desired to make the officers and agents of the selling corporation subject to the stipulations of the company in the contract of sale, it should have required their personal agreement to that effect. * * * This rule is not affected by the circumstance that they are indirectly interested as stockholders in the contracts of their corporation. If it were so, it would break down all distinction between the corporate entity and its component parts."

True, in that case it was sought to prevent certain of the officers and stockholders of the selling company from using the name of their ancestor as part of the name of the new company, which they had formed for the purpose of doing the same kind of business as that previously carried on by the selling company and whose assets and business they had sold. But since the Halls did not in that sort of a transaction exercise their individual rights so as to lose the privilege of using their own name subsequently in the formation of a company and so engage in the same character of business, it ought in principle to follow that the two Livingstons in the present instance are not exercising their individual rights to use their name when as officers and stockholders they act for the Century Company. See, also, *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273, 28 Sup. Ct. 288, 52 L. Ed. 481. It is simply misapplying the rule that one cannot be prevented from using his own name in his own business, to say under the facts of this case that these men can use their name as a trade-mark in the business of this corporation. The cases relied on by appellees upon this subject do not secure more than a personal privilege, and that only when it is exercised fairly and so as not to mislead the public. *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 348, 58 C. C. A. 499. In *Herring, etc., Safe Co. v. Hall Safe Co.*, supra, Mr. Justice Holmes said (208 U. S. 559, 28 Sup. Ct. 352 [52 L. Ed. 616]):

"The name of a person or a town may have become so associated with a particular product that the mere attaching of that name to a similar product without more would have all the effect of a falsehood. *Walter Baker & Co. v. Slack*, 130 Fed. 514 [65 C. C. A. 138]. An absolute prohibition against using the name would carry trade-marks too far. Therefore the rights of the two parties have been reconciled by allowing the use, provided that an explanation is attached. * * * Of course the explanation must accompany the use, so as to give the antidote with the bane."

When the appellant adopted the name Livingston as its trade-mark, it did so subject to the rule thus reannounced with such clearness; but it did not do more. It appropriated the name as a trade-mark in the business of distilling and selling whisky long before any one else attempted to do so. Hence, in the effort now made to sustain a division of the use of the mark between appellant and the Century Company through the right of the firm of M. Livingston & Co., the only rule is overlooked that might be available to the firm itself to justify its own use of the mark. *Royal Baking Powder Co. v. Royal*, *supra*; *Herring, etc., Safe Co. v. Hall's Safe Co.*, *supra*. More than this—in view of the practical transfer involved in the use actually made of the mark, the effort, if successful, would work a violation of the rule forbidding transfer of a trade-mark except as an incident to the sale of a business and good will or of a place where a business is at the time carried on. *Dietz v. Horton Mfg. Co.*, 170 Fed. 865, 871, 96 C. C. A. 41, and decisions there cited.

The order will be that the decree below be reversed, and the cause remanded with direction to enter a decree in favor of appellant according to the prayer of its bill with costs; but since no special damages appear to have been suffered by appellant, the prayer for an accounting is denied.

THE GEORGE HUGHES.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 19.

1. TOWAGE (§ 11*)—DUTIES AND LIABILITIES OF TUG—CARE AND SKILL REQUIRED.

A towing tug, although not required to exercise the highest degree of skill and care, is responsible for an accident due to want of proper knowledge on the part of her master of the difficulties surrounding navigation in the waters in which she operates and of the service which she undertakes.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

2. TOWAGE (§ 11*)—LOSS OF TOW—LIABILITY OF TUG.

A tug, towing two scows to the dumping ground at night, *held* not liable for the loss of one, which broke adrift owing to unusually heavy ground swells, and stranded on the beach three hours later: it appearing that the master discovered the loss within a reasonable time and made every effort, which in his judgment was safe and proper, to rescue the scow before she reached the shore.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by the Morris & Cumings Dredging Company against the steamtug George Hughes. Decree for respondent, and libellant appeals. Affirmed.

Armstrong & Brown (Pierre M. Brown, of counsel), for appellant.
Wallace, Butler & Brown (James K. Symmers, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. On the evening of June 19, 1906, the tug George Hughes left New York, having in tow the mud scows No. 40 and No. 36, bound for the dumping ground about two miles south-east of the Scotland Lightship. The scow No. 36 was at the tail of the tow. Between 1:30 and 2:10 a. m. of the 20th, the tug reached a point about three-quarters of a mile from the Lightship when, as a result of unusually heavy ground swells, the rear scow, No. 36, broke adrift and went on the beach some three hours later.

The libellant charges negligence, first, because the tug did not discover that No. 36 had broken away until some time after the event, and, second, because after the discovery of the loss, the tug did not take the necessary steps to rescue the tow, which drifted a distance of about three miles towards the beach and finally went ashore there.

Undoubtedly, if the tug, knowing that the scow was adrift, failed to rescue her in three hours while she drifted slowly towards destruction, a strong presumption of carelessness and neglect would arise. Indeed, the argument of the libellant leads to the conclusion that the master of the tug was either grossly incompetent or criminally negligent. When, however, it is remembered that his own position and reputation were at stake and that every consideration, founded alike upon humanity and expediency, required that he should save the scow, if possible, it would be unsafe to find negligence against the master of the tug, based upon the mere lapse of time. The question is, has the tug fairly and reasonably accounted for the time between the breaking away of the scow and her stranding on the beach? The tug was neither an insurer nor a common carrier. She was bound to exercise reasonable skill and care and is liable for failure in this respect. Though not required to exercise the highest degree of skill and care, she is responsible for an accident due to want of proper knowledge on the part of her master of the difficulties surrounding navigation in the waters in which she operates and of the service which she undertakes. *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The Lady Pike*, 21 Wall. 1, 22 L. Ed. 499.

If, then, it appears that the master of the Hughes, when confronted with the complicated problems disclosed by the proofs, exercised his best judgment and navigated with due regard to all the perils surrounding him, we cannot hold the tug liable, even though it should now appear, in the light of subsequent events, that a wiser course might have been adopted. If he did all that a prudent navigator should have done, the tug is not liable.

The accident happened at night and the testimony comes from witnesses, occupying widely varying positions on land and sea, who speak of events which occurred during a long period of time, approximately three hours. It is not surprising, therefore, that there should be disagreement among the witnesses and confusion in the testimony. We think, however, that the following propositions are established or that they are supported by sufficient testimony to warrant us in upholding the findings of the district judge, who saw and heard the witnesses:

First. The tide was flood, the wind N. E. and there was a heavy ground swell rolling on the beach.

Second. The master of the tug discovered the breaking away of the No. 36 within a reasonable time after it occurred and immediately took measures to rescue the scow.

Third. He owed the same duty to No. 40 as to No. 36 and would not have been justified in abandoning the former in order to rescue the latter. Good seamanship demanded that he should hold on to No. 40.

Fourth. No. 40 was loaded, and in order to overtake No. 36, which was drifting towards the beach, it was necessary to dump the former; otherwise it might have been impossible to overtake No. 36, which had dumped her own load and was standing high in the water, offering a broad surface to the wind.

Fifth. Considerable time was lost in waking the scowman on No. 40, who was the only person who could dump her pockets. In turning around while loaded one of her bridles broke, leaving the tug fastened by the other bridle to the port corner of the scow. Towing under such conditions would be difficult at all times, but with a heavy following sea which caused the scow to sheer and surge violently and with the long hawser trailing behind, it was an exceedingly hazardous operation, requiring the utmost care on the part of the tug and preventing fast progress through the water.

Sixth. There were several other tugs and tows in the immediate vicinity, some of them being between the Hughes and the shore. The tug was therefore compelled to wait until these tugs and tows passed on and thus lost valuable time at the crucial moment.

Seventh. No. 36 drifted over the "oil spot," where, on account of her greater draft, the tug could not follow. She did not abandon the scow, however, at this point, but stood by to the north of the "oil spot," hoping to head the scow off before she stranded.

We cannot find the tug liable in these circumstances; apparently she did what she could to avert disaster, or, at least, we are justified in finding that her master, who was an experienced tugboat man, exercised his best judgment in an unusual and trying situation, pursued as he was by a series of unexpected misfortunes which might have perplexed a most experienced navigator.

The decree is affirmed with costs.

EMPIRE TIMBER CO. v. WOODBINE TIMBER CO.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 45.

1. PLEADING (§ 250*)—AMENDMENT—ACTION FOR BREACH OF CONTRACT—PLEADING DAMAGES.

In an action for breach of a contract, it is within the discretion of the court to permit an amendment of the complaint, by substituting specific allegations of general damage for a claim for special damage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 731; Dec. Dig. § 250.*]

2. SALES (§ 89*)—MODIFICATION OF CONTRACT.

A contract by which plaintiff agreed to furnish to defendant piles of various sizes delivered on board vessels to be sent by defendant during the following year, and which provided that plaintiff should keep defendant constantly advised as to the quantities being cut and the location of the same with reference to the point of shipment, to enable defendant to intelligently charter vessels, necessarily implied that plaintiff should have the right to select the cargoes to be shipped, with respect to the sizes of the piles; and the fact that it at times complied with the wishes of defendant in that respect did not change the contract, nor estop plaintiff from asserting its right thereafter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259; Dec. Dig. § 89.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by the Woodbine Timber Company against the Empire Timber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In the opinion following the parties are designated as in the court below. On January 1, 1906, the parties to this action entered into a written agreement by which the plaintiff agreed to furnish to the defendant upon vessels in Georgia or Florida during the year following certain quantities of yellow pine piles of various sizes. The quantities and sizes of the piles are stated in schedules. The test whether piles complied with the requirements was stipulated to be the inspection by the defendant's inspector alongside the vessel. Each cargo was to be paid for when the vessel was loaded—delivery being f. o. b. the vessel.

The contract also contained the following provision: "The party of the second part [the plaintiff] shall constantly keep the party of the first part [the defendant] advised as to the quantities of piling being cut and made ready for shipment and the location of the same with reference to point of shipment, in order that the party of the first part may intelligently charter vessels to load same at proper loading points in full cargo lots of not less than four hundred nor more than five hundred piles per vessel. * * *"

The plaintiff furnished large quantities of piles under the contract, and no serious misunderstanding arose until during the month of November, 1906, at which time it is in effect claimed by each party that the other broke the contract. The provision of the contract concerning payment upon the loading of the cargo was not insisted upon before November, 1906, and payments were made after cargoes had arrived at New York.

The plaintiff brought suit against the defendant for the breach of contract which it charged, and the defendant on its part set up a counterclaim. The jury rendered a verdict in favor of the plaintiff, and the defendant has brought this writ of error. Other material facts are stated in the opinion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. T. Kiernan, for plaintiff in error.

Battle & Marshall (H. S. Marshall, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The defendant contends at the outset that the law of Georgia should be applied to this contract, because it was made and was to be performed in that state. This contention is undoubtedly well founded, but it presents no error. Georgia law seems to be the same as the general law upon the particular questions here involved.

It is next urged that the trial court erred in permitting the plaintiff to amend its complaint by substituting for its claim for special damages specific allegations of general damage. This amendment was probably unnecessary. Waiving its claim for special damages, the plaintiff was undoubtedly entitled to prove its general damages, without particularly stating the measure thereof. But the measure which the amendment stated was that which the law fixed, and the amendment did no harm. Certainly its allowance was within the discretion of the trial court. It is true that it would have been much the better practice to have written it out. But the statement of the court was treated as the amendment, and the defendant traversed its allegations. Afterwards it was too late to object upon the ground of informality.

The substantial contention of the defendant is that the trial court erred in refusing to dismiss the complaint. This contention requires, in the first place, the interpretation of the contract upon the question whether the plaintiff or the defendant had the right thereunder to select the piles to constitute the cargoes to be carried by the vessels sent by the defendant.

As shown in the extract from the contract in the statement of facts, the plaintiff was to keep the defendant advised of the quantities of piling ready for shipment from time to time, so that the defendant could intelligently charter vessels to carry it. In our opinion this provision necessarily implied that the plaintiff should have the right to select the cargoes to be shipped. The provision would have been useless and meaningless, if the defendant could have rejected the piling which the plaintiff had ready and have insisted upon receiving particular sizes which might not have been ready.

But it is said that the plaintiff waived this provision and conceded to the defendant the privilege of selecting the sizes of piling to be taken in each cargo. We find from the record that the plaintiff at different times did comply with the wishes of the defendant with respect to the shipments. But we find nothing requiring the jury to find that the contract was thereby changed, even if we assume that there was enough to justify the trial court in submitting that question to them. And no principles of estoppel prevented the plaintiff from asserting its rights under the contract when it considered it necessary to do so.

Now, there was evidence in the case to warrant the jury in finding that the defendant's inspector, in accordance with its instructions, refused to receive upon its vessel piling offered by the plaintiff of the

sizes due under the contract, because they were below a particular size required by one of the schedules, and that, because the plaintiff declined to load the vessel with piles of that size, the defendant sent it away, and sent no more vessels. So finding, the conclusion followed that the defendant broke the contract, unless it had been broken previously by the plaintiff.

It is insisted that the plaintiff did break the contract by its letter of November 22, 1906, in which it stated that it would load the vessel sent by the defendant with piles called for by the contract, but would not load exclusively with the particular sizes which the defendant demanded, and in which it also stated that it would insist upon payment through a bank or in some other satisfactory way before the sailing of the vessel. The trial court assumed that this letter, by this demand of payment, would have constituted a breach of the contract on the part of the plaintiff, if prior to a breach on defendant's part, and submitted the question of priority to the jury.

As we have seen, there was evidence to warrant the finding that the defendant, by refusing to accept the cargo offered by the plaintiff, broke the contract. There was also evidence sufficient to warrant the finding that the defendant broke the contract before the sending or receipt of this letter. Consequently the verdict of the jury was justified, and there was no error of which the defendant can complain. We may say, moreover, that we are by no means satisfied that the demand for satisfactory arrangements for payment before the sailing of the vessel was sufficient to constitute a breach of the contract. Under the circumstances it might well be considered a notice that the provisions of the contract relating to the time of payment, which had previously been waived, would be insisted upon.

The remaining assignments disclose no prejudicial error.

The judgment of the Circuit Court is affirmed.

ATLANTIC CITY R. CO. v. CLEGG.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 44.

CARRIERS (§§ 247, 327, 320, 347*)—INJURY TO PASSENGERS—MANAGEMENT OF TRAINS AT RAILROAD STATION.

Plaintiff's intestate entered the waiting room at a station on defendant's railroad, having the return part of a round-trip ticket, and, after inquiring the time of his train, sat down and waited for it. There were two tracks in front of the station building and his train passed on the farther one. A street crossed the tracks at the end of the station, paved with concrete, and from it and on the same level a paved platform extended on the outer side of each track, there being no division between the pavement of the street and the platforms. A picket fence also extended from the street between the tracks past the station, which prevented crossing except on the street. An automatic bell was rung by every train from the time it approached until it left the station. The train of plaintiff's intestate stopped with the rear car on the street cross-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing, and, as he was passing to it from the waiting room along the street, he was struck and killed by a through train on the nearer track going in the opposite direction at high speed. *Held*, that deceased was a passenger, and did not lose that relation by entering upon the street to reach his train which was at the implied invitation of defendant; that he had the right to act on the assumption that defendant would exercise proper care not to injure passengers while passing from the waiting room to the train by the only way open to them; and that the questions of negligence and contributory negligence were for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 987, 989, 1365, 1167, 1402; Dec. Dig. §§ 247, 327, 320, 347.*]

In Error to the Circuit Court of the United States for the District of New Jersey.

Action by Mary S. Clegg, administratrix of Charles A. Clegg, deceased, against the Atlantic City Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thompson & Cole, for plaintiff in error.

Frank S. Katzenbach, Jr., for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below Mrs. Mary S. Clegg, administratrix and wife of Charles S. Clegg, brought suit against the Atlantic City Railroad Company for its alleged negligence in causing his death. She recovered a verdict, and on entry of judgment thereon in her favor the railroad sued out this writ.

The accident in which the decedent lost his life occurred at the defendant's station at Magnolia, N. J. The ticket office and waiting room are at the side of a platform which runs along the south-bound track, and there is another open platform along the north-bound track. Eversham avenue, a public street, crosses the two tracks at the south end of the station. A picket fence between the two tracks extends from that avenue northward, and prevents passengers crossing from one platform to the other, except by using the avenue. The two platforms and the street are all made of concrete, are on the same level, and there is no dividing or marked line between platforms and street. North-bound trains often stopped at Magnolia station with a car standing on Eversham avenue, and passengers were accustomed to get off the cars on either side, using the street as a disembarking platform. There was an automatic bell, rung by an approaching train, and which kept ringing until the train left the station. There was neither watchman or gate at the crossing, and the station agent was the only employee. He was absent at the time of the accident, having gone to the post office to get the mail bag which it was his duty to put on the train. The testimony on plaintiff's behalf tended to show that on the day before the accident the decedent came to Magnolia on a train from Camden, and had a return round-trip ticket to that place. The next morning he went to the station shortly before 9 o'clock, reaching it from the waiting room side. He went into the waiting room, learned from the ticket agent, who had not yet gone out for the mail, the time

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of his return train to Camden, and then sat down to wait. His train came in shortly thereafter, and its last car stopped with its rear platform steps beyond the fence and opposite the Eversham avenue crossing. Its approach set in motion the automatic bell, and it was ringing when the deceased left the waiting room to take his train and crossed the south-bound track on the avenue. Just before he reached the train and while crossing the latter track, he was struck and killed by a scheduled express train which passed the station on the south-bound track without stopping. This train, which was ten minutes behind time and was running at high speed, blew for the crossing, and the deceased, had he looked before he crossed the track, could have seen it.

It will thus be seen the case turns on the relation the decedent and the railroad bore to each other, and its reversal is conditioned on the adoption by this court of the contention made in the brief of the railroad's counsel, viz.: "Entering upon the highway over which the railroad had no possible control destroyed the relation of carrier and passenger, if such existed, at any time prior thereto." This, in effect, would be to say that the decedent at the time of the accident stood in the relation of a stranger to the railroad, and that it owed no greater duty to him than to a pedestrian crossing its tracks by this public street. We think, however, there was evidence from which a jury was justified in finding the deceased bore at the time of the accident the relation of a passenger to the railroad, and that it failed to exercise due care for his safety. In point of fact the deceased had a ticket. He was waiting for the train's approach in a place provided by the railroad, and he could only reach its train by using the public street. The erection by the railroad of its fence, its use of the street as a train approach or platform, and stopping its train on the street, were acts from which a jury could infer the railroad invited the deceased to use the street as an approach or platform. It must be conceded that the relation of passenger existed when Mr. Clegg entered the waiting room, inquired for his train, and with a ticket in his possession sat down to await his train. If so, did that relation cease when he crossed an invisible and unmarked property line on the level platform and took the only path the railroad provided for him to get upon its train? To hold that under such circumstances the relation of passenger ended when he crossed the street line would seem unreasonable. As between the railroad and the municipality, the platform and the street were two different things, but, as between the passenger and the railroad, the latter had made them one by using it as the only means of approach to its north-bound trains and by impliedly inviting him to take it. The defendant had no one there to direct the decedent. The ringing signal was a warning given by the north-bound train, and, under the circumstances and the implied invitation to cross, the decedent was justified in assuming the railroad would warn him of danger threatening his crossing. While the case is not on all fours with *Warner v. Baltimore, etc., R. Co.*, 168 U. S. 346, 18 Sup. Ct. 68, 42 L. Ed. 491, yet both are governed by the general principle there stated:

"The situation of the tracks, the location of the station building and the waiting room, the coming of the local train, and its stopping to receive passen-

gers in a position which required the latter to cross a track in order to reach the train involved necessarily a condition of things which under one view of the testimony constituted an implied invitation to the passenger to follow the only course which he could have followed in order to take the train; that is, to cross the track to the waiting train. Whilst it is true, as was said in *Terry v. Jewett*, supra, that such implied invitation would not absolve a passenger from the duty to exercise care and caution in avoiding danger, nevertheless it certainly would justify him in assuming that in holding out the invitation to board the train the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution. The railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation, and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care. The doctrine finds a very clear expression in a passage in the opinion in the *Terry Case* [78 N. Y. 334], already referred to, where it was said: 'It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose great risks upon those who might have occasion to travel on the railroad.'

The case having been submitted to the jury in accordance with the foregoing principles, and the evidence such as to warrant a verdict based on negligence of the railroad and an absence of contributory negligence of the decedent, the judgment below is affirmed.

In re SCHOENFELD et al.

GAMBLE v. WILBUR-STEPHENS CO.

(Circuit Court of Appeals, Third Circuit. November 23, 1910.)

No. 1,364.

1. BANKRUPTCY (§ 114*)—RECEIVERS—SALE OF PROPERTY.

It is not illegal for one to purchase the claims of the creditors of a bankrupt, and, if by reason of such purchases those who have sold their claims lose interest and do not attend the sale of the bankrupt's property and bid thereon, such nonattendance and possible elimination of bidders cannot be charged against the receiver who makes the sale.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

2. BANKRUPTCY (§ 114*)—RECEIVERS—ACCOUNTING.

Where exceptions to the accounts of a receiver in bankruptcy charged him with a fraudulent conspiracy to discourage bidders at a sale of the bankrupt's property, but on the hearing such charge was not sustained, the referee was not authorized to surcharge his account on another ground as to which there was no exception or hearing.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

3. BANKRUPTCY (§§ 114, 368*)—ACCOUNTING BY RECEIVER OR TRUSTEE—RIGHT TO COMMISSIONS.

Within the limits fixed by law, the amount to be allowed as commissions to a receiver or trustee is subject to the sound judicial discretion of the court, and, where a receiver or trustee has been negligent in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

performance of his duty, the court may in a proper case, without the filing of any exceptions, deny him any commissions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. §§ 114, 368.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In the matter of Max and Hugo Schoenfeld, bankrupts. From an order surcharging his accounts and denying him commissions, Robert G. Gamble, receiver and trustee, appeals. Reversed in part.

Charles A. Woods and M. L. Avner, for appellant.

Ralph L. Smith, for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. In this case Robert G. Gamble, receiver and trustee of Max and Hugo Schoenfeld, bankrupts, complains of the decree of the District Court overruling the exceptions contained in his petition to review an order of the referee, by which he was surcharged in his account as receiver with the sum of \$1,047.50, and allowing the exceptions of the Wilbur-Stephens Company, a creditor, by which action he was surcharged in his account as trustee, in lieu of the sum of \$1,047.50, with the sum of \$3,150. He brings the case to this court both by a petition to revise, under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), and by appeal under section 25a of the same act. As the errors complained of in the petition to revise and the assignments of error on the appeal are identical, and present only questions of law, we need not stop to consider which of the two methods of procedure is the correct one, or whether the two methods may be prosecuted together.

On March 27, 1909, the District Court made an order directing Gamble, who had just then filed his account as receiver, and who had previously qualified as trustee, to hold the balance appearing to have been in his hands until his account as trustee should be filed, when, it was ordered, both accounts should be subject to examination and exception by all parties in interest. After his account as trustee had been filed, the Wilbur-Stephens Company excepted to his account as receiver. The exceptions were (1) that the receiver had entered into a conspiracy with certain other persons to discourage bidders at the public sale of the bankrupt's estate for the purpose of personally profiting thereby; (2) that he had unlawfully refused to receive or consider some of the bids that were offered for the property at the sale; and (3) that the property was worth \$12,000, or more, and was sold by him to two of the alleged conspirators for the sum of \$4,350. The exceptions closed with a request that the receiver's claim for compensation and administration expenses be disallowed, and that he be surcharged with \$7,650, the difference between \$4,350 and \$12,000.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There is no evidence whatever in support of the second exception, and the third exception necessarily stands or falls with the first. As to the first exception, it is to be noted that the object of the alleged conspiracy is stated to have been that the receiver might personally profit thereby. But the referee himself declared, in his report on the exceptions, that he was not satisfied that the receiver was a party to any arrangement to profit by the sale that he made. That conclusion is amply supported by the proofs. It is shown that the claims of certain creditors were purchased by Finkelhor Bros., who were the purchasers at the receiver's sale, but it is not shown that the receiver had any connection with these purchases. It is not illegal for one to purchase the claims of the creditors of a bankrupt, and if, by reason of such purchases, those who have sold their claims lose their interest in the administration of the bankrupt's estate, and do not attend the sale of the bankrupt's property, and bid with others for that property, such nonattendance and possible elimination of bidders is not to be charged up against the receiver. It appears that Finkelhor Bros. paid three of the creditors of the bankrupts the aggregate sum of \$1,047.50. This is the sum with which the referee surcharged the account of the receiver. The ground on which the surcharge was made was not that the receiver had entered into the alleged conspiracy, but that the referee was "satisfied from the evidence that said sale was accomplished by reason of the failure by the trustee (receiver) to exercise that vigorous care to obtain the full value of the bankrupt stock which was his duty in the case." It appears, therefore, that the receiver was called on by the exception to his account to meet a charge of fraud, and, though no fraud was found, he was condemned on a ground not specified in the exceptions, not necessarily involving fraud, and of which he had had no notice. This, we think, was wrong.

The receiver then went to the District Court on a petition to review, assigning in the body of his petition as error the charge against him. The Wilbur-Stephens Company did the same thing, assigning as error the failure of the referee to surcharge the receiver with \$7,650, instead of \$1,047.50, and his failure to refuse to the receiver any allowance for his services or for his administration expenses. As above stated, the District Court dismissed the petition of the receiver, and, to the extent of \$3,150, allowed the petition of Wilbur-Stephens Company. In his opinion the learned judge of the District Court does not disagree with the conclusion of the referee that there is no satisfactory proof that the receiver entered into any arrangement for the sale of the bankrupt's estate by which he would be benefited. The case was disposed of by the District Court as well as by the referee on the ground that the receiver was not as vigilant as he should have been. Included in the charge of \$3,150 are commissions to the amount of \$225. Within the limits fixed by law, the amount to be allowed as commissions is subject to the sound judicial discretion of the court. Where a receiver or trustee has been negligent in the performance of his duty, the court may, in a proper case, without the filing of any exceptions, deny him any commissions. We are not disposed to interfere with the action of the District Court in the matter of these commis-

sions, but we think the case does not warrant the severe condemnation of the decree here complained of.

The decree of the District Court will be reversed and the record remanded, with instructions to enter a decree to the effect that the order of the referee surcharging the receiver with the amount of \$1,047.50 be set aside, and that the claims of \$100 in the receiver's account, and of \$125 in the trustee's account, as compensation for services rendered as receiver and trustee, be disallowed. Neither party will be allowed costs in this court.

GRUSSLAW v. PHOENIX KNITTING WORKS.

(Circuit Court of Appeals, Third Circuit. November 26, 1910.)

No. 1,437.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR NECK SCARF.

The granting of a preliminary injunction restraining infringement of the Mead design patent, No. 39,347, for a design for a neck scarf, *held* a proper exercise of the discretion of the court, on the showing made and a prior decision sustaining the patent.

Appeal from Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by the Phoenix Knitting Works against Samuel Grushlaw, individually and trading under the name and style of the Pennsylvania Knitting Mills, and also under the style of Penn Muffler Company. From an order granting a preliminary injunction (181 Fed. 166), defendant appeals. Affirmed.

Frank S. Busser, George J. Harding, and Hector T. Fenton, for appellant.

Fraley & Paul (F. E. Dennett and Henry N. Paul, Jr., of counsel), for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. This is an appeal from an interlocutory decree of the Circuit Court for the Eastern District of Pennsylvania, granting a preliminary injunction for infringement of design patent No. 39,347, issued June 9, 1908, to one Mead, for a neck scarf. Some time prior to the entry of the order allowing a preliminary injunction in the court below, the patent in suit had been sustained by the Circuit Court of the United States for the Eastern District of Wisconsin, in *Phoenix Knitting Works v. Bradley Knitting Company et al.*, 181 Fed. 163. It now appears that the defendant in the case decided in the Wisconsin court subsequently took out a license, as did also a defendant in another case then pending in New York, but which never came to final hearing because of the adjudication just referred to. The evidence in this case, outside of the introduction of a few patents claimed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to show the prior art, and some exhibits, consists entirely of ex parte affidavits.

The appellant's main point now is that the patent is invalid. His affidavits for the most part are intended to show an alleged anticipation, consisting in the use of the herring-bone stitch and serrated edge in a blank for a sleeve for a sweater; it being claimed that the sleeve blank is of the same design as the neck scarf. It is not conclusively clear, however, that such a sleeve, which at the most constitutes but a small part of a finished sweater, an article of an entirely different character from a neck scarf, is an anticipation of the design patent in suit. It is certain that the sleeve blank loses whatever resemblance it has to the patented design the moment it has become incorporated in and made a part of the sweater for which it was made. All that we intend to say, and all that we need say, however, is that it is not so obvious an anticipation as to warrant us at this time in holding the patent invalid and dismissing the bill of complaint. Whether the sleeve blank of a sweater would suggest to a person skilled in the art that it was adapted for a design for a scarf is a debatable question. The scarf as designed seems to have become very popular, and has met with a large and ready sale.

In view of the fact that the patent had been upheld in the case above noted, and upon the evidence produced on the question of validity and infringement, when the motion for a preliminary injunction was made in the court below, we feel that that court was justified in making the order appealed from. Its discretion was exercised reasonably and justifiably, and that is the question primarily presented by this appeal. Beyond this, we feel that we ought not, at this time, to go. It is quite possible that the case may be further illuminated, and whatever of doubt now exists dispelled. Notwithstanding anything that may have been said herein, it should be distinctly understood that it is not intended thereby to express any definite or controlling opinion upon either the question of the validity of the patent or its infringement.

The decree of the court below is affirmed.

UNITED STATES v. STANDARD OIL CO. OF INDIANA.

(District Court, W. D. Tennessee, E. D. November 17, 1910.)

No. 4,044.

CARRIERS (§ 38*)—INTERSTATE COMMERCE ACT—OFFENSES BY SHIPPERS—ACCEPTING CONCESSIONS.

An indictment under the Elkins act (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138]) charging that defendant received concessions from the established through rate on shipments from Evansville, Ind., to Birmingham, Ala., via Grand Junction, Tenn., is not sustained by proof that shipments were made by defendant from Whiting, Ind., via Evansville to Grand Junction, for beyond, at the lawfully filed and published rate which was prepaid, and were forwarded from there to Birmingham on orders from the consignee, which paid the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

freight, although the cost of the transportation from Evansville to Birmingham was less than the established through rate between such points.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 33.*]

Prosecution by the United States against the Standard Oil Company of Indiana. On motion by defendant for direction of verdict. Motion granted.

See, also, 154 Fed. 728.

Casey Todd, U. S. Dist. Atty., Geo. Randolph, Sp. Asst. U. S. Atty., W. S. Gregg, Sp. Asst. Atty. Gen., and Yandell Haun, Asst. U. S. Dist. Atty.

Robt. W. Stewart, Chauncey W. Martyn, and C. G. Bond, for defendant.

McCALL, District Judge: The indictment in this case is predicated upon section 1 of an act of Congress, approved February 19, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138]), and commonly known as the "Elkins Act." The first section provides as follows:

"That it shall be unlawful for any person, persons or corporation, to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, * * * whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given, or discrimination is practiced. Every person or corporation who shall offer, grant, or give, or solicit, accept or receive, any such rebates, concession or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than one thousand dollars, or more than twenty thousand."

There are 1,524 counts in the indictment, and they differ only in respect to the dates of the alleged offenses, the points of destination of the shipments, the weight thereof, the numbers of the cars, and the freight rate from Evansville, Ind., to destination, the shipment in each count being petroleum or some product thereof. For convenience, therefore, we shall consider a count relating to Birmingham, Ala., that being the point referred to in the opening statement by counsel for the government.

In substance, the charge is that between the dates of November 1, 1903, and November 13, 1905, the Illinois Central Railroad Company and the Southern Railway Company were common carriers in interstate commerce, and engaged in the transportation of property over their connecting railroads, from Evansville, Ind., to Birmingham, Ala., under a common arrangement for a continuous carriage and shipment; that during the said period the lowest lawful rate and charge by said common carriers for the transportation of petroleum and its products in car load lots from Evansville, Ind., to Birmingham, Ala., was 33 cents for each 100 pounds thereof, and that all the facts stated in the indictment were well known to the defendant, the Standard Oil Company of Indiana. It is then charged that within the period of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time aforesaid, to wit, on the 4th day of December, 1903, and while the said joint tariffs and schedules of rates and charges were still in force on the said route of the said common carriers, said common carriers unlawfully did engage in the transportation in interstate commerce aforesaid from Evansville, Ind., to Birmingham, Ala., over the said route, and through the Eastern Division of the Western District of Tennessee, for and on account of, and pursuant to the request of, the Standard Oil Company, a corporation theretofore organized and then existing under the laws of the state of Indiana, of 38,957 pounds of a product of petroleum known as refined oil, in a tank car of the Union Tank Line Company, No. 3932, under the said common arrangement for a continuous carriage and shipment, and at a total rate and charge to the Standard Oil Company for such transportation of the said property of 23½ cents for each 100 pounds thereof, and that the Standard Oil Company, a corporation, as aforesaid, on the 4th day of December, in 1903, and within the Eastern Division of said Western District of Tennessee, unlawfully did knowingly accept and receive from the said common carriers a concession in respect of the transportation of certain of its property in interstate commerce, whereby, and by which device, that property was transported in such interstate commerce at a less rate than that named in the tariffs so published and filed as required by law by the said common carriers. Thus it appears that the specific charge is that the Standard Oil Company of Indiana accepted and received concessions in relation to the transportation of freight from Evansville, Ind., to Birmingham, Ala. The device by which it is alleged that the common carriers and the defendant violated the law is not set out in detail in the indictment. At the opening of the trial, however, counsel for the government stated to the court and jury the theory of the prosecution, and it was in substance as follows: That the defendant shipped its product over the connecting lines of railroad from Whiting, Ind., to Grand Junction, Tenn., for points beyond, at the rate of 13 cents per hundredweight; that upon or before its arrival at Grand Junction orders were given by the defendant to the joint agent of the Illinois Central and the Southern Railway Companies at Grand Junction to forward the shipment to Birmingham, the point of destination; that the rate paid by the defendant from Grand Junction to destination was that portion of the through legal rate from Evansville, Ind., to destination, over the Illinois Central and the Southern Railroads, which was earned by the Southern Railway for its haul from Grand Junction to destination; that the legal rate over the Illinois Central and the Southern Railroads from Evansville, Ind., to Birmingham, Ala., was 33 cents per hundredweight, and that the defendant paid the Southern Railway its proportion of this rate, which was 16½ cents; that the proportion of the 13-cent rate per hundredweight from Whiting to Grand Junction, for beyond, which was paid by the defendant to the Illinois Central Railroad was 7 cents as its part of the haul from Evansville to Grand Junction. The result being that for transporting 100 pounds of freight from Evansville, Ind., to Birmingham, Ala., the defendant paid only 23½ cents, which is the sum of 7 cents, the amount paid the Illinois Central for its haul from Evansville to Grand

Junction, and 16½ cents, the amount paid the Southern Railway for its haul from Grand Junction to Birmingham, when the legal through rate from Evansville to Birmingham was 33 cents, a net saving of 9½ cents per one hundredweight. When the counsel for the government announced that they had offered all their evidence and rested, counsel for the defendant moved the court to direct a verdict for the defendant, upon the ground that the evidence did not support the charges in the indictment, and that the government had failed to prove its case. This raises the question which I am now to pass upon.

The uncontradicted evidence in the case is that upon written orders from the Standard Oil Company of Kentucky to the defendant, the Standard Oil Company of Indiana, at Whiting, Ind., the defendant company shipped to the Kentucky Company each car load of freight covered by each count in the indictment to Grand Junction, Tenn., for beyond, with freight charges thereon prepaid to Grand Junction, and that such shipments were received at Grand Junction, Tenn., by the Kentucky Company, and that it gave orders before the arrival at Grand Junction for the forwarding of each carload of the freight to the points of destination, respectively, and that the Kentucky Company paid to the Southern Railway Company the freight charges from Grand Junction to the point of destination, and the rate so paid by it was that proportion of the legal rate from Evansville, Ind., to the point of destination earned by the carrier from Grand Junction to destination; that there was no understanding, expressed or implied, direct or indirect, between the defendant, the Indiana Company, and the Kentucky Company in regard to the rates to be paid on these shipments, but that the Kentucky Company purchased the oil from the defendant company just as it would purchase any other commodity from any other person or company, and the shipments were made in the same way.

Upon this state of facts, I held on a former day of the trial that the defendant company could not be found guilty under any count in the indictment of the offense of accepting concessions in regard to the transportation of the freight from Grand Junction to destination, it, in so far as the evidence shows, not having paid said freight, nor was it in any way connected therewith. If the defendant is guilty under any count in the indictment, it must be for having received and accepted concessions in relation to the transportation of the freight in question over the Illinois Central Railroad from Evansville, Ind., to Grand Junction, Tenn., which line formed a portion of the route over which the freight moved from Evansville to destination.

The testimony in regard to the movement of this freight south of Grand Junction, therefore, can only be considered for whatever it may be worth in shedding light upon the question as to whether or not the defendant company received and accepted concessions in relation to the transportation of the commodity from Evansville, Ind., to Grand Junction, Tenn.

Touching this part of the haul, the uncontradicted testimony before the court is that each car of the commodity covered by the indictment was shipped by the defendant from Whiting to Grand Junction, for beyond, and that the defendant company paid the rate of 13 cents per

hundredweight for the transportation thereof under said shipment; that during the period covered by the indictment there was a 13-cent rate on petroleum and the products of petroleum in car load lots from Whiting to Grand Junction, for points beyond, and this rate was duly on file with the Interstate Commerce Commission, and was the legal rate; that the shipments covered by the indictment were in car load lots from Whiting to Grand Junction, for beyond, and that the defendant paid this rate.

The government witness, Mr. Crossland, who holds a position with the Interstate Commerce Commission at Washington, and who has charge of the tariff rates filed in this case, in response to a question from the court, stated, in substance, that the defendant company, upon an order from the Kentucky Company for a shipment of oil in car load lots from Whiting to Grand Junction, for points beyond, were authorized to avail themselves of this 13-cent rate, that being the legal rate for such shipments, and, further, that if inquiry had been made of him by a shipper, for the purpose of ascertaining what the legal rate was during the period covered by this indictment on petroleum and its products, from Whiting to Grand Junction, for beyond, that he would have informed them it was 13 cents per hundredweight. The government having proven that the legal rate on petroleum and its products from Whiting, Ind., to Grand Junction, Tenn., for beyond, was 13 cents; that the defendant shipped the freight in question for its customer to Grand Junction, for beyond, and paid the legal rate—it would seem that that is conclusive of the case. There is evidence showing that these shipments were made from Whiting to Grand Junction “blind billed”—that is, no rate was inserted in the waybills; that this blind billing was done by the carrier. There is not a syllable of testimony tending to show that the defendant company knew that the carrier was so blind billing the shipment. But if the defendant had known this fact, how could that affect its right to avail itself of the 13-cent rate which was filed with the Interstate Commerce Commission? It is not the duty of the shipper to publish the rate, that is the duty of the carrier.

But it is said that blind billing the freight is evidence that there was an effort made to conceal the rate, and thus establish a secret rate. If that were true, it would only be an effort upon the part of the railroad company so to do, which could avail very little as against the defendant, in the face of the fact that that freight rate was on file in the public offices of the Interstate Commerce Commission at Washington, as the law requires.

Not only this, but each count in the indictment alleges that the defendant accepted a concession in respect of the transportation of certain freights from Evansville, Ind., to the points of destination beyond Grand Junction named in the indictment. There is not a word of testimony that one pound of this freight was shipped from Evansville to points of destination, but, upon the other hand, it clearly appears that every pound of the freight covered by the indictment moved from Whiting, Ind., billed to Grand Junction, Tenn., for points beyond, upon the order of the Standard Oil Company of Kentucky, and that

the defendant paid the legal rate in force at that time from Whiting to Grand Junction, for points beyond.

Under the facts in this case, I am of the opinion that proof that these shipments were made from Whiting to Grand Junction, for points beyond, does not support the charge in the indictment that the concession was accepted by the defendant company on freight transported from Evansville, Ind., to the points of destination south of Grand Junction which are named in the indictment. The court permitted this character of evidence to be introduced against the defendant, by going to the very verge of its discretion, simply for the purpose of affording the government the greatest latitude possible, consistent with justice, to prove that the defendant company was guilty as charged in the indictment, if it could do so. And this course the court pursued not only as to this particular item of evidence, but as to other material evidence offered by the government, for the same reason.

I am led to the conclusion that, since the introduction of the evidence began in this case, facts have been developed of which counsel for the government were not informed, and which have more or less taken them by surprise. However this may be, the rule is, and should ever continue to be, that before any citizen, however great or small, or any corporation, however rich or powerful, can be legally convicted and punished for crime, that crime must be established, under and according to the rules of evidence and the forms of law. When the courts swing away from this rule, and those accused of crime are convicted by other means, the justice of our boasted jurisprudence will soon become a hollow mockery, and the judgments of the courts will be held in derision and contempt.

Gentlemen of the jury, under the testimony in this case, and under the law, if the case should be submitted to you, and you should return a verdict of guilty, I should feel it my sworn duty to set such verdict aside. The evidence is uncontradicted. It does not warrant a conviction beyond a reasonable doubt, nor, in my judgment, does it even preponderate in favor of the contention of the government.

Therefore, it becomes my duty to allow the motion made by counsel for the defendant, and to direct you to return a verdict of not guilty, and that will be your verdict. So say you all?

STERN v. PAPER et al.

(District Court, D. North Dakota. December 10, 1910.)

(Syllabus by the Court.)

1. BANKRUPTCY (§ 54*)—"FAIR VALUATION."

"Fair valuation," in subdivision 15, § 1, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 54.*

For other definitions, see Words and Phrases, vol. 3, pp. 2650, 2651.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 166*)—PURCHASE OF BANKRUPT'S PROPERTY—"REASONABLE CAUSE TO BELIEVE."

"Reasonable cause to believe," in section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), covers substantially the same field as "notice," in determining whether a person is a bona fide purchaser of property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*

For other definitions, see Words and Phrases, vol. 7, pp. 5956, 5957.]

3. BANKRUPTCY (§ 166*)—"REASONABLE CAUSE TO BELIEVE."

Facts which would put an intelligent business man upon inquiry constitute "reasonable cause to believe," under section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), if intent to prefer would be discovered by following up the inquiry.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*]

4. BANKRUPTCY (§ 166*)—"REASONABLE CAUSE TO BELIEVE."

"Fear" or "suspicion" of a preference constitute "reasonable cause to believe," under section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), if they would incite an intelligent business man to an inquiry which would disclose a preferential intent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*]

(Additional Syllabus by Editorial Staff.)

5. BANKRUPTCY (§ 159*)—"CREDITOR."

A guarantor is a "creditor" within the meaning of section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), relating to the giving of preferences to creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 159.*

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

Action by Max Stern, trustee in bankruptcy of Dave Naftalin, against Sam Paper and Abraham Yoffey. Decree for complainant.

Richmond, Jackman & Swanson, for complainant.

Ball, Watson, Young & Lawrence, for defendants.

AMIDON, District Judge. The complainant is the trustee in bankruptcy of Dave Naftalin, and the action is prosecuted by a creditor in his name to recover a preference. Naftalin had been engaged in the clothing business at Fargo since March, 1904, carrying a stock of ready-made clothing, gents' furnishing goods, and boots and shoes. In March, 1907, he gave his note to the First National Bank of that city for a loan of \$3,000, payment of which was guaranteed by the defendants. This note was renewed from time to time at 90-day periods. The last renewal occurred on December 13, 1907, and would mature March 13, 1908; \$100 had been paid on the principal of the debt. About February 3, 1908, the bankrupt, for the purpose of paying this note, sold and delivered to the defendants out of his stock of merchandise goods whose cost price was \$4,400. They were turned in at \$3,140. March 24, 1908, Naftalin was adjudged a bankrupt on a voluntary petition, and the plaintiff was afterwards duly elected trustee of his estate. This suit is brought against the defendants to recover the goods or their value.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The case gives rise to three principal questions:

- (1) Was the bankrupt insolvent at the time of the transfer?
- (2) Were the defendants creditors of the bankrupt?
- (3) Did the defendants have reasonable cause to believe that the transfer was intended as a preference?

The evidence establishes the bankrupt's insolvency at the time of the transfer beyond any reasonable doubt. The stock before the transfer inventoried at cost, \$13,851. The sale removed from this stock goods of the cost value of \$4,400, thus leaving a balance of \$9,451. The stock contained some goods that were three or four years old. Just what proportion of them were of that age the evidence does not disclose. They consisted, according to the testimony, of heavy winter goods. The season of the year for their sale closed with the month of January, and it would have been necessary to carry the greater part of them over until the ensuing winter before they would be in demand. The defendants, when they purchased the goods, discounted the cost price nearly 30 per cent. The stock on hand at the time of the adjudication was appraised at \$3,316.05 by three merchants having large experience in such matters. Between the transfer to defendants and the bankruptcy, there was no change in the condition of the goods, and the total sales did not exceed \$200. The only property owned by the bankrupt outside of his stock in trade consisted of fixtures and accounts. These accounts had been accruing for four years. Their face value was \$2,200. The fixtures at some time had been inventoried at \$1,800. The bankrupt testifies that the accounts and fixtures "stood" him at these sums. The appraisers fixed the value of the accounts at \$249.33, and the fixtures at \$357. The record shows that the trustee, who is a skillful man in such matters, endeavored to dispose of this bankrupt estate at the best price possible, and as the result of his efforts the entire estate was sold on May 11, 1908, for \$2,946. It is urged by counsel for the defendants that no confidence can be placed in the appraisement because it is claimed the appraisers valued the goods as a bankrupt stock. That would have been a violation of their duty, and the court cannot assume that they proceeded in that manner. It was their duty to appraise the property at its fair market value. The bankruptcy had nothing to do with the performance of that duty. It was the business of the appraisers simply to look at the several articles belonging to the estate, and determine what they were fairly worth. I am satisfied from the evidence that they followed that course. I am confirmed in this by the testimony of Mr. Stern, who is disinterested and is qualified by many years of experience as a merchant in the same line, to speak of the value of the estate, and he has testified that the valuation of the appraisers represented the fair market value of the property. According to that valuation, the entire estate was worth \$3,922.43, and at a liberal estimate could not have been worth at the time of this transfer to exceed \$5,000.

"Fair valuation," within the meaning of subdivision 15 of section 1 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), means a value that can be made promptly effective by the owner of property "to pay his debts." That is the

language of this liberal statute. It ought not to be enlarged. Such a value excludes, on the one hand, the sacrifice price that would result from an execution or foreclosure sale, and, on the other hand, the retail price that could be realized in the slow process of trade. This latter value should be excluded because it could only be gained by large expense and the many risks of a mercantile venture. "Fair valuation" means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property. Such a value will depend upon many circumstances, such as the age and condition of the stock, the season of the year, and the state of trade. Under the evidence in this case I am satisfied that the fair value of Naftalin's property, exclusive of that transferred, could not possibly have exceeded \$5,000. His indebtedness then amounted to \$10,407.21. This demonstrates his insolvency.

That defendants were "creditors," within the meaning of section 60 of the bankruptcy act, is settled for this circuit by *Kobusch v. Hand*, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660, and *Huttig Manufacturing Co. v. Edwards*, 160 Fed. 619, 87 C. C. A. 521. Not only were the defendants guarantors of the note, but the evidence satisfies me that Mr. Paper was the chief author of the project for the sale of the goods to his firm in order to protect them from their liability upon the note. Counsel for defendants urges that this was an independent transaction, and had no reference to the payment of the note. The facts do not support that contention. Naftalin testifies as follows:

"Q. How did you happen to sell these goods to Paper & Yoffey?

"A. Well, sir, I had a heavy winter stock at the time, and I had lots of bills to pay, and in the meantime I got notice from the First National Bank saying that they would like to have me take up the paper. I went to Mr. Paper, and told him that if I could sell so many goods at a price to raise about 3,100, 3,150 or 3,200 to clean up some of the accounts, because those goods I have got in hand the biggest part of it I cannot use until next fall, and, if I could raise the amount of money to pay off the bank, that would relieve me of paying 10 per cent. interest. So he said he would talk it over with his manager, and maybe they can use the goods; if they can, they will have it. Then he decided finally to buy the goods, and I sold it to him at those figures."

He tried to qualify this testimony later, but I am satisfied that it gives the true origin of the sale of the goods. It was a scheme developed by the defendants and the bankrupt to meet the emergency that arose when the bank demanded the payment of the note. Naftalin had no means with which to meet that crisis. He had already exhausted every resource to raise money to pay pressing claims, and there were still many such claims in the hands of banks and attorneys clamoring for payment. The extraordinary sale was necessary to save the defendants as guarantors, and was devised for that purpose. The theory that it was an expedient hit upon to aid the bankrupt to meet the pressing claims of mercantile creditors breaks down before the evidence. The very day the goods were delivered, and before the inventories were footed up, Naftalin called upon the defendants for \$2,950 with which to pay the note at the bank, and clearly stated that purpose to them. At that time there were hundreds of dollars of

creditors' claims in the hands of local collectors pressing for payment. They, however, were all passed by, and the note at the bank paid February 13th, 30 days before its maturity. These facts are inexplicable upon any theory except that the sale was devised to raise funds for the payment of the note.

The sale to defendants worked a preference. Creditors will receive less than 30 cents on the dollar, while the claim at the bank was paid in full. Did defendants have reasonable cause to believe that a preference was intended? Defendant Paper testifies that, after the guaranty of the first note, he visited Naftalin's place of business frequently. He often talked with him about the condition of his business. In the month of December, 1907, and January, 1908, he knew that Naftalin was hard up. He knew himself, and had been told by other business men, that Naftalin was in bad shape. He also knew that there were pressing claims in the hands of collectors in Fargo. During the month of January, 1908, the First National Bank received drafts on Naftalin for mercantile creditors aggregating \$815.08. One draft of \$5 was paid, five were returned on February 8th, and one February 13, 1908. The bank also received on February 8th a draft of \$56.40, which was returned in March. In addition the bank also had for collection two notes of John G. Miller & Co., aggregating \$600, one for \$300, due December 15, 1907, and which was not paid until January 20, 1908, and another note for \$300, due January 1, 1908, which was returned unpaid January 31st, so that during January the bank had for collection against Naftalin drafts and past-due notes aggregating more than \$1,400, and all were returned unpaid except \$335. In addition to these items, claims were in the hands of local attorneys who were pressing Naftalin for payment. Mr. Paper says he knew that there were pressing claims unpaid. He does not specify what these claims were; but in view of his intimate relations with Naftalin, and also with the First National Bank, the inference is justified that he knew in detail what the claims were. The defendants also knew that the season for the sale of such a stock as Naftalin's had closed, and that his stock would have to be carried over until the ensuing year. During the month of January, Naftalin had held an extraordinary sale from which he has realized about \$1,600. After this sale his total receipts ran from \$3 to \$5 a day. Still the record shows he was owing more than \$10,000 of mercantile liabilities. He kept books which showed this indebtedness in detail; but at the time of the purchase the defendants scrupulously abstained from examining them or asking for a statement of his indebtedness. We must also consider, in passing upon this branch of the case, the transaction which is charged as a preference. It was extraordinary in its character. The defendants themselves are merchants, and must have known that other creditors would not stand by and permit a large part of Naftalin's stock to be appropriated to a single creditor without immediately pressing their claims to judgment and execution. Such a sale in bulk is declared by chapter 221 of the Laws of North Dakota for 1907 to be presumptively fraudulent, and that statute simply expresses the experience of the business world. Such a transaction would evidence to any business man that Naftalin was in financial ex-

tremity. His credit was gone, his stock depleted, and his sales trifling. In June or July, of 1907, Naftalin prevailed upon a friend by the name of Meyers to exchange checks with him for the sum of \$400. He collected his friend's check, but allowed his own to go to protest. Meyers applied to the defendants, and explained the situation to them, and repeatedly urged them to pay the check. They offered him \$250 for it. In January, in response to the importunities of Meyers, Naftalin gave him a check for \$50, and requested him to go to the defendants and ask them to cash the check, and assure them that he would take it up that week. This the defendants did. The evidence lends strong support to the belief that the notice from the bank to Naftalin to take up his note was prompted by the defendants. The notice was given at an unusual time, some 40 or 50 days before the maturity of the note. The bank certainly did not feel itself insecure as to the loan. It regarded the guaranty of the defendants as good security. This is proved by the fact that, on the very day that the defendants gave their check to Naftalin for \$2,950 with which to pay the note, the bank discounted the note of the defendants for the same amount, and the inference is irresistible that this loan was made for the very purpose of furnishing the defendants money with which to pay for the goods. The bank therefore surrendered the note signed by Naftalin, and guaranteed by the defendants, and took a note signed by the defendants alone. The bank had learned of the desperate condition of Naftalin's affairs through the collections which had come to it against him. All these facts suggest strongly that both the defendants and the bank saw that the end of Naftalin's mercantile career was at hand, and called for the payment of the note in order that the defendants might have an opportunity to protect themselves before the crash came. About two weeks after the sale to defendants, a Mr. Tilly, who had been their attorney, was employed by the bankrupt to visit his creditors and try to make a settlement with them on the basis of 20 cents on the dollar. Forty days after the sale Naftalin was adjudged a bankrupt.

In addition to these circumstances, there is the direct testimony of Meyers himself. It is true he had a grievance against the defendants, and is interested as a creditor to have the transfer set aside. Still, a careful reading of his evidence satisfies me that it is substantially true. He testified that he saw certain goods packed up from the Naftalin store some time after Christmas, 1907. Upon inquiring he was told that they were sample goods belonging to a drummer; but he saw these goods hauled with a team belonging to the defendants from the Naftalin store to their store. Thereupon Meyers again demanded the money on his check from the bankrupt. They got into a dispute, whereupon Paper, who was present, promised that if Meyers would come to his office the following morning he would pay him, "provided you keep your mouth shut and do not let on to anybody what you seen." On the following morning Meyers went to get his money. Paper refused to pay, and advised the witness that he was foolish for "not taking stock when I told you to take it." Meyers' testimony continues:

"I says: 'I wouldn't do it. I am scared that the creditors will take it from me back again.' I said: 'I know what you have been doing. You have been taking the goods out of the store all right, and now you refuse to pay me what you promised me.' At that he said, 'Well, we bought that and we got a receipt for it.'"

Meyers further testifies that he wrote a letter to John G. Miller & Co., creditors of Naftalin, stating the fact that these goods were taken, and received in reply a letter from Mr. Jackman, one of their attorneys. This letter he showed to the defendants, and relative to what then occurred he says:

"I showed to Paper and Yoffey that letter. We talked, and Yoffey was very excited, and he shook so his glasses fell from his nose. He got nervous, abused me, and told me to get out of the store. He said that: 'You are a bad man; you are telling on us. You don't keep no secrets; you are telling on us.' I told him that he had been stealing the goods out of us creditors, and he ordered me out of the office. He said, 'If you would keep your mouth shut, you would have your money long ago.'"

Do the circumstances and evidence above narrated show that defendants had reasonable cause to believe that the transfer was intended as a preference? The authorities tell us that section 60 of the bankruptcy act does not, on the one hand, require actual knowledge or actual belief of an intent to prefer (*In re Eggert*, 102 Fed. 735, 43 C. C. A. 1; *In re Virginia Hardwood Mfg. Co.* [D. C.] 139 Fed. 209); and, on the other hand, that mere fear or suspicion of a preference will not invalidate a transfer (*Powell v. Gate City Bank*, 178 Fed. 609, 102 C. C. A. 55). Thus between actual knowledge and actual belief, on the one side, and fear and suspicion, on the other, lies the "reasonable cause to believe" mentioned in the section. This classification, however, is not as helpful in the decision of a concrete case as it appears. Fear and suspicion of insolvency, if they be strong enough, become belief, and the difficulty with the classification is that there are no criteria by which it can be said that one set of facts ought to engender fear or suspicion only, while another set of facts furnish reasonable cause for belief. It is impossible to group the ever-changing facts of business life into hard and fast categories, and say that one category produces fear, another suspicion, and another belief. Again, the rule of negotiable paper that facts which arouse suspicion will not defeat the title of a holder (*Hotchkiss v. Bank*, 21 Wall. 354, 22 L. Ed. 645; *Clark v. Evans*, 66 Fed. 263, 13 C. C. A. 433) ought not to be applied to a question of preference because that rule "was framed in order to encourage the free circulation of negotiable paper" (*Goodman v. Simonds*, 20 How. 343, 356, 15 L. Ed. 934), and has no proper application to transfers of property. "Reasonable cause to believe," under section 60 of the bankruptcy act, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property. Hence, under this statute, "notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop." *Coder v. McPherson*, 152 Fed. 951, 82 C. C. A. 99. But if a party has knowledge of facts which cause him to fear or suspect that a transaction into which he is entering will work a preference, that knowledge as a rule will at least be sufficient

to put him upon an inquiry which if prosecuted would disclose the real character of the transaction. It follows, therefore, in my judgment, that the doctrine that fear or suspicion of a preference is not sufficient to invalidate a transfer must have a restricted application under our present bankruptcy law.

What constitutes "reasonable cause to believe," under this section, is a pure question of fact, and each case is best disposed of by an independent consideration of its own facts. The attempt to apply the doctrine of authority to such questions simply results in exalting a few facts that have been emphasized in the first decision so as to bring the second case within its scope, and overlooking other facts which ought possibly to determine the second case. What the statute requires is that the facts and circumstances known to the purchaser shall be ascertained, and then the question answered whether those facts and circumstances would have caused an intelligent business man to believe that a preference was intended, or would have put such a man upon an inquiry that would have discovered the true character of the transaction.

In the present case I am satisfied that the transfer was an illegal preference upon both the grounds which we have considered: (1) The defendants had reasonable cause to believe that it was intended as a preference. (2) The facts that were known to them put them upon inquiry, and, if they had used the slightest diligence, they could have ascertained every fact that is disclosed in the record on this trial.

The evidence shows that the defendants have disposed of the property. They are, therefore, liable for its value. I find that value to be the price which they paid for it, \$3,140. A decree will be entered against them for that amount, with interest thereon at the rate of 7 per cent. from the 13th day of February, 1908, together with the costs of this suit. It would seem that defendants would be entitled as a result of this decree to prove a claim against the estate for the principal of the note, and interest to the time when Naftalin was adjudged a bankrupt.

S. F. MYERS CO. v. TUTTLE. TUTTLE v. S. F. MYERS CO. SAME v. S. F. MYERS SONS CO.

(Circuit Court, S. D. New York. October 5, 1910.)

1. GOOD WILL (§ 6*)—SALE—RIGHTS OF PURCHASER—RESTRAINING BREACH OF CONTRACT.

Complainant, having purchased from the M. Company's trustee in bankruptcy its good will, outstanding accounts, subscription lists, and about three-quarters of its tangible assets, was entitled to restrain the sons of M. from organizing a new corporation under practically the same name for the purpose of destroying the good will of the former corporation purchased by complainant and from so conducting their business as to destroy or impair such good will by appropriating to themselves as much as possible the customers and business of the M. Company.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 3-5; Dec. Dig. § 6.*]

2. GOOD WILL (§ 6*)—SALE—RIGHTS OF PURCHASER—PLACE OF BUSINESS.

It is not essential that the purchaser of the good will of a business be protected in the enjoyment thereof that he shall have continued the business in the same location where it has been previously conducted.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 3-5; Dec. Dig. § 6.*]

3. GOOD WILL (§ 6*)—SALE—RIGHTS OF PURCHASER—PURCHASE OF ASSETS.

It was not essential to the protection of a purchaser of the good will of a business, having purchased in addition the outstanding accounts, subscription lists, etc., that he should have purchased all of the assets.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 3-5; Dec. Dig. § 6.*]

4. GOOD WILL (§ 6*)—SALE—BANKRUPT CORPORATION—RIGHTS OF PURCHASER—RESTRAINING BREACH OF CONTRACT.

On the bankruptcy of the M. Company, a mail order jewelry concern, the good will, subscription lists, and a portion of its assets were purchased by complainant, after which the sons of M. organized the M. Sons Company and prevented complainant from obtaining a lease of the old location. *Held*, that complainant was entitled to do business under the name of the M. Company, and that the M. Sons Company should be restrained from using the old company's subscription lists, from soliciting business from the old customers, from simulating the letter heads, bill heads, and papers of the former corporation, and from operating in the name of the M. Sons Company if they continued to do business in the old location.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 3-5; Dec. Dig. § 6.*]

In Equity. Suits by the S. F. Myers Company, complainant, against Arthur W. Tuttle, defendant, and by Arthur W. Tuttle, cross-complainant, against the S. F. Myers Company, cross-defendant, and S. F. Myers Sons Company, defendant. Decree for Arthur W. Tuttle, defendant and cross-complainant.

Samuel J. Siegel, for complainant S. F. Myers Co. and defendant S. F. Myers Sons Co.

Martin Chas. Ansorge and E. C. Ferguson, for Tuttle.

HOLT, District Judge. The good will of the S. F. Myers Company was an asset of that company in bankruptcy. It was sold by the trustee by order of the court. Mr. Tuttle was the purchaser, and that property in his hands is entitled to the same protection as any other property. The sons of S. F. Myers, who were officers of the S. F. Myers Company, have a right to do any lawful business, and for that purpose to organize a corporation which shall engage in the same kind of business that the S. F. Myers Company engaged in; but they have no right to organize a corporation for the purpose of destroying the good will of the S. F. Myers Company, purchased by Mr. Tuttle, or to conduct their business in such a way that it destroys or impairs the value of such good will. The evidence satisfies me that the sons of S. F. Myers, with intent to appropriate to themselves the good will of the business of the bankrupt corporation, S. F. Myers Company, organized the new corporation, S. F. Myers Sons Company, established the business at the same place at which the business of the S. F. Myers Company had been conducted for many years, prevented Mr. Tuttle from leasing a place of business in said premises, and in various instances made use of the lists, letter heads, and sta-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tionery of the S. F. Myers Company for the purpose of soliciting business from the former customers of the S. F. Myers Company, and have had the letter heads and other stationery of the S. F. Myers Sons Company intentionally prepared so as to simulate the letter heads and other stationery formerly used by the S. F. Myers Company, and all with the intention of appropriating to themselves as much as possible the good will of the business of the S. F. Myers Company, and depriving Mr. Tuttle of a portion of such good will so purchased by him.

The counsel for the S. F. Myers Company claims that Mr. Tuttle should be prevented from doing business in the name of the S. F. Myers Company, and should be required to do business in his own name as successor of the S. F. Myers Company, on the ground that the S. F. Myers Company proposes to obtain a discharge in bankruptcy, and then resume business under its original name. I think it will be time enough to pass upon any question of that kind when the company has obtained its discharge in bankruptcy, and in any case my present impression is that that company would be obliged to so conduct any new business as not to interfere with the good will of its old business, which has been sold under the order of this court.

Counsel also claims that Mr. Tuttle, by his purchase of the good will of the S. F. Myers Company, did not in fact obtain anything, because the business is not carried on at the same street number as the business of the S. F. Myers Company, but in the adjoining building, and also because the entire plant and assets of the S. F. Myers Company were not purchased by Mr. Tuttle. The old definition of "good will" was the likelihood that former customers would resort to the old stand; but that does not mean that in all cases there cannot be any good will left if the place of business is changed. This business was principally a mail order business. In my opinion, it was not essential to the purchase of the good will that the business should be continued at 49 instead of 51 Maiden Lane. Nor, in my opinion, is the fact that Mr. Tuttle did not purchase the entire assets of the bankrupt decisive. He purchased the good will, the outstanding accounts, the subscription lists, and about three-quarters of the tangible assets, paying for them many thousand dollars. I think he was substantially the purchaser of the business as a going concern, and he is entitled to carry on the business without interference or piracy on the part of the Myers.

The motion of the bankrupt to stay Mr. Tuttle from doing business under the name of S. F. Myers Company is denied. In regard to the motion by Mr. Tuttle, I think that the order should enjoin the S. F. Myers Sons Company from using the subscription lists, from soliciting business from the old customers, and from simulating the letter heads, bill heads, and papers of the former corporation. I think, too, that, if they are to carry on the mail order business in jewelry and similar articles at 49 Maiden Lane, they should change the name of their corporation, so that the public will not be deceived in supposing that it is the same business, the good will of which was sold to Mr. Tuttle, or, if they prefer to carry on the business under the name of S. F. Myers Sons Company, they should be required to remove

from 49 Maiden Lane. Generally, the sons of S. F. Myers, and all persons formerly connected with that concern, should be enjoined from doing anything which would naturally tend to induce the public to believe that the business formerly conducted by the S. F. Myers Company is not now being conducted by Mr. Tuttle, or which would naturally tend in any respect to damage or impair the good will sold to Mr. Tuttle.

The orders in accordance with this decision should be settled on notice.

UNITED STATES CASUALTY CO. v. CHARLESTON, S. C., MINING & MANUFACTURING CO.

SAME v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court, D. South Carolina. October 21, 1910.)

1. INSURANCE (§ 141*)—THE CONTRACT—EFFECT OF ACCEPTANCE AND RETENTION OF POLICY.

An assured who accepts and retains a policy without objection, in the absence of fraud or misrepresentation, is bound by its terms, and cannot plead ignorance of them, nor avoid them because not in accordance with the application or the agreement made in the preliminary negotiations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 262; Dec. Dig. § 141.*]

2. INSURANCE (§ 141*)—THE CONTRACT—ESTOPPEL BY ACCEPTANCE AND RETENTION OF POLICIES.

Defendant during a number of years carried policies of insurance, known as employer's liability policies, issued by complainant, the premiums on which were based on the amount of the pay roll of the employes covered by the policies, estimated in the first instance and to be adjusted at the end of the terms on reports by defendant showing the actual amount paid. The negotiations were between defendant and an agent of complainant who took the applications and delivered the policies, and with whom settlements of the premiums were made. Twenty-eight of the 30 policies issued covered all of the employes of defendant, including the executive officers and office men. *Held*, that defendant, having accepted and retained such policies during their terms and having had the benefit of the insurance covering such employes, could not avoid payment of the premiums thereon on the ground that the applications provided that they should be excluded and that it did not read the policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 262; Dec. Dig. § 141.*]

3. INSURANCE (§ 188*)—ACTIONS FOR PREMIUMS—EMPLOYER'S LIABILITY POLICIES—PREMIUMS BASED ON PAY ROLLS—RIGHT TO AUDIT OF BOOKS.

In order to determine the amount of premiums to which complainant was entitled under the provisions of such policies, it had the right to an audit of defendant's books, pay rolls, and like documents.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 188.*]

4. INSURANCE (§ 181*)—PREMIUMS—WAIVER BY ACCEPTANCE OF LESS THAN AMOUNT DUE.

Complainant, having had no knowledge at the time the several settlements were made that the reports made by defendant did not include the salaries paid to such classes of employes, did not by accepting the premi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ums based on such reports waive its right to recover the remainder of premiums to which it was entitled.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 181.*]

Waiver by acceptance of premiums, see note to Life Ins. Clearing Co. v. Bullock, 33 C. C. A. 369.]

5. INSURANCE (§ 188*)—ACTION FOR PREMIUMS—LACHES.

By the terms of employer's liability insurance policies issued by complainant to the defendant, the premiums were to be computed on the actual pay rolls of defendant during the terms of the policies, including thereon all employes covered by the policies, and it was made the duty of defendant at the end of each term to make a report showing the amount of such pay rolls. The reports so made did not include the salaries paid to certain classes of employes covered by the policies, but complainant was ignorant of such fact, and, accepting the reports as correct, made settlements thereon. After the policies had all expired, it accidentally discovered such omissions, and within a reasonable time thereafter brought suit to recover the additional amount of premiums to which it was entitled. *Held*, that complainant was not barred by laches from maintaining the suit on the ground that in the meantime defendant had destroyed its original pay rolls, since it was its duty to make correct and complete reports, and, not having done so, to preserve the evidence the destruction of which was at its peril, and especially as it further appeared that it had summaries showing the totals of each week's pay rolls.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 188.*]

In Equity.

In the year 1898, and previously thereto, the United States Casualty Company was engaged in the business, among other things, of writing policies of insurance known as "employer's liability policies," their principal place of business being in the city of New York, and they were represented in the city of Richmond, Va., by J. B. Moore & Co., their general agents at that place. At the same time the Virginia-Carolina Chemical Company, engaged in the manufacture of fertilizers situated in various states, applied for and obtained from the United States Casualty Company policies of insurance covering the various plants owned, operated, and controlled by it. It appears from the evidence in the case that the manner of conducting this business, briefly stated, was as follows: Moore & Co. would make a memorandum of what was desired upon certain blanks which they had for that purpose, specifying the amount of insurance desired, the location of the plant, and the employes to be covered. These papers were retained by Moore & Co., became a part of their office files, and that firm, having gone out of business, passed them on to their successors, by whom they were finally turned over to the defendant. Upon the trial of the case, these papers were put in evidence by the defendant's witnesses, who testified also that copies thereof, containing the information upon which these policies were thereafter to be issued, were sent from time to time to the home office of the casualty company.

It is also shown by the testimony that, in due course of business, following the plan adopted by the casualty company and constituting its method of doing this business, the policies desired by the chemical company were prepared from the papers thus furnished from the office of Moore & Co., were forwarded to the latter concern at Richmond, and were, in due course, delivered to the chemical company, which in every instance retained the policies without protest or objection. Thirty policies were issued under this arrangement and in the course of business thus outlined; the first being issued in the month of May, 1898. More particular reference will hereafter be made in this statement to the classes of policies as the same were treated before me in the argument of the case.

It is insisted by the complainant that the premiums upon these policies were to be calculated upon the estimated pay roll of the defendant company

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at each of the plants from time to time covered under these policies respectively, and, at the end of the policy period, the amount of the actual pay roll was to be reported to the casualty company, and a premium based upon such actual pay roll was to be paid. Taking the policies as issued and retained by the assured as the contract between the parties by which their rights are to be determined in this proceeding, it appears that all the 30 policies sued on in this cause, with two exceptions, include within their terms the estimated pay roll of the chemical company at the respective plants named in the policies and the wages of all executive officers, office men, and piece workers employed in the factories or shops without exception. The two exceptions noted here are policy L 33,964, Virginia-Carolina Chemical Company, from November 26, 1900, to May 12, 1901 (Exhibit C), and policy L 13,975, Navassa Guano Company, from May 12, 1898, to May 12, 1899 (Exhibit H). These policies except from their terms executive officers and office men; so persons in the employ of the chemical company within this description are not to be included in the estimated pay rolls upon which the premiums upon these two policies are to be calculated.

The remaining 28 policies cover, as has been stated, all the employes of the chemical company without exception.

At various times during the currency of this insurance, settlements were made between the chemical company and the casualty company; the latter relying upon the statements of the pay rolls furnished by the former and accepting the same at the time as correct.

It is also contended by counsel for the complainant that, subsequent to such settlements, it was brought to the attention of the officers of the casualty company that the chemical company had claimed before a legislative committee, having under consideration some matters affecting the interest of the chemical company, that that company was employing a number of persons considerably in excess of those who had been reported to the casualty company as upon its pay rolls at the time of such settlements. The casualty company thereupon set on foot an investigation into the matter and discovered that the chemical company had not made full report of the number of persons upon its pay rolls, and it subsequently developed that that company claimed that such actual pay rolls so to be furnished to the casualty company were not to include certain classes of employes which it insisted were expressly excepted from the terms of the policies. Some correspondence then ensued between the parties, and the final outcome was the institution of these proceedings.

Pending the suit the parties, by agreement, had an audit made of the books and records of the chemical company, the result of which is in the form of statements showing the amount due in the event it is held that the employes of all classes are to be taken into account, which statements have been filed with the record.

Similar bills of complaint were contemporaneously filed against the Charleston, S. C., Mining & Manufacturing Company, and a stipulation was made in the cause to the effect that this cause was to be heard together with the cause second above entitled and upon the same record and is to abide the result of the last mentioned cause.

It is contended by the defendant that in the year 1898 the late Mr. J. B. Moore, of Richmond, a friend of Mr. S. D. Crenshaw, who was then auditor and shortly thereafter became secretary of the defendant, solicited its business; that Mr. Moore did business under the firm name of J. B. Moore & Co., but had no partners and was the general agent of the complainant in Richmond; that the solicitation of Mr. Moore resulted in business relations between the parties, which was carried on by Mr. Crenshaw on the side of the defendant, and by Mr. Moore on behalf of the complainant, until late in 1902 or the early part of 1903; and that Mr. Moore never saw or had any dealings with any officer of the complainant until after suit had been instituted and testimony was being taken, 10 years after the business began.

It is further contended that this relation continued for about five years, or until March, 1903, when the defendant withdrew its business; that during all this period not a single direct communication between the parties took

place; that the conduct of the whole business was in the hands of Mr. Moore; that all premium payments were made to him; and that he saw to all payments for first aid when accidents occurred, conducted the settlement of cases, and, in short, acted as the casualty company. Also, that he negotiated as to what or who was to be covered by the policies and delivered them over; that his activity in the matter was such that he himself prepared the blanks giving the data for the policies to be issued; and that not a single blank was ever signed by the defendant.

It is claimed, moreover, that the general agents of the casualty company received 25 per cent. of the premiums paid as compensation; that the Virginia-Carolina business was originally written at a premium rate of 42 cents per \$100 of wages paid; that, instead of receiving 10½ cents, Moore received 17 cents of this, 42 per cent. of the premium; that this extraordinarily large compensation was for his extra work in connection with the business; and that, naturally, as he had apparently full responsibility and discretion, it was only fair to him that he should have extra pay.

And it is further insisted that the information as to factories, workmen, and pay rolls was given him from time to time, as the business went on, upon the basis of which policies were issued and premiums computed and paid; that this information was full and truthful and covered the risks insured against; that he knew precisely the understanding which he had with Mr. Crenshaw as to these matters; that this understanding was also known to others who were in his office, and his son J. B. Moore, Jr.; that yearly settlements were made on this perfectly known basis, and all matters were supposed to be closed when the business was withdrawn.

Also, that Mr. Moore never asked for an audit of the defendant's books, and nothing more was heard from him after the business was terminated; and that the complainant never attempted to secure from him any account of premiums other than those he had reported in accordance with his prior accounts. The defendant also claimed that in 1903, within a month or so of the end of the said relationship, and as a result of a conversation with counsel, who repeated some hearsay remarks supposed to have been made on behalf of the company in opposing hostile legislation in South Carolina, the complainant's president thought there might be something more due to his company and sent down an auditor to look over the books of the defendant, and that "very likely the smart of having lost the business may have also been a factor in this move." That, at all events, an auditor went down to Richmond early in May, 1903, and remained there a month. This auditor testified that his examination was restricted to the last two years of the period; the pay rolls for the prior years having been refused him. That he tries to make it appear that he went back to Richmond in the fall of the same year to make an audit of the defendant's books, but on cross-examination admitted that he had other work there and received no instructions as to them, and that his visit had nothing to do with this matter. He said that he arrived in Richmond September 2, 1903, and on October 2d the casualty company appears to have written the defendant asking for an audit; but this letter, though it may have been delivered, was never brought to the knowledge of the company's officers, and remained unanswered, and no further steps in the matter were taken by the casualty company, which remained apparently satisfied just as Moore & Co. had been. Mr. Moore in the meanwhile had died in July, 1905, and, in the natural course of business, all the policies which had been issued, except those covering the last year of insurance, were lost or destroyed.

Three years after the last policy had expired, suit was instituted in 10 jurisdictions, and voluminous bills in equity were filed setting up the alleged provisions of policies covering a period of five years, charging the defendant with fraud, concealment, and misrepresentation, and demanding audits and accountings. Interrogatories of the most sweeping nature were annexed.

The brief of the defendant, among other things, contains this clause: "Realizing that the intricate nature of the action and the difficulties which the court would have, should the question of proving figures be gone into, and strong in the consciousness of its own propriety of conduct throughout,

the defendant consented to a complete audit of all of its pay roll records of factories and mines, and a full examination was made by auditors representing both parties. It also furnished to the complainant a complete record of all its other expenditures in salaries and wages from the president down to the humblest employé during the whole five year period, and all these masses of figures have been tabulated and cast into such form that their volume need no longer be a terror to the court."

Mordecai & Gadsden and Rutledge & Hagood, for complainant.
Oudin & Oakley and Lindabury, Depue & Faulks, for defendants.

PRITCHARD, Circuit Judge (after stating the facts as above). It is insisted by the complainant, as will appear from the statement of facts, that the policies issued by it to the defendant, with the memoranda and schedules thereto attached, constitute the contract between the parties; and that the pay rolls required to be furnished thereunder, in order that the actual premiums should be determined, should have included the amounts paid all employés of the company, without exception. In other words, that executive officers and office men should have been included in such pay rolls. And, as supplementary to this, that the complainant had, and still has, a right to an audit of the defendant's books, pay rolls, and similar papers.

The defendant, as respects this point, contends that only persons engaged in the actual manual labor of manufacturing fertilizers were to be included in the actual pay roll expenses, as reported at the end of the year. It appears from the evidence that the data furnished to Moore & Co., the agents of the plaintiff, by the agent of the assured, and in turn by Moore & Co. to the New York office, in order that the policies might be made up, excepted the class of employés known as "executive officers and office men," from those to be included within the terms of the insurance; but it also appears that, in the actual making up of these policies, this class of employés was included except in policy L 33,964, Virginia-Carolina Chemical Company, from November 26, 1900, to May 12, 1901 (Exhibit C); and policy L 13,975, Navassa Guano Company, from May 12, 1898, to May 12, 1899 (Exhibit H).

It appears that the policies containing the words "executive officers and office men" were sent to the assured and received by it, and that no objection was made to the fact that such class of employés was included therein.

In the case of *Weinberger v. Merchants' Insurance Co.*, 41 La. Ann. 31, 5 South. 728, a similar state of facts existed. In that case an application was made and accepted subject to all other clauses and conditions of the policy of the company, and in the application, among other things, it was provided that the vessel was to "navigate the Gulf of Mexico, the Caribbean Sea, and the Atlantic Coast, so far up as Boston." The condition of the policy referred to in the application as being the one to which it was subject was as follows:

"Warranted by the assured not to use port or ports in Eastern Mexico, Texas nor Yucatan, for anchorage therefor during the continuance of this insurance."

The action in that case was based upon a claim for damages sustained "from encountering violent gales from Galveston, Tex., to Vera Cruz, in Eastern Mexico." The court said, in this case:

"The written part of the application forms a part of the policy, and is copied and incorporated in the policy, and thus the application and the policy form but one contract. The policy was delivered some 15 days after the application was made. The assured cannot plead ignorance of the clause in the policy. It was their duty to read the policy, so as to determine whether or not it was made in accordance with the application. The defendant company insures vessels navigating the seas, but has clauses in its policies excepting certain ports and localities from its risks. A person dealing with an insurance company ought at least to know the general course of its business, and, if he desires exceptions in policies to be avoided, he ought to state the fact in his application, and be willing to pay the premiums for the risk."

The principle that, in the absence of fraud, a party accepting a contract without objection is bound by all its recitals, covenants, and conditions, is well established. That preliminary negotiations and arrangements, in order to secure the issuance of a policy, should be taken in subjection to the terms of the policy, as the same may be written, is the universal rule; and the contract, in this instance, must necessarily be determined by an examination of the policies themselves and the provisions thereof, which, from the very nature of things, necessarily control.

The evidence shows that the defendant received these policies and, without reading them and ascertaining the provisions contained therein, put the same in a place of safety. It was the duty of the defendant, under the circumstances, when the policies were received, to examine them, and, if they contained any provisions that were not in accordance with the terms agreed upon, the defendant could, then and there, have returned the policies and relieved itself from any obligation thereunder; but this was not done, while, on the other hand, as I have stated, the policies were accepted, and the complainant was permitted to assume any and all liability attaching thereunder, on account of any accidents that might occur to the laborers employed as well as the executive officers and office men. Under these circumstances, if any of the executive officers or office men had been injured, undoubtedly the complainant would have been liable under the policies for damages resulting from such injury.

In the case of *Morrison et al. v. Insurance Co. of North America*, reported in 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63, the Supreme Court of Texas passed upon this question. The rule is thus stated in notes 1 and 2 of the syllabus of that case:

"In an action on an insurance policy, a pleading which sets up that the party failed to perform the conditions in the policy because of ignorance of such conditions, but which fails to allege fraud, misrepresentation, or concealment, is insufficient as a defense.

"An insurance policy contained a provision that the procuring or having other insurance on the property not made known to the company, and consented to thereon, would render the policy void. In an action on the policy, plaintiff offered to show that the agent, who was shown to have had power to issue and cancel policies and make indorsements of other insurance when necessary, was informed of the other insurance complained of, made no objection thereto, but promised to indorse it on the policy; that plaintiff

relied on such promise; and that, just before the loss occurred, the agent arranged to renew the policy at its expiration, and a memorandum for renewal was made, with such reinsurance contained in it, but it was never indorsed on the policy. *Held*, that the company was bound by its acquiescence in such acts of its agents, although the policy contained a clause that no agent had authority to bind the company in violation of any of the printed terms of the contract, and no condition or restriction contained in the policy, which by its terms may be waived, shall be deemed to have been waived, except by distinct agreement contained in the body of the policy; this clause having no reference to the subject of reinsurance."

In that case it was alleged that the failure to perform the conditions of the policy was due to ignorance of certain conditions. The court clearly disposes of the point involved by holding that, in the absence of allegations of fraud, misrepresentations, or concealment, one would not be entitled to plead ignorance as a defense. This is the principle which applies to all contracts where one seeks to alter or control a written instrument by parol evidence. In the case of *Insurance Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674, the court, among other things, said:

"But to this question there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by an inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in all such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

In the case of *Accident Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, the third note of the syllabus is in the following language:

"Statements in an application for a policy of insurance, expressing the applicant's understanding of what will be the effect of the insurance, cannot control the legal construction of the policy afterwards issued and accepted, although the application warrants the facts stated therein to be true, and the policy is expressed to be made 'in consideration of the warranties made in the application.'"

There are some cases in which a different rule has been announced, notably among those being *Fireman's Fund Insurance Co. v. Norwood*, 69 Fed. 80, 16 C. C. A. 137. However, in that case Judge Sanborn wrote a strong dissenting opinion, in which, among other things, he said:

"There is no doubt that there are cases where one party to a written contract has been so imposed upon by the fraudulent representations of its contents, or by some artifice or deceit of the other party, which prevents him from reading it, that he may be excused for ignorance of its contents. But I cannot subscribe to the proposition that a mere statement or agreement as to the terms of the proposed contract, made in the preliminary oral negotiations which result in the subsequent written contract, will excuse either party from reading the contract when it is delivered, or will reverse the

settled rule that the written contract must prevail over the preliminary negotiations. It is the duty of every party to a contract to read it and to know its contents when he has an opportunity to examine it before he accepts, and, in the absence of fraud, concealment, or misrepresentation, as to its contents, he must be conclusively presumed to have knowledge of them. Contracts for insurance furnish no exception to this rule."

There it appears that the plaintiff had examined the policy, and, finding the amounts correct, did not further examine it, owing to a conversation which he had with the agent, and placed the same in his safe, and the company, by delivering the policy with knowledge through its agent as to the amount of insurance to be taken, waived the condition as to other insurance and was, therefore, estopped to assert the same as a defense under the law, inasmuch as the plaintiff had the right to rely upon such knowledge of the agent. There is nothing to be found in that case which seriously conflicts with the rule here announced.

That the plaintiff has the right, in order to determine the amount of premiums to which it may be entitled, to an audit of the defendant's books, pay rolls, and like documents, under the clause in the policy to which reference has been made, has been determined in numerous cases, notably being *Swedish-American Telephone Co. v. Fidelity & Casualty Co.*, 208 Ill. 562, 70 N. E. 768; also in the case of *Fidelity & Casualty Co. v. Seagrist, etc., Co.*, 79 App. Div. 614, 80 N. Y. Supp. 277, and *United States Casualty Co. v. Robins Co.*, 108 App. Div. 361, 95 N. Y. Supp. 726.

The next question to be determined is as to whether the claimant, by accepting the annual payments of the premiums, thereby waived its right to recover in this proceeding against the defendant such excess of the actual pay rolls over the amounts included in the annual settlements. It is apparent from the evidence that, when these annual settlements were made, a number of the employes of the defendant were not included within the pay rolls, then used as a basis of settlement, and it is insisted that as a result of an audit made, during the progress of the cause, over \$600,000 of wages to such officers and employes were found not to have been included in the annual settlements. The fact that executive officers and office men were included in the policies and employed by the company was peculiarly within the knowledge of the defendant, and, from the very nature of things, the complainant could not have had knowledge of these facts at the time the settlements were made. It was shown by the evidence that the complainant had no knowledge of any failure on the part of the defendant to include as a part of its pay rolls this class of men.

It is well settled that, to constitute a waiver, the party affected thereby must have knowledge of the facts and be fully informed as to the voluntary surrender of any right arising out of the facts thus within his knowledge. In the case of *Insurance Co. v. Wolff*, 95 U. S. 333, 24 L. Ed. 387, among other things, the court said:

"To a just application of this doctrine, it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts—of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it."

In the case of *Bennecke v. Insurance Co.*, 105 U. S. 359, 26 L. Ed. 990, the court said:

"A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce the waiver from the conduct of the party. Thus where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding." *Darley (Earl) v. London, Chatham & Dover Railway Company*, Law Rep. 2 H. L. 43.

There are many other cases in harmony with this rule, notably *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Scovil v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Brant v. Virginia Co.*, 93 U. S. 326, 23 L. Ed. 927.

As already stated, the facts upon which it is insisted that the complainant has waived its right in this instance were peculiarly within the knowledge of the defendant. The complainant, relying upon the good faith and fair dealing of the defendant, entered into the annual settlements which are now sought to be used as ground upon which to base a waiver, and now comes into a court of equity for the purpose of seeking the compensation to which it would have been entitled in the beginning, had it been in possession of all the facts and circumstances surrounding the preparation of the pay rolls. In view of the evidence, I am impelled to the conclusion that the complainant has not waived its right to assert claim to any excess that may have existed over the pay rolls upon which these annual settlements were made.

Has the complainant been guilty of laches in the pursuit of its right, or, on the other hand, has it used proper diligence in the assertion of its right? It is insisted by the defendant in its answer that the complainant has been guilty of laches and is, therefore, not entitled to be heard at this time. Among other things, it is stated in the answer that certain records and information, which would have enabled it to entirely disprove the truth of the complainant's claims, "now for the first time set up" (had such claims been made within a reasonable time after the expiration of the policies), had been lost, and that it had been so prejudiced by the complainant's delay in bringing the action that it cannot now properly defend itself.

Being of the opinion that it was the duty of the defendant to furnish complete pay rolls, which would necessarily include executive officers and office men, each year during the period contained in the policies, it was the duty of the defendant to preserve the pay rolls; and, such being the case, if it destroyed its pay rolls and other documentary evidence, or put itself in a position where it could not comply with the terms of the contract which it had undertaken to fulfill, the defendant cannot now plead its own neglect as an excuse for not complying with the terms of its contract, or as a reason why the complainant should not

be permitted to assert its right. On this point it is insisted by counsel for complainant that:

"It appears very clearly from form No. 47, put in evidence, and from which was made up the report of the auditors who examined the books *pendente lite*, contains all the information necessary for the defendant now, and at the time of the commencement of this suit, to make full disclosure of its pay rolls as they stood during the policy periods. Mr. S. H. Malone, traveling auditor of the defendant, refers to these forms No. 47, which were used by this auditing committee, from which their report was made up, showing over \$600,000 of compensation not reported to the complainant, as a 'factory weekly report covering the pay roll for that week, by the superintendent, which report includes all the labor and wages paid at the factory, the superintendent's salary, the clerical salaries, and every laborer in connection with the factory, and in some instances I have known it to be a fact that contract labor was put in form No. 47 and charged up to the distribution as mentioned.' See page 110. Mr. Malone also said that, as traveling auditor, he was familiar with the way in which the salary and wage records of the company had been kept, and in keeping these records the original pay rolls are condensed in form No. 47 for the purposes of record, and that thus the original pay rolls were only preserved for a while, possibly a year or so, until the end of the season, and then destroyed." See page 112.

Street's Federal Equity Practice, § 943, in referring to the defense of laches, says:

"The defense of laches arising from the staleness of the claim which supplies the basis of the bill is quite similar to the defense of the statute of limitations and is likewise available on demurrer. But if the bill shows in avoidance of the laches that the plaintiff was ignorant of the cause of action—and this without fault imputable to himself—and that as soon as the cause of action was discovered he bestirred himself diligently to obtain redress, the demurrer cannot be maintained."

In the case of *Hanchett v. Blair*, 100 Fed. 817, 41 C. C. A. 76, the court said:

"Laches which will bar a suit in equity depends on the peculiar circumstances of each case, and where the complainant's inaction does not appear to have worked injury to any one, and it is not shown that there was any occasion for more promptly asserting his rights, the defense will not prevail."

This view is sustained by the following cases: *London & S. F. Bank v. Dexter et al.*, 126 Fed. 593, 61 C. C. A. 515; *McIntire v. Pryor*, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606; *Hammond v. Hopkins*, 143 U. S. 234, 12 Sup. Ct. 418, 36 L. Ed. 134; *Wilson v. Smith (C. C.)* 117 Fed. 707; *Wheeling Bridge, etc., Co. v. Reymann Brew. Co.*, 90 Fed. 189, 32 C. C. A. 571; *Bissel, etc., Plow Works v. T. M. Bissel Plow Co. (C. C.)* 121 Fed. 357.

Mr. Birdseye states that, when he attempted to examine the pay rolls during the spring and summer of 1893, and after many attempts to examine the same, the defendant refused to permit him to have access to them, stating as the reason therefor that the statute of limitations had then barred the claim. At page 60 et seq., Mr. Birdseye, among other things, said:

"Q. Did you after reaching Richmond under instructions have any communication with the Virginia-Carolina Chemical Company in reference to the auditing of pay rolls?

"A. I did.

"Q. Who did you see?

"A. I cannot say who I saw first. I went to the office and finally reached—I think the gentleman's name was Miller—who had charge of the room where the manufacturing pay rolls were kept. I saw a number of gentlemen. I think I saw Mr. Crenshaw, but whether immediately on reaching Richmond or later I cannot say. I noticed yesterday that his face was somewhat familiar.

"Q. Did you meet a gentleman by the name of Witherspoon?

"A. I did.

"Q. Will you please state, Mr. Birdseye, when you went to the office of the Virginia-Carolina Chemical Company for the purpose of making this audit what occurred.

"A. I went there, and I cannot say the exact number of people I met, but I finally found a gentleman in the charge of the manufacturing pay rolls and I told him who I was. I think I probably saw the secretary first and was referred to Mr. Miller—if the gentleman's name was. That was the one that I recollect I saw most of, and he gave me certain pay rolls.

"Q. What departments did those pay rolls cover?

"A. They covered the manufacturing only.

"Q. What years?

"A. 1901 and 1902.

"Q. Did you ask for any other pay rolls?

"A. I did.

"Q. What happened?

"A. They were refused.

"Q. What pay rolls did you ask for which were refused?

"A. For the pay rolls before the 1901 year.

"Q. How about the pay rolls of 1901 and 1902 other than manufacturing; were they refused?

"A. Refused.

"Q. So that in response to your demand the only pay rolls that were furnished you were the manufacturing pay rolls for 1901 and 1902?

"A. Yes, sir.

"Q. And all others were refused?

"A. Yes.

"Q. Did you leave Richmond?

"A. I did when I had stayed there long enough to have interviewed several gentlemen connected with the company trying to obtain the pay rolls and being refused.

"Q. You failed utterly?

"A. Failed utterly.

"Q. What was the length of time that you remained at Richmond for this specific purpose?

"A. I should say about a month, as I got there on the night of the 14th, and I think it was about the 11th or the 14th of June that I left."

Again, on page 68 et seq., Mr. Birdseye said:

"Q. Then what further application did you make?

"A. I afterwards saw—I won't say which I saw first, whether Mr. Borden or Mr. Witherspoon. One of the gentlemen, if I recollect rightly, had been out of town or sick, and I saw the other, and then I saw the one that had been sick or out of town.

"Q. What request did you make to them? And what did they say in answer?

"A. I requested the pay rolls, all the pay rolls for the time covered by our policies, and they refused to give me anything more than what I had.

"Q. Did they assign any reason for their refusal?

"A. They did.

"Q. What was that reason?

"A. The reason given was that the statute of limitations had run against me and I could not go back of the issue of 1901."

Mr. Miller, who was also a witness corroborates the testimony of Mr. Birdseye. On pages 209 and 210 et seq., his testimony in that respect is as follows:

"Q. Was it part of your duties during the period from 1898 to 1903 to have charge of the records of the manufacturing department?

"A. Yes.

"Q. In what form were those records kept?

"A. You refer now particularly to the pay rolls?

"Q. Yes.

"A. They came to us weekly on what is known as form 47, which is a condensed, tabulated report of the weekly pay rolls.

"Q. What has become of the original pay rolls, if you know?

"A. Well, they were, of course, always left in the factory offices for a sufficient length of time for any reference we might want to make to them for statistics. As far as I know, then they were destroyed, they were of no use any longer, because they were carried on to headquarters here in the form of other reports, this form 47, which was all we wanted."

In the case of *O'Brien v. Wheelock*, 184 U. S. 493, 22 Sup. Ct. 370 (46 L. Ed. 636), Chief Justice Fuller, among other things, said:

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

Has there been such change of situation during what might be termed "neglectful repose" as to render it inequitable to grant the relief demanded? The defendant was the custodian of these pay rolls, and, according to the terms of the policies which it had in its possession, it was provided that the complainant should have the right at any time to an audit of the same. It was, therefore, the duty of the defendant to preserve the pay rolls or a record of them so that there might be at all times full and ample opportunity afforded the complainant to examine the same, and, according to the evidence of Mr. Malone, as will appear later, there was a record in the possession of the defendant from which an intelligent estimate could be made as to the actual amount of the pay rolls. The conduct of the complainant has not been such as to induce the defendant to do anything calculated to render it impossible for the complainant to assert any rights that it may have under the terms of the policies.

According to the testimony of Mr. S. H. Malone, traveling auditor of the complainant, the defendant has now in its possession all the information necessary to make a full disclosure of its pay rolls as they existed at the time the premiums were paid. Mr. Malone, among other things, on page 110, testified as follows:

"Q. In the spring of 1907, you and two auditors representing the complainant made an examination of the pay rolls of the Virginia-Carolina Chemical Company for the period covered by the policies in suit in this action?

"A. We made an examination of form 47, which is compiled from the pay rolls; but the originals of the pay rolls giving details and the name of each laborer were not in existence.

"Q. When you speak of form 47, what do you mean?

"A. I mean the factory weekly report, which is compiled at the factory, covering the pay roll for that week, by the superintendent, which report includes all the labor and wages paid at the factory, the superintendent's

salary, clerks' salaries, and every laborer in connection with the factory; and in some instances I have known it to be a fact that contract labor was put in form No. 47 and charged up to the distribution as mentioned there."

The witness also testified as follows on page 112:

"Q. As traveling auditor and as disbursing cashier for the Georgia Division, you were familiar with the way in which the salary and wage records of the company have been kept?

"A. Yes, sir.

"Q. And, in keeping those records, do I understand that the original pay rolls are condensed into what you call form 47 for the purpose of records?

"A. Yes, sir.

"Q. And the original pay rolls, after being so condensed, are no longer preserved?

"A. Well, they are preserved for a while, possibly a year or so, until the end of the season.

"Q. And then are destroyed?"

Thus it will be seen that the defendant was in a position to furnish the necessary data without the slightest inconvenience.

Following the rule as laid down by the Supreme Court of the United States, as well as other courts, I am of the opinion that the complainant has not been guilty of laches in this instance. It is therefore at liberty to assert any right to which it may be entitled under the provisions of the contract in this respect. It necessarily follows that the complainant is entitled to recover of the defendant premiums on the basis of the amounts paid by the defendant for compensation to its employes, which should include executive officers and office men during the respective policy periods to be ascertained hereafter.

It has been intimated that the parties may agree as to the amounts of the various pay rolls; however, if there should not be an agreement as to the amount involved, an auditor will be appointed in order that there may be an accurate report made as to the amount of pay rolls and as to the number of employes, including executive officers and office men, in accordance with the terms of the policies.

BERWIND-WHITE COAL MINING CO. v. METROPOLITAN S. S. CO.

AMERICAN TRUST CO. v. METROPOLITAN S. S. CO. et al.

(Circuit Court, D. Maine. October 1, 1910.)

No. 625.

CORPORATIONS (§ 566*)—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF EARNINGS OF RECEIVERSHIP—PRIORITY BETWEEN MORTGAGE AND RECEIVERS' CERTIFICATES.

Receivers were appointed for the property of a large steamship company in a creditors' suit, and afterward, on the consolidation of such suit with one to foreclose a mortgage securing bonds, the receivership was extended to the latter. On petition of the receivers with notice to the mortgage trustee and without objection, receivers' certificates were issued and sold at par, to pay coupons due on the mortgage bonds. The property was insufficient to pay the mortgage debt, and a deficiency judgment was taken. As the result of the operation of the property by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the receivers there remained in their hands a considerable amount of net earnings, but not enough to pay the deficiency judgment. The mortgage gave no lien on the income of the mortgaged property. *Held* that, as the mortgagee had no right at common law to the income of the property, on the appointment of receivers by a court of equity, its right thereto under the circumstances could only be enforced in accordance with equitable principles, and that, the bondholders having received the proceeds of the certificates, the holders of such certificates were entitled to priority of payment over the deficiency judgment from the net earnings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.*]

Receivers' certificates, see notes to Postal Telegraph Cable Co. v. Vane, 26 C. C. A. 350; Nowell v. International Trust Co., 94 C. C. A. 601.]

In Equity. Suits by the Berwind-White Coal Mining Company against the Metropolitan Steamship Company, and the American Trust Company against the Metropolitan Steamship Company and others. Consolidated cause. On question of payment of receiver's certificates. Order for payment.

See, also, 173 Fed. 806; 183 Fed. 257.

Coolidge & Hight and Clarence A. Hight, for receivers.

Ropes, Gray & Gorham and Robert S. Gorham, for Hayden Stone & Co. and First Nat. Bank of Boston.

William A. Sargent and J. Markham Marshall, for American Trust Co.

PUTNAM, Circuit Judge. This proceeding arises out of the receivership created by the Circuit Court for the District of Maine in certain proceedings against the Metropolitan Steamship Company, wherein an interlocutory receivership was created of all the assets of that corporation by an interlocutory order entered on the 4th day of February, 1908. This order was never litigated in any form. It has always been acquiesced in. The immediate topic is a petition of the receivers for leave to pay two series of certificates of indebtedness known as "series B" and "series C," issued by the receivers as hereinafter shown. The principal litigation is the bill filed by the American Trust Company to obtain foreclosure of certain mortgages made to it. The only objector to the allowance of the application of the receivers is the American Trust Company, which maintains that the funds in the hands of the receivers should be applied to its own claims until they are liquidated. Series B was an issue of \$37,000, according to the following form of one of the certificates:

"Metropolitan Steamship Company.

"Receivers' Certificate of Indebtedness.

"This is to certify that the undersigned, William T. Cobb, Calvin Austin and Abel I. Culver, not personally but in their capacity as receivers of the property of the Metropolitan Steamship Company, are indebted to the bearer hereof in the sum of ten thousand dollars (\$10,000), payable six (6) months from the date hereof, or earlier, at the option of the receivers, at the office of the City Trust Company, in the city of Boston, Massachusetts, together with interest thereon, until paid, at the rate of six (6) per cent. per annum.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"This certificate is one of a series of certificates of like tenor, but for varying amounts, the aggregate amount of all certificates of this series being limited to thirty-seven thousand dollars (\$37,000), and is issued under authority of and by virtue of an interlocutory decree of the Circuit Court of the United States for the District of Maine, dated June 29, 1908, made in the consolidated cause resulting from the consolidation of the cause of the Berwind-White Coal Mining Company v. Metropolitan Steamship Company with the cause of American Trust Company v. Metropolitan Steamship Company et als., pending in said court; and by the terms of said interlocutory decree, the said certificates are declared to be a debt of the undersigned and their successors as such receivers, and to constitute a lien on the property of the Metropolitan Steamship Company in the custody of said receivers upon the date of said interlocutory decree or subsequently acquired by them or their successors. Said lien, however, to be subordinate and inferior to the lien of receivers' certificates now outstanding to the amount of \$80,000 and subordinate and inferior to the lien of any mortgages made to the American Trust Company under that name or the name of the American Loan & Trust Company, trustee, and all bonds and coupons secured thereby and all charges and expenses of the trustee thereunder, and subordinate and inferior to any indebtedness of said Metropolitan Steamship Company found by the court to be a lien superior to said mortgages and the bonds and coupons secured thereby, but said certificates to constitute a lien upon the property aforesaid prior to the general unsecured indebtedness of said Metropolitan Steamship Company.

"This certificate shall not become obligatory until countersigned by the clerk of the United States Circuit Court for the District of Maine as registrar.

"In witness whereof the undersigned as such receivers have signed this certificate this 10th day of July, A. D. 1908.

"William T. Cobb,

"Calvin Austin,

"Abel I. Culver,

"Receivers Metropolitan Steamship Company.

"Countersigned and registered this 10th day of July A. D. 1908.

"James E. Hewey,

"Clerk United States Circuit Court for the District of Maine. [L. S.]"

Series C bears date the 7th day of November, 1908, and is for the gross amount of \$64,606. These certificates contain a provision subjecting them to the liabilities for supplies and materials which were to be paid according to the decrees appointing the receivers. In all other particulars they read the same as the certificates of series B. There are sufficient funds in the hands of the receivers to discharge these prior liabilities in any event; so that, although all parties interested were notified to answer to the present application of the receivers, no holders of claims for supplies or materials appeared. Therefore the two series of certificates stand for the present hearing exactly alike. Consequently, in disposing of series B, we also dispose of series C.

We have spoken of the interlocutory order creating the receivership entered on the 4th day of February, 1908. This needs explanation. This order was entered in the suit of Berwind-White Coal Mining Company v. Metropolitan Steamship Company, which suit was the first commenced, and which was merely a creditor's bill as ordinarily called. It carefully reserved all the rights of the American Trust Company as trustee. While it authorized the receivers to take possession of all the assets of the corporation and to operate its steamship lines, it expressly stated that the appointment of receivers was without prejudice to, and subject to all, the rights legal and equitable of the Ameri-

can Trust Company as trustee, and of the holders of bonds secured by the trust mortgage. Subsequently the bill was filed in American Trust Company v. Metropolitan Steamship Company for the foreclosure of the mortgages as already said. As soon as the bill was filed, the solicitors for American Trust Company also filed, on the 4th day of March, 1908, an application for the appointment of receivers, *pendente lite* therein, of all the properties described in the bill of complaint; and on the same 4th day of March, 1908, an order drawn and offered by the solicitors for the complainant, the American Trust Company, was entered consolidating the two suits we have described. That order also extended the receivership in the case of the Berwind-White Coal Mining Company, referred to, "to all the matters and things to which the bill of complaint of the American Trust Company related." It added that it was so extended for the purposes prayed for in the bill of complaint of the American Trust Company, and was made to embrace and cover all the mortgage property described in that bill. It also appears in the order that the counsel for all the parties, including the American Trust Company, were present in open court, and agreed to the order last described. Thus it came about that the receivership operative here originated in the affirmative action of the American Trust Company. Had it not been so, the questions in reference to the income acquired by the receivers in operating the steamship lines might have been of a mixed and difficult character. As it now stands, however, the earnings of the receivership were, in law, the result of the affirmative action of the American Trust Company asking from the court the extension of the receivership to the entire body of the mortgaged property, thus canceling the reservation in that particular which was inserted in the original order of February 4, 1908, which we have described. With this preliminary explanation we adopt the summary in the printed record before us, having fully verified its statements. We have added to it some further matters necessary to bring the entire case before the court.

"On August 7, 1909, upon the bill and supplemental bills of American Trust Company, a foreclosure decree was entered, pursuant to which decree the property of the steamship company covered by the mortgages was sold by special masters, the property so sold was conveyed and delivered to the purchaser, and the sale was confirmed by an order entered November 1, 1909. The proceeds of the sale were distributed ratably among the bonds and matured coupons secured by the mortgages, and the several reports relating to said sale and distribution were confirmed.

"On November 8, 1909, the court allowed claims to that date for costs of the receivership, compensation of receivers, and fees of counsel, and the same were paid by the receivers.

"The current cash assets other than cash were then sold by order of the court, and turned over to the purchaser. Under an order of the court for proof of supply and material claims the receivers ascertained and reported such claims to amount to \$144,395.11. The court confirmed that finding and report, and on September 5, 1910, ordered a dividend of 50 per cent. to be paid on said claims."

It also appears that there is now in the hands of the receivers approximately \$275,000; that the receivers continued to operate the property until the foreclosure was completed in all respects; that the amount now in the hands of the receivers, \$275,000, is the net result of the earnings of the property while in the hands of the receivers; that the receivers, when they were appointed, came into possession of and disbursed certain moneys and quick assets which were the result of the operation of the properties before either bill which we describe was filed; that therefore the \$275,000 is in no respect any part of the body of the property covered by the mortgage; that the result of the foreclosure sale was to leave a deficiency of \$261,295.27, for which, with interest, judgment was entered on foreclosure; and that there are no assets from which this deficiency can be paid unless from the \$275,000 now in the hands of the receivers. Therefore the American Trust Company claims that the outstanding receivers' certificates are subject to and inferior to the deficiency debt, and that no portion of the certificates should be paid until the deficiency debt is satisfied by the receivers. There are no outstanding liabilities for which the receivers are liable, or to which the amount in their hands can be applied, except the unpaid 50 per cent. of the so-called "supply claims," the receivers' certificates in question, and the deficiency debt which we have described. Of course, the fund in the hands of the receivers could not be demanded in payment of the judgment for deficiency merely because it is a judgment. If the American Trust Company has any claim to that fund, it is because it is entitled as mortgagee to the "rents and profits" or income of the property pending foreclosure.

The mortgages contain no specific pledge of the "rents and profits" or income, and no specific stipulation on the part of the Metropolitan Steamship Company that it would account for or pay over the "rents and profits" or income, either prior to default or afterwards. The description in the mortgage of the property pledged is as follows:

"All and singular the property, both real, personal, and mixed, now owned, or hereafter acquired, by the steamship company, including the ships, steamships, steamboats, vessels, land, wharves, docks, piers, warehouse, buildings, approaches, and structures now owned, or hereafter acquired, by the steamship company. And also including the equipment, machinery, materials, furniture, fuel, supplies, contracts, books, documents, choses in action, and other chattels and personal property now owned, or hereafter acquired, by the steamship company. And also including the easements, privileges, and rights and all other property of every kind and nature now owned, or hereafter acquired, by the steamship company, which premises shall include without restricting the generality of the foregoing description the property described in the schedule hereto."

This contains a sweeping transfer of all property, present and future. It does not specify moneys in terms, or income. Even if it did, and even under the liberal rules of the federal courts as to after-acquired property, a broad attempt to convey moneys and income would be ineffectual; although, of course, a conveyance of income of certain specified property which was pledged might be effectual to a certain extent. Therefore, in order to give the American Trust Company any lien on the earnings of the Metropolitan Steamship Company, it must be by applying the rules of the common law, which, under ordi-

nary circumstances, refuse to give the mortgagee income of mortgaged property until from the time he has actually obtained possession thereof; although, under certain provisions in mortgages, equity may sometimes compel the mortgagor to account for and pay for intervening "rents and profits" or income. Different decisions of the Supreme Court of the United States apparently lay down some rules contrary to what we have stated; but, on a careful examination of all the circumstances, none will be found contradicting these propositions. The last statement of the rule in that court is in *Willis v. Eastern Trust & Banking Company*, 169 U. S. 295, 310, 18 Sup. Ct. 347, 42 L. Ed. 752, which is in complete harmony with what we have stated. A statement of the rule (1 *Jones on Mortgages* [6th Ed.] § 670) is in harmony with the common law as always practiced and as stated by us. It followed, therefore, that, in order to make available the intervening income, it was necessary for the American Trust Company to proceed in equity and seek the appointment of receivers, as it did. It might have stayed out of equity and undertaken to assert its common-law rights; and, if it thus proved successful, it might thus have avoided equitable application by the court of any part of the net income which came into the hands of the receivers. Not having done this, but having on the other hand sought the aid of the equity court, the net accumulation of income, including the \$275,000 referred to, is subject to equitable rules; and the disposition thereof was required to be made on equitable principles. In no other way can the continual application by the federal courts of income to the payment of priority claims be explained or supported. This practice is such a continuous testimony to what we assert that it is hardly necessary to cite authorities to support ourselves. Therefore, while ultimately the remnant of the fund now in the hands of the receivers should be paid to the American Trust Company to the extent of its deficiency, as "rents and profits" or income, as to a mortgagee who has secured the assistance of a receiver from the equity court, yet this payment must not be accomplished until all superior equities have been disposed of. That the holders of the certificates in question have an equity superior to that of the amount unpaid to the American Trust Company hardly needs any elaboration.

It is true that the receivers' certificates in question here were sold merely for the purpose of paying interest in arrears on the bonds which the mortgage to the American Trust Company secured. It is also true, as said by the American Trust Company, that the payment of those coupons postponed the foreclosure for the corresponding period covered by the due dates thereon, in this case we understand a year. It is also true that the American Trust Company maintains that the purpose of the issue of the certificates and of applying the funds to the payment of coupons was merely through an intent on the part of the corporation to delay foreclosure. There is not a particle of proof in favor of that proposition. On the other hand, these certificates were issued by virtue of an order based upon petitions setting out that it was for the common interest that those particular coupons should be paid. Why it was for the common interest does not appear; but it is a matter of common knowledge that, if a foreclosure sale had

taken place at the earliest time at which it might have occurred if the coupons paid out of the proceeds of the certificates had not been paid, it would have come at a time before the market had recovered from a general panic, and at a time when the Metropolitan Steamship lines were in a broken down condition financially, and therefore at a time unfortunate for the sale in view of the interests of all concerned. However, the case puts clearly the contrary of this proposition. The American Trust Company was duly notified of the applications for the issues of the certificates in question, was in court when the orders were made, made no objection thereto, and not only made no objection thereto, but indorsed on the order authorizing the issue of certificates C that it did not care to be heard thereon. There can be no question that the American Trust Company knew that, if it had opposed the issues of these certificates for the mere payment of interest to its own clients and to its own bondholders, the court would never have made any of the orders providing therefor. It would be beyond credit to assume that the court would have authorized these certificates for the purpose of forcing payment of interest on bondholders who did not wish it. We doubt not under the circumstances that the allegations in the petitions of the receivers to which we have referred were in accordance with the facts. If they had not been, there was ample opportunity to meet them; and therefore we find as a fact that it was for the interest of all concerned that these certificates should have been issued as they were issued. Beyond that it cannot require any argumentation to show that the receivers' certificates issued by the court without any objection, which court was administering a receivership in a matter involving several millions of dollars, in comparison with which the total of the certificates was almost a negligible quantity, should be protected as against an unpaid balance of a deficiency decree.

However, in one aspect, it seems to us to reduce the position of the American Trust Company to a matter of mere illegal injustice. These certificates were sold at par, and every dollar of the funds which they represented went into the hands of the bondholders in discharge of coupons to an equal amount at par. The American Trust Company now desires that its bondholders should receive two dollars for one; one of the two dollars being what they derived from the sale of the receivers' certificates, and the other one of the two dollars to come out of the pockets or those holders of the certificates, without any equivalent whatever therefor. This is a result which no court of equity could possibly permit.

We have said that, as to the general principles herein considered, we hardly need a citation of authorities. Nevertheless, the language of the Supreme Court in *Fosdick v. Schall*, 99 U. S. 235, 253 (25 L. Ed. 339), is thoroughly crystalized into the rules on this topic as administered by that court; and it is so clearly applicable to the facts in this case we think it well to quote from it as follows:

"For even though the mortgage may in terms give a lien upon the profits and income until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. The mortgagee has his strict rights which he

may enforce in the ordinary way. If he asks no favors, he need grant none. But, if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity."

The clerk will enter the following interlocutory decree:

It is ordered, adjudged, and decreed that the receivers deposit in the registry of the court forthwith a sum equal to the principal of the receivers' certificates constituting series B and C now outstanding and interest thereon to the date of the deposit; that they also deposit sums equal to the poundage of the clerk, and his lawful fees and disbursements in reference to the matter to which this decree relates; that the receivers deposit with the clerk for cancellation any certificates which have not been sold or which have come back into the hands of the receivers; that the holders of the several certificates surrender the same to the clerk for cancellation and payment; that, before payment, each shall be authenticated by the signature of the receivers or their solicitor as valid, and the clerk shall verify each by reference to the registry which shows the issue thereof; that, each being so authenticated, the clerk shall pay it, with interest to the date of the deposit as aforesaid; and that, upon such payment, each certificate shall be effectually canceled by the clerk, and shall be duly filed.

BERWIND-WHITE COAL MINING CO. v. METROPOLITAN S. S. CO.

AMERICAN TRUST CO. v. SAME.

(Circuit Court, D. Maine. November 28, 1910.)

No. 625.

CARRIERS (§ 180*)—CARRIERS OF GOODS—CONNECTING CARRIERS—LIABILITY ON THROUGH BILL OF LADING.

Where a connecting carrier receives and forwards goods, which were shipped on a through bill of lading issued by the initial carrier, of which the connecting carrier is advised when it receives the goods, it takes them subject to the terms of such bill of lading; and where the original bill contains a provision for marine insurance on the shipment, the connecting carrier cannot limit its liability thereunder, as against the shipper, by the issuance of a supplemental bill of lading to the carrier from which it receives the goods, whatever its rights by subrogation may be against such carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 180.*]

In Equity. Suits by the Berwind-White Coal Mining Company and the American Trust Company against the Metropolitan Steamship Company. On intervening petition of Brown & Adams. Decree for petitioners.

See, also, 183 Fed. 250.

Whipple, Sears & Ogden, for petitioners.

Coolidge & Hight and J. Markham Marshall, for receivers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
183 F.—17

PUTNAM, Circuit Judge. This relates to several shipments of wool from Albuquerque, in the territory of New Mexico, to Boston, state of Massachusetts. All the shipments are the same in circumstances, the questions arising as to each are the same, and the judgment prayed for is a consolidated amount; so that we may speak of all the shipments in the singular, so far as it is convenient so to do. The wool was received in New Mexico by the Atchison. It was delivered en route by the Atchison to the Southern Pacific, and was delivered by the Southern Pacific en route to the receivers of the steamers of the Metropolitan Steamship Company, appointed by this court, to be transported by those steamers from New York to Boston. There was a total loss en route. There was no joint line and no joint undertaking by the three carriers named; but the Atchison gave a through bill of lading. That through bill of lading covered marine insurance, but fixed an agreed valuation on the shipments in case of loss. On receipt of the wool at New York, the receivers gave the Southern Pacific a supplemental bill of lading, which also covered marine insurance, but provided that the insurance should be adjusted according to the policies held by the receivers. There was a difference between the agreed valuation and the amount payable in the event of total loss by the policies last named, the excess being in favor of the shippers; and it is for that excess that the present intervening petition seeks to recover.

The case was argued before us; but we desired additional briefs which we have received and considered.

The bills of lading given by the receivers at New York contained a memorandum as follows:

"Insured Rate.

"Mdse. shipped under this bill of lading is covered by marine insurance while on board the steamers of the Metropolitan Steamship Co. in accordance with and subject to the conditions and limitations of policies held by them.

* * * * *

"Deliver to party surrendering bill of lading of initial line properly indorsed.

H. M. Whitney.

"Nov. 5, 1908."

Had this memorandum been called to our attention at the argument, we probably would not have asked for the supplemental briefs. It appears from this that the receivers were advised of the through bill of lading given by the Atchison from Albuquerque to Boston. The position of the various carriers was as follows: The Atchison transported the wool over its own line, and was responsible for its proper carriage to that extent. At the end of its line it stood in the position of a forwarder for subsequent transportation. Thereupon the Southern Pacific took it for carriage over its own line, and at the end of its line again took the place of a forwarder. The relative rights of the various carriers, and of the shippers to the various carriers, grew out of the different changes in the obligations of the first two carriers. It is entirely plain that, when the wool was delivered to the receivers, they were aware that the Southern Pacific stood as the forwarder, and they were informed that a bill of lading had been given covering the entire route. It followed, therefore, that they were

chargeable by the law with knowledge of the fact that, in forwarding the merchandise, neither the Atchison nor the Southern Pacific had any authority from the shippers to change the terms of the original bill of lading. It was therefore, in the eyes of the law, the duty of the receivers to ascertain the contents of the original bill of lading, so far as it concerned the through shipment, and they were charged with the knowledge thereof and the conditions which it imposed. This duty is a simple one, plainly resulting from the fundamental legal principles relating to the routing of the goods, and also as shown by the ordinary practice between carriers who merely connect, and the rules which have been worked out by a mass of decisions which we need not undertake to cite or explain. Therefore the result is that, in the eyes of the law, at the time the goods were delivered to the receivers, they knew the terms imposed by the original bill of lading on the two prior shippers, the Southern Pacific by succession to the Atchison; and they knew, consequently, as a matter of law, that the prior carriers were not authorized to forward the goods, except in accordance with the directions which each of them, one in succession to the other, had received. Therefore the receivers knew as a matter of law that the Southern Pacific had no authority to vary the terms of shipment from those contained in the original bill of lading, whatever they were. If they did ascertain them, and were not satisfied to abide by them, they had a right to refuse the goods; but, no matter how much they might protest otherwise, the receipt of the goods bound them, of course, to the terms of the shipment. They could not receive the goods, making new terms therefor to suit their own convenience or customs. By the receipt of the goods, they were estopped in that direction as a matter of fundamental law. If they did not investigate the terms of the original bill of lading, they nevertheless, as we have shown, stand charged with the knowledge of its contents.

Whether or not, in view of the precise terms given by the receivers in their supplemental bill of lading, plainly in conflict with those contained in the original bill of lading, the Southern Pacific, by accepting the supplemental bill, bound itself primarily to make good to the shippers the excess we have named, and whether or not the receivers are under merely a secondary obligation which the Southern Pacific may be called on to make good to them, we are not required to determine, beyond the fact that the receivers should be subrogated to any claims which the shippers may have, or might have, against the Southern Pacific, which the judgment in this case must protect so far as it has any value, if it has any value. Aside from that, the situation is clear, and reducible to the plain terms of the case where the owners of certain merchandise in storage directed the warehouseman to forward the goods, without any authority on the part of the warehouseman to change the common-law terms of carriage. *Russell v. Erie R. R.*, 70 N. J. Law, 808, 59 Atl. 150, 67 L. R. A. 433, decided November 15, 1904. In this case the carter of the warehousemen undertook to modify the terms of the shipping order from the owners of the merchandise; but the presentation of the shipping order was held to be a notice to the carrier that the carter had no authority with reference to

any modification. This was an ordinary, homely case; but it involved all the principles involved here, beyond the mere fact that the receivers did not in truth know the terms of the original bill of lading, a fact which we have shown to be unimportant, because they were chargeable with knowledge of it. Therefore there must be a decree for the petitioners, subject to any rights of subrogation which the receivers may have as explained herein. As the transaction arose entirely after the receivers were appointed, while the receivers were managing the steamers of the Metropolitan Steamship Company, the amount found due the intervening petitioners must be paid from the funds in the hands of the receivers, on the same footing as the ordinary charges and disbursements connected with the operation of the steamers; and the petitioners must receive the costs of this court to be paid in the same way.

The petitioners will file a draft decree in accordance with this opinion on or before the 3d day of December, 1910, and the receivers will file corrections thereof on or before the 7th day of December, 1910; all in a manner analogous to that directed by our rule 21.

UNITED STATES v. YUEN PAK SUNE, alias YUEN PAK SUEN, alias
PAK THUNE et al.

(District Court, N. D. New York. November 10, 1910.)

1. ALIENS (§ 31*)—DEPORTATION OF CHINESE—CHINESE UNLAWFULLY IN UNITED STATES.

A Chinese alien and subject of the Chinese Empire not of the exempt classes, who knowingly crosses the Canadian border into the United States, but not at or near any established port of entry, with the purpose of entering and remaining in the United States, who is apprehended after he has crossed the boundary and taken before a Commissioner of Immigration at the nearest port of entry and given a hearing as an applicant for entry, and after such hearing is refused admission and ordered returned to Canada, but who cannot be returned because of the demand of the Canadian authorities for a head tax which he refuses to pay, is found, and is unlawfully, in the United States, and subject to arrest and deportation under the Chinese exclusion laws. Act May 5, 1892, c. 60, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1319) extended by Act April 29, 1902, c. 641, § 1, 32 Stat. 176, and by Act April 27, 1904, c. 1630, § 5, 33 Stat. 428 (U. S. Comp. St. Supp. 1909, p. 473).

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. § 31.*]

2. ELECTION OF REMEDIES (§ 10*)—DEPORTATION OF CHINESE—RIGHT TO DEPORT—WANT OF KNOWLEDGE OF FACTS.

The treating of such Chinese person in the first instance as an applicant for entry and the order directing his return to Canada was not an election of remedies by the United States which precludes his subsequent deportation to China, since prior to his hearing his status could not be known nor was it known that he could not be returned to Canada in obedience to the order, but the ascertaining of such facts determines that he was unlawfully in the United States.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 13; Dec. Dig. § 10.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Proceeding by the United States against Yuen Pak Sune, alias Yuen Pak Suen, alias Pak Thune, Ng Sin, Ng Len Koon, Ng Dick, and Ng Yee Hing. Order for deportation of defendants.

On the complaint of George W. Ketcham, one of the Chinese Inspectors of the United States, and a warrant duly issued, these five Chinese persons are before me as United States District Judge for the Northern District of New York, under the provisions of the Chinese exclusion laws (Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319] extended by Act April 29, 1902, c. 641, § 1, 32 Stat. 176 and Act April 27, 1904, c. 1630, § 5, 33 Stat. 428 [U. S. Comp. St. Supp. 1909, p. 473]), on the claim that they are alien Chinese persons, and not of the privileged classes, and that on or about the 14th day of October, 1910, they were found unlawfully in the United States, and are now unlawfully in the United States, having placed themselves therein unlawfully, etc. Deportation to China is sought.

George B. Curtiss, for the United States.

Yuen Pak Sune, in pro. per.

Ng Sin, in pro. per.

Ng Len Koon, in pro. per.

Ng Dick, in pro. per.

Ng Yee Hing, in pro. per.

RAY, District Judge. As the essential facts in the five cases are the same I will in this opinion recite the facts fully in but one, that of Yuen Pak Sune, or Suen, or Pak Thune. When brought before me, the defendants were informed of their rights, and of their right to be represented by counsel, or to see any one they or either of them knew, or any one they or either of them desired to see. Each one stated he did not know any one in the United States, had no relatives here (except in one case) so far as he knew, and that there was no one he desired to see. Each expressed a willingness to be sworn and was sworn and examined, and from the testimony and statement of Yuen Pak Sune under oath it appears:

(1) That the first he remembers or knew of himself he was living in China either alone, or with his mother, in Hung Mei village, Sun-ming district, Lower China; was married there; did no work of any kind and never did; and is now 20 years of age. He says he does not know the name of his father, or mother, or wife, or number of his children, and never did.

(2) He came from China to Vancouver, B. C., on the steamship Empress of China in June or July, 1910, where he landed and remained about three weeks, and went thence by railroad to Montreal, where he says he remained about a month and then left by rail with a ticket, he says, for Boston, Mass. He claims he did not pay his own passage; that a ticket was sent him by mail for his passage from Vancouver to Montreal unaccompanied by any letter or writing.

(3) The latter part of September, 1910, he left Montreal for Boston, he says. He found himself on the train with the four other Chinese persons, strangers to him, and who were arrested with him

and came by train a distance and then took a team with the other Chinese, such team being driven by a white man unknown to him, and came a further distance, and then took a train for Boston. He denies purchasing a ticket for his journey from Montreal, but says it was furnished by some one entirely unknown to him. Says he paid no board in Montreal, and did no work. He denies all knowledge of the other Chinese persons referred to up to the time he took the train at Montreal.

It is evident that he tells the truth in some things and testifies falsely in others. So far as he knew, he was never in the United States until the latter part of September, 1910, and so far as he knows has no means of showing he ever was here. He makes no claim that he was born in the United States. The evidence of Mr. Ketcham, the Chinese Inspector, and certain documentary evidence, proves that on the 26th day of September, 1910, five Chinese persons, including Yuen Pak Sune, were together in a carriage drawn by horses in Canada and approaching the border between the United States and Canada near North Burke, and were watched until they came into the United States, and had showed an intent to come and remain in. They were then arrested and treated as alien Chinese persons seeking to enter the United States, and taken before Gec. B. Billings, United States Commissioner of Immigration, at Boston, Mass., the nearest port of entry. Here they were given a full and fair opportunity to show their right to enter, but after a full and fair hearing and being sworn in their own behalf were refused admission, and ordered turned back into and returned to Canada. From the decision of the commissioner, no appeal has been taken. The officers charged with the duty of returning Yuen Pak Sune and the other four Chinese taken with him to Canada attempted to do so, but the officials of that Dominion refused to receive them or allow them to return to Canada or to be brought or taken into Canada unless they each paid the sum of \$500 as a head tax required of every Chinese person entering that Dominion.

Yuen Pak Sune, this defendant, and the other four Chinese, were informed of this, but they each stated they had no money to pay a head tax, and did not, whereupon they were liberated and at once taken into custody at Malone, Franklin county, N. Y., in the Northern District of New York, as alien Chinese persons found and being unlawfully in the United States, and thereupon they were taken before the United States District Judge and sworn complaint made and a warrant of arrest issued and this proceeding instituted.

The decision or judgment of Commissioner Billings on the application of this defendant to enter and rendered at Boston, Mass., September 30, 1910, is as follows:

"In re the case of Yuen Pak Sune, applicant for admission to the United States, he having left Montreal at 8 a. m. on September 26, 1910, and crossed the United States border line at North Burke, N. Y., at 4:40 p. m. same date. Serial #393. Having carefully reviewed all the evidence submitted in this case, I am not satisfied that the applicant has established his right to admission. I therefore find and determine that Yuen Pak Sune is an alien Chinese person, not a member of any of the exempt classes of Chinese entitled to

come into or remain in the United States, and he is accordingly this day denied admission.
Geo. B. Billings, Commissioner."

The question presented is whether a Chinese alien not of the exempt classes who crosses the Canadian border into the United States, but not at or near any established port of entry, and who knowingly enters on United States territory with the evident and thereafter declared purpose of entering and remaining in the United States, and who is apprehended by the immigration officers of the United States while he is in the act of entering, but after he has purposely crossed the boundary line into the United States in violation of its laws, and who is then treated as a Chinese person seeking to enter the United States and applying to enter, so far as to take him before a United States Commissioner of Immigration at the nearest port of entry and give him an opportunity to apply for admission, and who after so applying is given a full examination and inquiry and then refused admission to the United States and ordered turned back and returned to Canada, but who cannot be returned to Canada for the reason the Canadian authorities refuse to receive him except in payment of the \$500 head tax required by its laws of all Chinese persons seeking to enter that Dominion from any foreign territory, which payment is refused by such Chinese person and is not made, is then found unlawfully in the United States, and is unlawfully in the United States and subject to arrest and deportation under the provision of the Chinese exclusion laws.

In my judgment such Chinese persons under such circumstances are unlawfully in the United States, and are then found unlawfully in the United States, and are then subject to arrest and deportation under the provisions of the Chinese exclusion laws. Such Chinese persons are not on United States soil for the purpose of applying for admission and invited, taken, or permitted to come thereon temporarily for the purpose of applying for admission. Citizens of the United States, and this includes Chinese persons born here, are entitled to enter the United States at any point or place. I know of no law forbidding them to do so. Alien Chinese persons, not of the exempt classes, may be and are by law forbidden to enter at any point or place, and are excluded absolutely, and it is made the duty of certain officials to exclude them when they apply or seek to enter. Points called ports of entry have been designated by law for the entry of all aliens into the United States, and, when aliens whose entrance is forbidden enter at other points, they enter illegally and in violation of law, and are thenceforth illegally in the United States. It is, however, impossible and impracticable for the United States by its officials to stand at all highways and places of possible entrance on the borders and examine the Chinese who approach or cross the border line. They cannot be repelled by force or forcibly driven back across the line if the officer meeting them suspects they are not citizens of the United States. Chinese aliens are now coming in droves and in groups to various points on the border and crossing into the United States. They make no pretense of going to the ports of entry. They openly violate and designedly disregard the law,

evidently at the instigation of various persons engaged in the illegal importation of Chinese aliens into the United States. This fact has come to my knowledge in numerous cases. We have the immigration laws and the Chinese exclusion laws, which are, to my mind, if properly construed and administered and enforced, ample to secure the rejection and exclusion and deportation of all Chinese aliens not entitled to enter or to be and remain in the United States. The Circuit Court of Appeals, Second Circuit, has held (*Wong You et al. v. U. S.*, 181 Fed. 313, reversing *Ex parte Wong You et al.* [D. C.] 176 Fed. 933) that alien Chinese laborers who clandestinely and surreptitiously and in violation of law enter the United States at other points than ports of entry, and, of course, without any examination or opportunity for examination, cannot be dealt with and deported under the provisions of our immigration laws. This is, of course, and necessarily, a holding that alien Chinese are under our laws a privileged class of aliens, a class that must be dealt with under the provisions of the Chinese exclusion laws, and not under our immigration laws. No amount of sophistry can change this fact. It was, of course, competent for the Congress of the United States to so legislate and provide. I have held and am of the opinion that Chinese who enter the United States at points other than ports of entry, and who are apprehended in the very act of entry and before it is completed fully, and who are joined by United States inspectors at the boundary line, and accompanied by them into the United States and then taken into custody, are to be treated in the first instance as Chinese persons seeking to enter the United States, and are entitled to be taken before the Commissioner of Immigration at the nearest port of entry and given an opportunity to apply for admission, and show their right to enter, as, for instance, that they were born in the United States, and are therefore entitled to come in at will at any point, or that they belong to the diplomatic corps, etc. *Ex parte Chow Chok et al.* (C. C.) 161 Fed. 627, affirmed by 163 Fed. 1021, 90 C. C. A. 230. If they avail themselves of this opportunity and show a right to enter, they are admitted and set at large in the United States, and, in the absence of fraud, this action would be and is final and conclusive in their favor. If, however, it is decided that they were not born in the United States, are not citizens of the United States, and are not entitled to enter, this determination should be conclusive of that fact, unless reversed on appeal to the Department of Commerce and Labor, or by the courts in case of arbitrary or illegal action. *United States v. Ju Toy*, 198 U. S. 253, 260, 261, 262, 263, 25 Sup. Ct. 644, 49 L. Ed. 1040.

If such Chinese persons are, on such application and examination, denied admission to the United States, and an order is made denying them admission and turning them back, as in this case, to the Dominion of Canada whence they came directly into the United States, and the foreign country, as Canada in this case, refuses to receive them, they having voluntarily actually left that country and actually entered the United States so that Canada is under no obligation to receive them, and it would be contrary to the laws of the Dominion of Canada

to receive them without the payment of a head tax of \$500 each, which such Chinese persons are unable to pay and refuse to pay, are or are not such Chinese persons subject to the provisions of the Chinese exclusion laws, subject to arrest and to deportation under such laws if found on examination under such laws to have no right to be and remain in the United States where they have placed and find themselves by their own unlawful and wrongful acts done in violation of our laws? By treating them fairly has the United States lost any right or waived its right to deport them under the Chinese exclusion act? If the Dominion of Canada will not receive them, do such Chinese gain the right to remain and be in the United States? Must the United States pay the head tax if she would be rid of them? As stated, the United States has neither invited them in, brought them in, nor consented to their being or remaining in the United States. This government has simply given them the right in the first instance to show that they had and have the right to enter. In this they fail. They are in the United States by their own voluntary and wrongful acts, and cannot be turned back into or returned to the Dominion of Canada because of her laws with which such Chinese persons are unable to comply and with which they refuse to comply. Are they rightfully in the United States or entitled to remain here? Clearly not. These Chinese have failed to show before the Commissioner of Immigration a right to enter. He holds they were not born in the United States. Before me the same question has been gone into fully, and these Chinese persons have been given an opportunity to show they are of the exempt classes of Chinese, or that they were born in the United States, which they fail to do. I hold that they have not shown a right to be in the United States, and that they are alien Chinese persons not of the exempt classes, and that they left China with the purpose of coming into the United States by way of the Dominion of Canada, which is contiguous foreign territory, and that they cannot be returned or deported to that country without the payment of a head tax of \$500 on each person, and that the United States is under no duty or obligation to pay such tax, and that such persons have refused to pay same, and that by their own wrongful acts and willful violation of the laws of the United States and failure to comply with the laws of Canada they have placed themselves in the United States and are now unlawfully here and not entitled to remain, and are subject to deportation under the provisions of the Chinese exclusion laws. In this case the Chinese persons were not accompanied across the border by inspectors of the United States government, but were seen to cross and taken in custody very soon thereafter.

When Chinese aliens or aliens of any nationality of any class apply for admission, they should come to a proper port of entry, and, when they are refused admission, they are simply turned back, and under all ordinary circumstances, when they do apply, they are regarded by both governments as on the foreign soil that they seek to leave all the time. But this has no application, and cannot bind the foreign country when alien Chinese (not citizens of Canada) actually

leave that country intending to go to and remain in the United States, and surreptitiously or otherwise actually enter the United States, not at a port of entry and without the permission of the United States. This is especially true of Chinese aliens, subjects of the Chinese Empire. I know of no rule or principle of international law which obligates the Dominion of Canada to take back Chinese aliens who go to that country from China, and then pass voluntarily into the United States.

Nor can it be said that the United States by giving to these Chinese who come unlawfully into the United States a fair hearing before a Commissioner of Immigration, and treating them in the first instance as Chinese persons applying to enter, has elected its remedy, having two and being at liberty to pursue either, and has thereby precluded itself from resorting to the Chinese exclusion laws. That these Chinese were alien Chinese, or that they were not citizens of Canada, subjects of Great Britain who would not be received without the payment of a head tax, were not known or predetermined facts. Neither was it known nor could it be known that they would not pay their head tax and comply with the laws of Canada if treated as persons applying for and on examination refused admission to the United States. That, under the provisions of the Chinese exclusion laws, they were illegally in and found illegally in the United States, was not finally determined or known until they refused to pay their head tax and return to Canada. Refused permission to remain in the United States, they might have returned and were given the opportunity to return to Canada, whence they immediately came, on paying the head tax required by the laws of that Dominion. This they refused to do. From that moment they were certainly illegally in the United States of their own volition and because of their prior illegal acts and present conduct, and from thenceforth subject to deportation under the provisions of the exclusion laws. This condition of things or state of facts did not exist when these persons were given the hearing before the commissioner at Boston, and they were ordered back to Canada.

An election of remedies presupposes the then existence of all the essential facts giving both remedies and also knowledge of such facts. "And broadly speaking, an election of remedies is the choice by a party to an action of one or two or more coexisting remedial rights where several such rights arise out of the same facts." Tidd, Pr. (2d Am. Ed.) 9. See, also, *Hays v. Midas*, 104 N. Y. 602, 11 N. E. 141; *Dickson v. Patterson*, 160 U. S. 584, 16 Sup. Ct. 373, 40 L. Ed. 543; *Spread v. Morgan*, 11 H. L. Cases, 588, 615; *E. C. Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487; 15 Cyc. 252, 262, and numerous cases cited.

These proceedings are civil, not criminal (*Fong Yue Ting v. U. S.*, 149 U. S. 698, 730, 13 Sup. Ct. 1016, 37 L. Ed. 905; *U. S. v. Meng*, 196 U. S. 635, 25 Sup. Ct. 794, 49 L. Ed. 629; *Ah Sou v. U. S.*, 200 U. S. 611, 26 Sup. Ct. 752, 50 L. Ed. 619), and hence an order turning these Chinese back to Canada, not executed and incapable of execution, and a subsequent order of deportation to China based on a

full knowledge of all the facts and acts done by these persons thereafter, are in no sense a punishment or a double punishment for the same acts. The deportation of Chinese aliens is a right which the government of the United States may exercise in its own way and at its own pleasure as authorized by Congress. *Fong Yue Ting v. U. S.*, 149 U. S. 698, 724, 13 Sup. Ct. 1016, 37 L. Ed. 905. Citizenship and the right to be and remain in the United States, if claimed, must be proved by the Chinese person. The burden of proof is on him. *Chin Bak Kan v. United States*, 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121; *Chin Ying v. United States*, 186 U. S. 202, 22 Sup. Ct. 895, 46 L. Ed. 1126; *Ah How v. United States*, 193 U. S. 65, 76, 24 Sup. Ct. 357, 48 L. Ed. 619.

The Chinese exclusion laws themselves (Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319]) provide:

"That any Chinese person, or person of Chinese descent, arrested under the provisions of this act, or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

This is upheld as a valid and constitutional provision. *Ah How v. United States*, 193 U. S. 65, 76, 24 Sup. Ct. 357, 48 L. Ed. 619.

And Act May 5, 1892, c. 60, 27 Stat. 25, extended by Act April 29, 1902, c. 641, § 1, 32 Stat. 176, and by Act April 27, 1904, c. 1630, § 5, 33 Stat. 428 (U. S. Comp. St. Supp. 1909, p. 473), in section 2 provides:

"That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: Provided, that in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country he or she shall be removed to China."

The burden is on the Chinese to show he is entitled to be deported elsewhere than China. *U. S. v. Sing Lee* (D. C.) 125 Fed. 627; *U. S. v. Lee Kee*, 116 Fed. 612, 54 C. C. A. 68; 20 Op. Atty. General, 171.

These Chinese persons now in question neither gave nor offered any proof that they were citizens or subjects of any country other than China. They are illegally in the United States, not citizens or subjects of any country other than China, and they came from China by way of Canada into the United States in violation and defiance of our laws. They have been fairly treated and given a full opportunity to show a right to either be or remain here, which they have failed to do. They know no one here, and evidently belong to that class of illegally imported Chinese who come, or are sent, or are sent for, and take their chances of not being arrested, or, if necessary, of finding witnesses here willing to swear they were born in the United States.

There will be an order of deportation to China in each case.

SLATER TRUST CO. v. GARDINER et al.

(Circuit Court, S. D. New York. November 10, 1910.)

1. CORPORATIONS (§§ 222, 335*)—LIABILITY OF OFFICERS AND STOCKHOLDERS—MISREPRESENTATIONS IN MORTGAGE.

A corporation executed a trust mortgage to secure an issue of bonds, covering its property described therein as 47,000 acres of "lands," and the bonds were sold in the market; purchasers being induced to buy by circulars containing a copy of the mortgage. In fact, except as to 700 acres, the company did not own the lands in fee, but merely the coal underlying them. The preparation of the mortgage and the description of the property therein were left by the directors to competent and experienced counsel, who knew the facts. *Held* that, conceding that the description of the company's interest as lands was erroneous and misleading, neither the president of the company, who signed the mortgage in its behalf, with knowledge of the facts, nor stockholders, who authorized its execution, were personally liable for deceit to a bondholder, who was misled by such description and suffered loss by reason thereof.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. §§ 222, 335.*]

2. CORPORATIONS (§§ 222, 335*)—OFFICERS AND STOCKHOLDERS—LIABILITY IN EQUITY.

Officers and stockholders of a corporation cannot be held to have personally warranted the truthfulness of representations made in a mortgage executed by the corporation, so as to authorize a court of equity to require them to make such representations good at the suit of a bondholder who bought in reliance thereon, where they are not chargeable with acts which would render them liable at law for deceit; nor can relief in equity be granted against them by way of rescission on the ground of mutual mistake, since they were not parties to the transaction as individuals, and did not receive the consideration paid for the bonds.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. §§ 222, 335.*]

Stockholders' liability to creditors in equity, see notes to *Rickerson Roller Mill Co. v. Farrell Foundry & M. Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.]

In Equity. Suit by the Slater Trust Company against James T. Gardiner, William A. Read, and John R. Hegeman. Decree for defendants.

Delmas, Towne & Spellman, for complainant.

Strong & Cadwallader, for defendant Read.

Rushmore, Bisbee & Stern, for defendant Gardiner.

Carter, Ledyard & Milburn, for defendant Hegeman.

HAND, District Judge. As this case goes off upon one point, and it is therefore not necessary, or proper, to consider any others, I shall, for the sake merely of raising that point sharply, dispose of the suit upon the assumption that the complainant has proved all the facts which he alleges he has proved upon page 28 of his brief. On that page he sums up what he claims to have proved in the following words:

"That the mortgage was executed to secure an issue of \$3,000,000 of bonds to be sold to the public; that it represented the mortgagor to be the owner of 47,000 acres of land in fee; that, had this representation been true, the security given for the bonds would have been ample; that, in order to facilitate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the sale of the bonds to the public, the company had caused the mortgage to be printed in pamphlet form and these pamphlets to be publicly distributed; that a person examining these pamphlets would be fully justified in understanding that the mortgage was intended to cover, and did cover, 47,000 acres of land which the company was the owner of in fee; that among the purchasers of these bonds were Mackay & Co., bankers in New York, whose purchase amounted to \$600,000; that, in making that purchase, Mackay & Co. knew of the representations contained in the mortgage, relied upon them, and bought, believing the company to be, as represented, the owner in fee of the land given as security; that of the 600 bonds it had purchased, Mackay & Co. sold 25 to the Slater Trust Company; that, in buying, the Slater Trust Company likewise relied upon the statements contained in the mortgage, and, but for its belief that those statements were true, would not have made the purchase; that the representation as to the ownership of the land by the company in fee was false, save only as to 700 acres; that the fact that it was false was apparent upon the very face of the conveyances through which the company claimed title to the property, since all of said conveyances—save as to 700 acres, as above stated—showed in plain and unmistakable terms that they conveyed, not the fee to the land, but merely the coal underlying it; that by reason of this falsity the security given for the bonds was utterly inadequate, and, instead of being worth, as it would have been, had the representations been true, \$3,000,000, it realized upon foreclosure only \$100,000."

The defendant Gardiner, who signed the mortgage in the company's name and as its president, is more directly connected with the enterprise than any one else; and if he be not liable, neither of the others are, whose share in uttering the false statements was limited to signing a stockholders' consent to the execution of the mortgage. As to Gardiner's knowledge, he concedes that he knew that they had only a small surface ownership, no more than enough to work the measures economically, though it was all that was usual in such cases. It is true, therefore, that he knew substantially the facts of the company's ownership. Nevertheless, it is also true that he left the reduction of the facts to legal form wholly to the company's lawyers, who were competent, as no one disputes, and who in turn put the preparation of the description of the realty interests into the hands of equally competent Missouri counsel. Gardiner signed the document in entire reliance upon the correctness of the reduction of the facts to proper legal form. In fact, the lawyers described the ownership of the measures in fee as "lands," which the opinion upon the demurrer has held to be erroneous and misleading. This is Gardiner's connection with the matter.

These being the facts in small compass as the complainant himself asserts them—for I do not mean to be taken as deciding on the truth of any one of them—what is the law? I must take from Judge Martin the fact that the bill has equity, and is not open to demurrer. The complainant suggests two legal theories: The first, that it is a bill for restitution in kind because of a common-law tort—i. e., deceit; the second, that equity will relieve in any event, even if no tort be committed upon which a court of law might give damages. Judge Martin took a third theory; i. e., that it was an action at law, for deceit, which got into equity because of the number of the plaintiffs who would have to sue.

The question is whether a man, knowing the facts, who asks skillful lawyers to prepare a trust mortgage conveying the legal rights of a

company over which he is president, is responsible for the resulting damage because the words describing the property erroneously include the surface, which the company does not in fact own. It must be remembered that Gardiner did not employ the lawyers who drew up these papers, and is not responsible for them as his agents.

At the outset the character of the mistake must be observed. Gardiner knew the facts, but he did not know the meaning of the words. Although the great weight of authority is to the contrary (*Derry v. Peek*, 14 App. Cas. 337), I may assume for the purposes of this case that a man may be responsible for his uttered false words, even when he believes them to be true.

Such authorities as hold to this rule regard the uttered word as the cause of the damage, which, of course, it is, and they hold that a man, by speaking or writing words on which he knows others will rely, must be held to their truth quite as much as though he made a promise (*Mr. Justice Holmes dissentiente*, *Nash v. Minnesota Title Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489; *Pollock on Torts* [6th Ed.] page 283). But these authorities, which regard the word as the tortious act, certainly should not, in analogy with the other law of torts, be supposed to mean that a man should be responsible for the remote results of his words. The extent of his responsibility, indeed, ought to be limited, as it is in other torts, to those matters which would come within the foresight of the hypothetical reasonable man. With remoter damage it is as unjust to charge the words of his mouth as the movements of his legs or arms. Although they do not in these words indicate the distinction, I think that this is the explanation of such of the cases as make negligence the test, and of these there are a number.

If Gardiner was responsible for the words he uttered, regardless of scienter, at least he was not responsible for such consequences as no man could avoid with the use of reasonable care. What happened in spite of the exercise of such care was remote, within all the analogies of the law of torts. "*Causa proxima non remota spectatur.*" Nor does it make any difference that it was in respect of the meaning of his words that he was mistaken. The utterance of a word is one thing; its eventual interpretation by a reader is another, and is as much the external consequence of its utterance as anything else. A given interpretation, even a legal one, may be, from the point of view of the original utterer, so remote a consequence that no one ought in justice to be held accountable for it. For example, in the case at bar, if Gardiner did all a layman could do to get the facts set down correctly, the interpretation that J. T. Woodward put on the words Gardiner was not bound to anticipate, not even if it was the right one.

The authorities do not make any distinction between the discrepancy of the statement with the facts stated and the discrepancy of the statement with its subsequent interpretation. Thus in *Derry v. Peek*, 14 App. Cas. 337, it appeared that the directors who issued the prospectus knew all the facts and trusted their solicitors to prepare the statement correctly (see Lord Bramwell's judgment, page 348); their misstatement was in calling the franchise absolute which was in fact conditional. This statement they successfully justified, because they

regarded the condition attached to the franchise as practically certain of fulfillment and the statement really truthful (Lord Herschell's Judgment, pages 378, 379). The point is that the error was in supposing that the facts which they knew were correctly set forth in the statement. A similar case, where the exact point was passed on by the Supreme Court of Massachusetts, is *Nash v. Minnesota Title Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489, the dissent in which I have already mentioned. But that dissent proceeds upon the theory that no scienter is ever necessary in an action for deceit.

There is another possible ground upon which to hold Gardiner, which is that, although he believed the statements to be true, they were in fact put in such form as to lead others to suppose that he personally knew them to be true, or at least that he had a greater acquaintance with them than they had. It is familiar law that to say what you do not know as though you did know it is deceit, however much you may believe it. *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665, 673, 14 Sup. Ct. 219, 37 L. Ed. 1215.

To take up the evidence upon each of these two grounds of liability separately: First, was Gardiner guilty of any neglect in assuring himself that the mortgage correctly represented the facts? What more could he have done than he did? Before signing, he got the assurance of most experienced counsel in New York, who left it to most experienced counsel in St. Louis, that the legal rights of the company were described in such words as, under the law of Missouri, where the land lay, most accurately covered them; nor do I say that the words were in fact misleading, for upon that, as I have said, I simply follow Martin, J. If Gardiner had interfered himself, he would justly have been chargeable with recklessness. The complainant would then have rightly said that, if he had only left to experts matters as to which he knew, and could know, nothing at all, no damage would have been done. These descriptions were pre-eminently "words of art," depending upon local law, and were a part of one of the most complicated documents known to the law. That was the very purpose of giving it over to local experienced lawyers to draw, and their purpose in employing the best man they could in Missouri to pass upon the descriptions. No man should be called on to foresee that, after this care in reducing to written form the legal rights of the company in a mortgage, a mistake would be in fact made which would result in damage to a bondholder. To prevent such a result the best way was to employ lawyers, who are used to such matters. If not, then to issue such a statement is to warrant for its correctness. Neither the man who issues it nor the man who receives it understands anything of the sort.

The only remaining ground of deceit is that, though he believed the statements to be true, Gardiner stated them as though he knew their truth, or at least more than he did know. This altogether depends upon what personal knowledge a reader would suppose that the president of a company would have of the allegations in a trust mortgage regarding its real property. Perhaps it is true that he should have a knowledge of the extent of its property, as Mr. Delmas says; but that

is not the question here. Gardiner did have such knowledge, and could doubtless have stated it accurately enough in his own way; but these statements, occur in a legal document, which he could not have drawn if he would. To suppose that the statements in legal phrase of the ownership of the company's land emanated from the personal knowledge of the president, or that he vouched for their accuracy himself, is so extraordinary a contention that it need not take up any time to refute. All sensible people know perfectly well that in such matters the attorneys have sole control; that they prepare the descriptions from the records, and are charged with all the responsibility; that the formal language of conveyance in such a mortgage, is as little the result of any personal acquaintance of the officers who sign it as the manufacture of the paper on which it is written. If a man reads it, and thinks that the president has personally prepared the descriptions after an examination of the deeds, or that he knows in the least what ought to be the language to describe the ownership in fee of coal in situ, as opposed to ownership in fee of both coal and surface, he has only himself to thank for his ignorance. This, therefore, disposes of any liability of Gardiner for deceit.

Having, therefore, disposed of Gardiner's liability, little need be said as to Read and Hegeman. Assuming, what I believe to be untrue, that by signing the consent to the mortgage as stockholders, they vouched in any way at all for the statements contained in it, they did so precisely as Gardiner did. Hegeman did not apparently know anything at all about any of the facts. As to him the case is absolutely without color of justification. Read knew in a general way that it was "not a farming proposition," and knew that the surface acreage was about 700, though just when he learned that he did not know. However, like Gardiner, he relied, and could only rely, upon the correctness of the mortgage as the lawyers drew it up. It is true that Read had originally been the client personally, and it might be necessary in his case alone to consider whether, in drawing up the supplemental mortgage, he remained the principal, though, in view of Gale's testimony, there cannot be much doubt that he did not; but all such questions Mr. Delmas voluntarily put out of the case by expressly asserting upon the argument several times that he did not seek to charge any of the defendants through the tort of their agents, but for their personal acts.

In so far, then, as the suit sounds in tort for deceit, it will fail. This was the ground of the opinion of Martin, J.; but the complainant insists that he need not rest on it alone, and that equity will grant relief, regardless of whether an action at law would lie. As I understand his theory, it is that, regardless of any tort such as law would recognize, equity will compel the defendants to make good the representations of the mortgage, and so acquire the fee of the soil. The best answer is that the defendants never promised to do anything of the kind. When they created a corporation to make promises, they did it to avoid making themselves liable personally, and every one who dealt with the corporation so understood perfectly well. Of course, that did not relieve them from the consequences of their torts, if they committed any;

but it did relieve them from any voluntary engagement. To hold them liable on the covenants would be to create an obligation which they did not mean to assume, and which the bondholders did not expect to get. It is not necessary to resort to the twenty-second article of the original mortgage to meet any contractual obligation.

The liability must, therefore, sound in tort; and, since there is no proof of legal tort, it must be some actionable deceit known only to equity, which does not exist. *Arkwright v. Newbold*, 17 Ch. Div. 301, 320; *Derry v. Peek*, 14 App. Cas. 337, 360. The nearest analogy is the right of rescission under a mutual mistake; but the complainant misconceives that remedy, if he supposes that it helps him. Such cases proceed upon the theory that, had the facts all been known, the transaction would not have taken place, and upon their actual discovery each person holds in trust what he got, as he ought in justice to do, for the benefit of him from whom he got it. Therefore the relief is in such cases always limited to a restoration of the parties to the status quo. Certainly, when the defendant has been innocent of conscious misstatement, rescission is not based upon a legal wrong antedating the discovery of the mistake. The rule as to the allowance of interest in such cases is proof enough of this. In the case at bar, none of the defendants have received anything of the complainant which they now wrongfully retain, nor has there been any transaction between them to unravel. It was the company which got the money and used it; and, if the defendants are liable, it is because they committed some wrong when they uttered the statement.

The complainant suggests no authority which in the least bears out his contention of the law, unless it be the litigation of *O'Beirne* against *Bullis* and *Barse*, which was long pending in the courts of New York, and which eventually got into the Supreme Court in the case of *Bullis v. O'Beirne*, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340. The facts of that case, as stated by Mr. Justice Day quite completely in 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, were that *Bullis* and *Barse*, the defendants, knew that what they said was false, and intended to deceive when they uttered it. Such was one of the specific findings of the New York Special Term, which was afterwards affirmed. The Supreme Court felt obliged to determine that such intentional deceit was the gravamen of the suit, in order to decide that it survived discharge in bankruptcy. Whatever be the explanation for the relief granted in that case, it is quite clear that it was relief upon a cause of action in deceit at common law, and that the Court of Appeals of the state of New York had no intention of deciding that it was enough to prove that *Bullis* and *Barse* made statements, in fact untrue, which they supposed to be true. The peculiarity of that case, in so far as it is peculiar at all, arises from the forum in which the relief was given, and the precise form it took. That it was relief based upon the usual state of facts necessary in deceit no one can doubt who takes the trouble to read the opinions.

There is no theory, therefore, upon which the complainant can succeed, and the bill must be dismissed, with costs.

Let such a decree pass.

BELL v. NEW YORK SAFETY STEAM POWER CO.**Ex parte KNAUTH, NACHOD & KUHNE.**

(Circuit Court, S. D. New York. December 5, 1910.)

1. CONTRACTS (§ 2*)—VALIDITY—WHAT LAW GOVERNS.

The validity of a contract made in New York, between a New York corporation and a New York firm, purporting to give a lien on personal property in another state, is prima facie determinable by the law of New York.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145; Dec. Dig. § 2.*]

2. CHATTEL MORTGAGES (§ 33*)—EQUITABLE LIENS—EXECUTORY AGREEMENT TO GIVE MORTGAGE.

A contract to give a chattel mortgage, not filed for record, is not enforceable in equity as a lien as against third parties, where the mortgage, if executed, but not filed, would be void as against such parties.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 17; Dec. Dig. § 33.*]

3. RECEIVERS (§ 170*)—RIGHT TO CONTEST MORTGAGE—SEQUESTRATION SUIT AGAINST INSOLVENT CORPORATION.

A receiver, appointed in a suit in equity to sequester and distribute the assets of a corporation, represents the creditors, and may resist a chattel mortgage, void under the statute for want of record against judgment creditors.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 170.*]

In Equity. Suit by Louis F. Bell against the New York Safety Steam Power Company. On petition of receiver. Petition granted.

This is an interlocutory proceeding in a suit brought to sequester and distribute the assets of the defendant company. The receiver appointed in sequestration files a petition asking for instructions as to the disposition of 25 electric generating machines, manufactured by the defendant company and sold to the United States government, but subsequently rejected by it. The respondents, Knauth, Nachod & Kuhne, who have been made parties, claim the machines by virtue of a contract entered into on May 11, 1908, between themselves and the company, before the machines came into existence, by which they lent \$25,000 to the company, and, among others, upon condition that they should be secured by the machines when built, and by the purchase price when paid. The third paragraph of that contract is as follows:

"As further security for the repayment of said loan, the parties of the first and third parts covenant and agree that the parties of the second part shall have a lien upon, and the right to take possession of, all machinery and parts of machinery, and all finished machines belonging to said parties of the first and third parts, or either of them, and suitable for the performance of the said contract with said Major Taylor, and that they will execute and cause to be executed any further assurance, bill of sale, chattel mortgage, or other instrument demanded by the parties of the second part, and necessary or reasonably adapted to the purpose of making such lien effective and readily enforceable."

The contract was never filed as a chattel mortgage under the laws of the state of New York, and the question arises as to the ownership of the machines which have been returned.

Charles P. Howland, for receiver.

Briesen & Knauth, for Knauth, Nachod & Kuhne.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAND, District Judge (after stating the facts as above). The lien is good inter partes in equity at common law. *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865. It is, moreover, good as against a receiver, since the receiver stands in the place of the debtor, unless it be void, first, under the chattel mortgage act, or, second, under the acts against conveyances without change of possession.

First. What law governs? The contract was made between a New York corporation and a New York firm in New York, and concerned machines which were to be made and sold in Rhode Island. It may well be that a Rhode Island creditor who seized the goods might insist that his rights should be judged under the Rhode Island law. *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109. But that is not this case. Prima facie the *lex loci contractus* governs, and that is New York; nor is there any reason here to deviate from the rule.

It is clear that against a judgment creditor or a trustee in bankruptcy the lien would be void. *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. There is nothing in the point that the lien was still equitable, and had not yet taken its intended form as a chattel mortgage. *Reynolds v. Ellis*, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; *Skilton v. Codington*, supra; *Langdon v. Buell*, 9 Wend. (N. Y.) 80; *Hale v. O. N. Bank*, 64 N. Y. 550. A contrary doctrine would involve the absurd holding that, though the lien would have been void, had the contract been performed and the mortgage remained unfiled, still it was valid so long as the contract remained unperformed. That would be a very easy way to avoid the statute. Unexecuted agreements relating to chattels by way of security are within the equity of the statute. Certainly such a lien cannot be better than a mortgage.

A more difficult question is whether the receiver here represents creditors. An assignee for the benefit of creditors does not (*National Bank of Deposit v. Rogers*, 166 N. Y. 380, 59 N. E. 922), being apparently like any other volunteer. Upon this point the case last cited apparently overrules *Reynolds v. Ellis*, supra, though in *National Bank v. Rogers*, supra, there may be a distinction, unnoticed in the opinion, that a trust receipt was given. The cases, however, where such receipts have been held good, are all, I think, where the pledgee had originally taken over the rights of the seller by advancing the price to him. *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818. If so, then *National Bank v. Rogers*, supra, cannot be so distinguished.

The petitioner's cases do not show that a receiver may not resist the mortgage. *Husted v. Ingraham*, 75 N. Y. 251, was a case where the lienor succeeded against the receiver of a firm appointed on bill by one partner for dissolution without allegation of insolvency. Such a receiver does not represent the rights of creditors in the same sense as an insolvency receiver. *Hale v. O. N. Bank*, 49 N. Y. 626, was a case on demurrer, where the defendant appeared to be merely a meddler with the property of the equitable mortgagor. When it appeared on the trial in the same case (64 N. Y. 550) that he was a second mortgagee, he succeeded. Indeed, the lienor seems only to have contended that the mortgagee abused his rights of priority, and to have

conceded that they were in fact prior. In *Hovey v. Elliott*, 118 N. Y. 124, 23 N. E. 475, the receiver was not appointed in insolvency proceedings, and so did not represent the rights of creditors as such at all. *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614, was a case of land, to which the chattel mortgage act does not apply. There was an actual mortgage given, though whether it was recorded or not does not appear. In any case the question of the recording act was not raised, so that the decision was at common law. In *Coman v. Lakey*, 80 N. Y. 345, the transaction was construed as a conditional sale, which is valid as against creditors. *Black v. Ellis*, 197 N. Y. 402, 90 N. E. 958, seems to follow *Coman v. Lakey*, as well as to rest upon the theory that the mortgage was a purchase-money mortgage. It certainly does not make for the petitioner.

On the other hand, receivers in supplementary proceedings may dispute the mortgage (*Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11) certainly by suit in equity to recover the property (*Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678); but it must be conceded that they stand explicitly in the right of the judgment creditors, and are not therefore precisely like sequestration receivers in equity. A statutory receiver of a corporation in insolvency after judgment may also set aside such a mortgage. *Rudd v. Robinson*, 54 Hun, 339, 7 N. Y. Supp. 535; *Farmers' Loan & Trust Co. v. Baker*, 20 Misc. Rep. 387, 46 N. Y. Supp. 266 (Beekman, J.). It is true that these decisions are not, under the rules governing federal courts, authoritative; but they are of importance as authority, especially the opinion of Mr. Justice Beekman, even though he includes with such receivers assignees for the benefit of creditors; the law in that regard being subsequently changed by *National Bank v. Rogers*, *supra*, as appears above.

If a statutory receiver may dispute the mortgage, may a sequestration receiver in equity do the same? Such a receiver may be appointed only after judgment, except by the consent of the defendant, and his duties are similar in character to those of a receiver after judgment of a corporation or individual, except as these have been hedged about with statutory limitation. The rationale of the cases seems to be the same. Each is the representative of the creditors. If the courts of New York insisted that there should be some express statutory bestowal of this right upon any representative of the creditors, that would, of course, be the law of that state; but such does not seem to be the fact. The last expression of the Court of Appeals in *Skilton v. Codington*, *supra*, is certainly more liberal in its aspect. For example, on page 87 of 185 N. Y., and page 792 of 77 N. E. (113 Am. St. Rep. 885), occurs the following language:

"Where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of a creditor."

However, it must be conceded that *Skilton v. Codington* eventually seems to rest upon section 67 of the bankruptcy act. (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), which no doubt

deprives that case of some of its weight as an authority for these purposes.

The case at bar is, so far as I can find, strictly *res integra*; a question, therefore, of interpreting the statute of New York. It is, however, settled beyond question that judgment is not a condition precedent to the existence of the creditors' rights against an unfiled chattel mortgage. It is only matter of procedure. All considerations of policy and consistency unite to recommend the interpretation which allows this receiver to resist the claim. The alternative would be to sequester the assets till the creditors might go to judgment and then let them intervene. That would be a very dry proceeding.

The answer of the firm, therefore, sets up no valid claim to the goods, and the receiver is awarded them upon his petition, together with a docket fee and disbursements.

Let such an order pass.

UNITED STATES v. JANKE et al.

(District Court, D. North Dakota, W. D. October 20, 1910.)

ALIENS (§ 72*) — NATURALIZATION — OFFENSES — FALSE SWEARING — "KNOWINGLY."

A state court granted naturalization to a woman who had been dead over four years, and the certificate was issued by the clerk. No hearing was had nor evidence taken in open court, as required by Naturalization Act June 29, 1906, c. 3592, § 9, 34 Stat. 599 (U. S. Comp. St. Supp. 1909, p. 482); but affidavits in support of the petition were made out by the clerk, and subscribed and sworn to by defendants, the material statements in which were false. Defendants, however, did not understand the English language, and were not informed of the contents of the affidavits, but signed the same as directed by the clerk. *Held*, that they were not guilty of "knowingly" giving false testimony, made a crime by section 23 of the act.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 161; Dec. Dig. § 72.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 3937-3939.]

Prosecution by the United States against Gottlieb Janke and Christian Baltzer. On motion for directed verdict at the close of the government's case. Motion granted.

P. H. Rourke, U. S. Atty.

Edward Engerud, for defendants.

AMIDON, District Judge. The indictment in this case charges the defendants with the crime of perjury. They were witnesses in the district court of Logan county in support of the petition of Mathilda Schultz to be admitted as a citizen of the United States, and signed and swore to affidavits embodying facts essential to her admission to citizenship. These affidavits were false. The evidence shows that at the time the proceeding was instituted Mathilda Schultz had been dead for more than four years. Herman Hardt, clerk of the court, was the guardian of her minor child. Previous to her death she had filed upon a government homestead. Hardt became appre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hensive that the child would lose title to the homestead, because the mother at the time of her death was neither a citizen nor had declared her intention to become such. He therefore determined to carry through the court of which he was clerk a proceeding which should result in a judgment admitting Mathilda Schultz to citizenship, and thus he thought the minor child would be given a status which would entitle him to prove up on the homestead.

This case is a striking illustration of how impossible it is to secure good government even under wise laws, if men who are charged with their administration are false to their trust. In the year 1906 Congress had before it for months the question of the proper regulation of the admission of foreigners to citizenship. The subject had been brought impressively before the country by the discovery that extensive frauds had been committed under the laws then in force. In cases arising at St. Louis (*Levin v. U. S.*, 128 Fed. 826, 63 C. C. A. 476; *Dolan v. U. S.*, 133 Fed. 440, 69 C. C. A. 274) it appeared that corrupt politicians, in order to forward their corrupt purposes, had gathered together mobs of foreigners and brought them to the courthouse, grouped according to their nationality, Huns, Italians, Armenians, and Jews. They were collected in the corridors of the courthouse, and each band placed under the generalship of a policeman, and then marched in blocks before the judges of one of the high courts of that city, and there, under a merely formal ceremony, in which the oath was administered to the entire block, they were admitted as citizens. In some cases the formality of going before the court was omitted, and citizenship papers issued to lists furnished by ward politicians. Upon investigation it was found that many of those people had been in the United States for only a few days. Similar frauds were subsequently discovered in other cities. As the result of these disclosures an extensive inquiry was entered upon by the government, which resulted in the passage of the law under which these defendants are now upon trial. The whole method of admitting aliens to citizenship was changed. The cardinal feature of the proceeding under the present law is that it shall be, as to each person applying to be admitted, a solemn and carefully carried out judicial proceeding. The party applying to be admitted is required to file a petition in writing in court, and to support that petition by the affidavit of at least two witnesses, disclosing that he has resided continuously in the United States at least five years immediately preceding the time of the filing of the petition, and has also resided in the state in which the application is made at least one year. The petition and affidavits must also show that the party is such a person as would be entitled to citizenship. A copy of the petition and of the affidavits supporting it must also be filed in the department at Washington. Then notice is given, as in the case of a judicial proceeding, setting forth that the application has been made, and that the hearing will be had before a court of record at a time specified. Now, what is to be done in court when that proceeding is taken up? Let me read to you the section of the law:

"That every final hearing upon such petition shall be had in open court, before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court, and entered in full upon a

record kept for that purpose; and upon such final hearing of such petition the applicant and his witnesses shall be examined under oath before the court and in the presence of the court." Act June 29, 1906, c. 3592, § 9, 34 Stat. 599 (U. S. Comp. St. Supp. 1909, p. 482).

This law requires that each applicant and his witnesses shall be separately and individually examined under oath like a witness in the trial of a case. Such an examination, if properly carried out, cannot fail to disclose whether or not the applicant is in fact and in truth entitled to citizenship. There can be no longer admission of foreigners to citizenship in the United States in blocks. It is as much an individual proceeding as the trial of any lawsuit is an individual proceeding. The ordinary judicial oath should be administered to the applicant, and to each of his witnesses, and then it is made the duty of the presiding judge, or of some person acting in furtherance of the law, to interrogate each of the witnesses and the applicant, so as to disclose whether the law has in fact been complied with, and whether the applicant is a person entitled to admission to citizenship under the provisions of the law. I am aware that the administration of this law imposes a heavy burden upon courts; but it may be doubted whether courts can devote their time to any higher service than the protection of the roll of citizenship of the republic.

Now, this case discloses that every feature of the law intended to safeguard the citizenship of the republic was outraged in the district court of Logan county in the proceeding that we have had under investigation. It was outraged by the violation of their duty by the clerk of that court and by the judge who presided at the hearing. The practice was substantially the same here as it was in the St. Louis cases. The foreigners were brought before the court in a drove, and simply passed into citizenship without any knowledge on their part of the requirements of the law, or on the part of the court as to whether those requirements had been complied with. These foreigners could not speak English, and did not understand a word of the proceeding. No interpreter was employed; no questions were asked; no examination was had. Simply the oath of allegiance was administered to the whole band in a body. To the aliens the ceremony was an empty form, and to any one having a proper regard for law it was a legal outrage. What is the result? A person who had been dead four years is admitted to citizenship of the United States; and what was the object of this outrage upon federal law and American citizenship? To enable a person who was not entitled to 160 acres of land to get title to it.

As I said at the beginning, gentlemen, this is an impressive illustration of how impossible it is to obtain good government, regardless of how wise our laws may be, if public officials will not be faithful to the performance of their duty under those laws. What, then, are we to do with these defendants? It is made a crime for any person "knowingly" to make a false affidavit in any of these citizenship proceedings. I think the evidence conclusively shows that, owing to the lax and miserable way in which the law was administered in Logan county, these witnesses, being foreigners, knew nothing about

what they were doing. They made the affidavits, and gave color to this judicial proceeding, through a mistake on their part. They acted under the advice of the clerk of court. He prepared a series of affidavits (all except those relating to Mathilda Schultz being for persons entitled to citizenship), and they simply signed where he told them to sign. A younger brother of the dead woman, by the clerk's direction, signed her name to the petition for her admission to citizenship. The clerk falsely certified that she appeared before him and swore to the petition. He, too, was a foreigner, and had little knowledge of the law. The court must bear the chief responsibility for this wrong. It treated a solemn judicial proceeding as an empty ceremony, and we ought not to be surprised that ignorant foreigners accepted the action of the court as a proper interpretation of the law. A proper judicial hearing would have disclosed the error under which these foreigners acted. It is the block system of admitting aliens which is responsible for the wrong. These defendants were simply dumb instruments of that system. They are not guilty of the crime of which they are charged, because they had no guilty knowledge. They ought not to be convicted.

I therefore advise you, gentlemen, that you ought to return a verdict of not guilty.

UNITED STATES v. BAKER et al.

(Circuit Court, N. D. New York. December 6, 1910.)

CONVERSION (§ 4*)—CONDEMNATION OF LANDS OF INFANT—LAW OF NEW YORK.

In New York by operation of law there is an absolute out and out conversion of the real property of an infant taken in condemnation proceedings to personal property, the conversion being absolute and perfect when the award is confirmed and the money deposited; and in the absence of a statute to the contrary the award is to be treated by the court as personal property, and paid over to the general guardian of the infant, notwithstanding the fact that Code Civ. Proc. N. Y. § 2345 et seq., provide in effect that the proceeds of an infant's lands, when sold by order of court, shall be treated as real estate, and paid over to a special guardian for investment, unless the general guardian shall give security therefor on improved and unincumbered real estate.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 2; Dec. Dig. § 4.*]

Proceedings by the United States against James B. Baker and others for condemnation of lands. On application for distribution of awards. Order of distribution.

George B. Curtiss and Thomas H. Dowd, for the United States.

George A. Lawyer, for incompetent defendants.

Samuel Child, for infant defendants.

RAY, District Judge. The United States, with leave of the state of New York, has condemned several thousand acres of land situated at Pine Plains, Jefferson county, N. Y., for military purposes, by appropriate proceedings in this action had under the provisions of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Code of Civil Procedure of the state of New York. There are several infant defendants, and the commissioners appointed by the court have made their report, fixing the value of the interests of said infants in such real estate respectively. The report has been confirmed, and the sums due to the defendants, including such infants, have been deposited with the clerk of this court. It is the duty of the court to direct payment to such persons as may be entitled to receive the same. Some of the infants have general guardians, who have given bonds as such without reference to the compensation awarded in this action, and others of such infant defendants, so far as appears, have no general guardians.

Under the laws of the state of New York, when the interest of an infant in real estate is sold by order of the court, the proceeds of such sale cannot be paid to the general guardian of the infant, unless such guardian has first given security for the money on unincumbered real estate. The general guardian of an infant, who is to receive personal property and the rents and profits of real estate only, is only required to give a bond with two sufficient sureties, to be approved by the court appointing him. The question is presented whether the sums awarded as compensation for lands taken by the United States in this proceeding to the infant defendants are to be regarded as real estate, and treated as such, or as personal property. The provisions of the Code of Civil Procedure, providing for and regulating the condemnation of lands and the consequent exercise of the right of eminent domain, are silent on the subject.

Sections 2345-2348 of the Code of Civil Procedure of the state of New York provide for the sale or mortgage of the interest of an infant in real estate. These and the following sections in substance and effect expressly provide that the proceeds of such a sale remain and are to be treated as real estate. A special guardian is provided for, and section 2361 provides for the disposition and investment of the fund. Rule 59 of the Supreme Court provides that no part of such proceeds of such a sale shall be paid to a general guardian, unless he has given security on improved and unincumbered real estate. The interest and income, and in some cases the principal, arising from such a sale, may be used for the necessary support and maintenance of the infant and the payment of his or her debts. This shows a general legislative policy that the proceeds of the sale of the real estate of an infant, when made by order of the court, shall retain its character as real estate and be treated as such.

The question is presented whether an action or proceeding for the condemnation of lands and the fixing of the compensation to be paid are to be considered a sale by order of the court? The law provides for commissioners to fix the compensation to be paid, and further provides that when the report of the commissioners is confirmed, and the sums awarded the various owners are deposited in court, the title to the premises shall vest in the plaintiff—in this case in the United States. This mode of passing title to real estate is in the nature of a sale by order of the court, and guided by the legislative policy referred to one would be disposed to say that the compensation awarded to the owner ought to be treated as real estate. Otherwise the entire

real property of an infant by condemnation proceedings might be converted from real estate to personal property, and the devolution thereof in case of the death of such infant before arriving at the age of 21 years entirely changed, without his consent or participation. In New York the heirs at law are not in all cases the same as the next of kin entitled to take the personal property of the decedent.

It is, of course, true that money is personal property. When the Legislature authorizes the condemnation of real property and the award of the money compensation to the infant owners, and the money compensation is deposited in court, the Legislature necessarily changes the nature and character of the property belonging to the infant. It is no longer real estate in fact, but personal property. In the absence of any declaration on the subject, impressing the compensation awarded and paid into court with the character of realty, or providing it shall retain that character, such proceeds or compensation become personal property by force of the proceedings. It cannot be questioned that it is competent for the Legislature to make this change, or provide a procedure by which the change is effected; and in the absence of a declaration to the contrary it would seem that the real estate by such proceedings is converted out and out into personal property. But for the legislative policy above referred to, this would seem to be the outcome. I am inclined to the opinion that the law of the state of New York should govern in determining this question, and should control the court in directing the payment of these funds to the guardians of the respective infant defendants.

In *Ballou v. Ballou*, 78 N. Y. 325, land was appropriated and taken possession of by the state of New York. After such appropriation, but before the damages were appraised and fixed, the owner, William P. Ballou, died intestate, leaving one son and a widow. The Court of Appeals held that the title to the fee and the claim for the damages for the taking descended to the son. After the death of William P. Ballou, and after the state had taken possession as stated, a claim for the damages was made in the names of the son and the widow of the intestate, and an award of damages made and recorded in their names. Subsequently the son died intestate, and his mother was appointed administratrix of his estate, and she sued to recover as such administratrix the damages awarded to the son. The court said:

"It [referring to the award] was at the time of his death [that of the son] a personal asset, and went to the plaintiff as representative."

No authority was cited.

In *King, Executor, et al. v. Mayor, etc.*, 102 N. Y. 171, 6 N. E. 395, it was held:

"Where, under a statute closing a highway, damages were directed to be awarded and paid to the owners of premises injured by the closing, held, that the right to damages was personal, and belonged to an owner at the time of the closing, although before the award he had conveyed his title."

In *Utter v. Richmond et al.*, 112 N. Y. 610, 20 N. E. 554, damages were awarded for injury to a lot fronting on the Bloomingdale road, caused by the closing of such road. At the time of the closing the lot was owned by one U., subject to the lien of a purchase-money mort-

gage. U. thereafter conveyed the lot to one W., who assumed the payment of the mortgage. The mortgage was foreclosed and the premises sold, leaving a deficiency of \$1,300. To avoid the entry of a personal judgment, U. paid the mortgagee \$200 to be released. The damages awarded were applied to extinguish the deficiency so far as unpaid, and this was held proper; that the lien of the mortgage extended to and embraced so much of the award as was needed to pay the deficiency. It was also held that, when land is taken for public use, the damages awarded take the place of the land "in respect to all the rights and interests dependent upon and incident to it." If this means that the award takes the place of the land so far as the rights of the heirs at law and next of kin of the owner are concerned, then the award should be treated as real estate until the owner has capacity to elect to take it as personal property. As an infant has no power to elect, it should be deemed real estate and held as such until the infant attains his majority.

In *Durando v. Durando*, 23 N. Y. 331, Paul Durando devised his real property to his widow for life, remainder to his children, of whom Peter Durando was one. During the lifetime of Paul Durando's widow, and while she was entitled to her life estate in the realty, a portion of it was appropriated to a public purpose, and the compensation awarded was by order of the court and subject to its order deposited, the interest to be paid to such widow during her life. Peter Durando died before the death of the widow of Paul Durando, leaving a widow. On the death of Paul Durando's widow, the widow of Peter Durando claimed that she was entitled to either dower in her husband's share, if held to be real estate, or to that share as personal property, if held to be personal. It is perfectly clear that on the death of the widow of Paul Durando the heirs of Peter took his share if it was real estate, or that his widow or next of kin took his share in the award if it was personal property. The question was squarely whether that award of damages for the taking of the property was real estate or personal property. The court held that the widow of Peter was not entitled to dower, for the reason that her husband was never seised in fact or law during the coverture. This, of course, was correct. The Court of Appeals further held:

"There can be no pretense that the widow is entitled to the funds in question as personal estate, under the statute of distributions. The money is the product of the land taken, and must belong to the person entitled to the land which it represents and out of which it arose."

I do not see that this case can be reconciled with *Ballou v. Ballou*.

In *Matter of Seventh Ave.*, 59 App. Div. 175, 69 N. Y. Supp. 63, the Appellate Division held as to the award for land in condemnation proceedings that:

"An award is not land, and is only treated as land in equity when necessary to adjust the rights of the parties. An award is a claim or right personal to the owner of the land. It is personal property, that passes at death to the personal representative, and not to the heir."

The opinion of the court then cites *King v. Mayor*, 102 N. Y. 171, 6 N. E. 395, and quotes from the opinion of Judge Finch in that case.

If an award in condemnation proceedings is personal property, and passes to the personal representative, and not to the heir, then it is entirely immaterial whether the person entitled to the award, and to whom it is made by the commissioners, is an adult or an infant.

Matter of City of Rochester, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161, is also referred to; but I think this case is in accord with others which hold that, when land is condemned and an award made, the lien of a mortgage on the land attaches to and follows the award. I do not see how this can be doubted.

In *Van Loan v. City of New York*, 105 App. Div. 572, 576, 94 N. Y. Supp. 221, it was again held that an award of compensation made for lands taken in the exercise of eminent domain is personal property, and that if the right to the compensation accrues to a decedent in his lifetime it passes to his administrators or executors. Here the right to this award has accrued to these infants in their lifetime.

In *Fawcett, as Receiver, v. City of New York*, 112 App. Div. 155, 159, 98 N. Y. Supp. 286, it was again held that a receiver appointed before an award is made for lands taken by eminent domain is entitled to an award made thereafter, as the judgment debtor ceases to have any interest in the lands taken, and also that such an award is personal property.

In *Harris v. Kingston Realty Co.*, 116 App. Div. 704, 101 N. Y. Supp. 1104, it was again held that an award to be paid for lands taken in condemnation proceedings is personal property.

On the other hand, in 9 Cyc. 849, it is said:

"Exercise of Right of Eminent Domain.—The better doctrine seems to be that where there is a compulsory conversion of real estate—that is, against the will or consent of the owner, such as the exercise of the right of eminent domain—the fund will be treated as real estate until the owner, being *sui juris* or of disposable capacity, manifests a willingness to accept it as personality."

The cases cited fall short of sustaining the quotation, so far as New York is concerned.

In 7 *American and English Encyclopedia of Law* (2d Ed.) 495, it is stated:

"By Statutory Authority—Eminent Domain.—Where the land of persons *sui juris* is taken under the power of eminent domain, the proceeds, of course, become personality. Where, however, the land is held in trust, or is held by an infant or a lunatic, the proceeds will be regarded as continuing their character as realty."

No New York authority is cited.

In *Durando v. Durando*, 23 N. Y. 331, no question of infancy was involved. The court held that an award of damages for land taken was realty, as already seen. But in *Ametrano v. Downs*, 170 N. Y. 388, 63 N. E. 340, 58 L. R. A. 719, 88 Am. St. Rep. 671, it is held that, where real estate is transferred under condemnation proceedings, its proceeds or damages awarded become personal estate as if the disposition had been voluntary.

In *Simonds v. Simonds*, 112 Mass. 157, the question was whether damages awarded for taking real estate devised in trust for George W. Simonds, and on the termination of the trust over to others, was real or personal estate. The court said:

"We are of opinion that the sum awarded by the city of Boston as damages for a portion of the Warren Street estate, taken for public use, must be regarded as real estate for the purposes of the trust. The legal title to the land taken was in the trustees; the taking it by the city cannot change the rights of the parties. It is merely a change of the trust securities, and the sum awarded in damages is to be treated as the real estate would be in the place of which it stands. The claim, therefore, that it passed to the administratrix of George, cannot be sustained."

The forced disposition of real estate held as a trust fund, and directed to be held as real estate, and the payment of money for the taking, is not in equity a conversion to personal property. The character of the trust property and its devolution cannot be changed in that way. In this all the cases agree. And it is immaterial whether the beneficiaries of the trust and those ultimately entitled to the trust property are adults or infants, persons of sound mind or non compos mentis.

In *Gibson v. Cooke*, 42 Mass. (1 Metc.) 75, real estate was devised in trust, the rents, etc., to be paid to the cestui que trust, and a part of such real estate was taken for a railroad, and the damages paid to the trustee. Held (Shaw, C. J.):

"The money received as damages is to be regarded as capital substituted, by act of law, in the place of the land taken; and the income thereof is to be distributed as the income of the land would have been, if no easement had been created therein."

The same doctrine is clearly and specifically declared in *Holland v. Cruft*, 69 Mass. (3 Gray) 162, 179, 180, 181, where the court (Shaw, C. J.) said (page 180):

"So where land held in trust is taken for public use under the right of eminent domain, the money paid for it stands in its place, subject to the same trust and to the same ultimate disposition."

In these cases there was a trust, and the holding was that in equity the exercise of the right of eminent domain did not impair the trust estate or change the character of the estate held under it.

In *Emerson v. Cutler*, 31 Mass. (14 Pick.) 108, 118-121, the court, per Shaw, C. J., held that, where land was devised to a female infant, and a part sold pursuant to license of the court, and a part taken in condemnation proceedings for use as a public highway, the proceeds of both the sale and condemnation were personal estate, and passed as such on the death of the infant owner before arriving at the age of 21 years. The court said (page 119):

"It appears to me that this result follows from the application of a few plain principles. The real estate of the minor is alienated by force of law, and the acts of the court and the guardian pursuant to law. The title of the ward is effectually divested. He acquired a sum of money as an equivalent, and the title to this money, which is personal property, is vested in him. On his death, the property to be distributed is personal, and the law governing the distribution of personal property must apply to it, without regard to the source whence it was derived. It seems no valid objection to urge that, if it had not been alienated, it would have gone to the heir as real estate. So where an adult owner of real estate alienates his estate by his own act, instead of the act of his guardian, and receives the money and dies, the money must be distributed as personal estate, and yet the same suggestion is true—that but for such alienation the heir, and not the administrator, would have taken. And all derivative claims depending upon the legal distinction between real and personal estate, such as dower, curtesy, and the like, will be governed by the same rule."

This covers the case now before this court, and is in accord with the great weight of authority in New York. The same, in the case of condemnation of an infant's lands, was held in Pennsylvania. Hough's Estate, 3 Pa. Dist. 187. The same in Stark's Estate, 9 Kulp (Pa.) 120. See, also, Cadman v. Cadman, L. R. 13 Eg. 470, 41 L. J. Ch. 468, 20 Wkly. Rep. 356. However, in Kelland v. Fulford, 6 Ch. Div. 491, 25 Wkly. Rep. 506, money paid into court for land of which an infant was absolutely seised, and which land was taken under the provisions of section 69, Lands Clauses Consolidation Act of 1845, was held to remain impressed with the character of real estate, and, on the death of the infant, to pass to his heir at law. I think this decision resulted from the terms of the act. The same in effect was held in the case of a lunatic (Dixie v. Wright, 32 Bear. 662), and in the case of a felon, when otherwise the money would have escheated to the crown (Re Harrop, 3 Drew, 726, 3 Jur. U. S. 380, 26 L. J. Ch. 516, 5 Wkly. Rep. 446).

In New Jersey (Wetherill et al. v. Hough, 52 N. J. Eq. 683, 29 Atl. 592) it was held that:

"Where there is a compulsory conversion of real estate, as in the exercise of the right or power of eminent domain, without the consent or against the will of the owner of the fee, being sui juris or of disposable capacity, he must either recognize it or manifest a willingness to accept it as personalty to effect a conversion."

The same court in the same case also held that where adults sold the interest of an infant in real estate, and his share in the proceeds of sale was paid to his guardian, such money became personal estate as to such adults; they being tenants in common with the infant. I am unable to comprehend how the forced and unlawful sale of an infant's real estate by the other tenants in common of the same property converts the proceeds of the infant's share into personal property. The persons making the sale could not thereafter as heirs of the infant claim the land of the purchaser; but it seems to me that the proceeds of such unlawful and involuntary sale would remain real estate and descend as such.

In Graham v. Dickinson, 3 Barb. Ch. (N. Y.) 169, 184, it was held that:

"Where the real estate of a married woman (who at that time could not sell her real estate without the assent and concurrence of her husband) has been converted into personalty by operation of law during her lifetime, it will be disposed of by the court after her death in the same manner as if she had herself converted it into personal property previous to her death."

The chancellor said:

"It is true, if the real estate of the devisee had not been sold under the order of the surrogate, and she had continued to own it until the time of her death, it would have descended to her heirs at law, and her husband would have been excluded. But there is no legal presumption that a feme covert who is the owner of real estate will not join with her husband in selling it, for the purpose of converting it into personalty. And the real estate in this case having been converted into personalty, by operation of law, during her lifetime, it must now be disposed of in the same manner as if she had herself converted it into personal property."

If this be good law, Why are not the proceeds of real estate of an infant, such real estate having been converted into money "by opera-

tion of law," as by condemnation proceedings, to be treated and disposed of personal?

Under all the cases, nearly, the condemnation of the land of a person of full age and sound mind and the payment into court of damages as compensation for the taking converts the proceeds of the land taken into personal property out and out. This is so, irrespective of any consent or election on the part of the owner. If the condemnation and payment of damages for the taking converts the damages into personal property in the case of an adult, why not in the case of an infant? The conversion does not depend upon assent or election. The law effects the conversion, irrespective of assent or election in the case of an adult; then why not in the case of an infant, there being no statutory provision on the subject? And, if so converted by operation of law, the conversion is perfect when the damages awarded are deposited in court subject to the order of the owner of the interest condemned, whether he be an infant or an adult. All real property is held by the owner subject to the exercise of the right of eminent domain, and it is immaterial whether the land is owned by an adult or an infant, an alien or a citizen, a person of sound or unsound mind. If the legal effect of the exercise of this right and the payment of just compensation is to convert that compensation into personal property, then it becomes a matter of legislative enactment as to when and on what conditions the money shall be paid to the guardian of an infant owner.

The Legislature of the state may enact a law that such damages awarded to an infant shall be held and invested in the same manner as the proceeds of real estate sold during the minority of the infant are held and invested, and require that the general guardian receiving such proceeds shall give any kind of security as a condition of receiving it. Guardians are appointed pursuant to laws made by the Legislature, and are only entitled to receive the property of the ward on complying with the conditions imposed by the law creating them. But in New York we have no statute requiring the general guardian of an infant to give security on improved unincumbered real estate as a condition of receiving the award of damages made in proceedings condemning the real estate of such infant for a public use. As in this case the award and its confirmation and the deposit of such award in court vests the title to the real estate in the United States, and converts the award made into personal property out and out, in the absence of legislative enactment to the contrary, such damages are personal property, and are to be held and treated as other personal property of the infant defendants. And under our statutes the general guardian is entitled to receive all the personal property of his ward on giving a bond conditioned as required by the statute, approved by the surrogate or probate court appointing him. The courts have no power to disregard or change the conditions imposed by the Legislature. As a condition of directing the payment or delivery of the personal property of an infant in its hands, or subject to its order, to such general guardian, the court has the power to see to it and determine that the guardian has complied with the statute as to giving security.

This is not the case of a sale under execution, or by virtue of a

judicial decree, as in the case of partition, where the power to sell is a mere incident to the power to partition, and where a sale is made only when actual partition cannot be made without injury to the parties interested, and in which case the money derived from the sale is regarded as real property until an election by adults is presumed. As the infant is under disability and cannot elect, his share remains and is treated as real estate until he arrives at full age. This has always been the rule in partition for the reason stated. *Horton et al. v. McCoy*, 47 N. Y. 21, 27, 28. So where real estate is actually converted into money, by accident or by absolute necessity, so as to execute the will of a decedent, the proceeds of such real estate will be deemed and treated as real estate. *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533.

In the case of a bankrupt, voluntary or involuntary, on the appointment of a trustee the real estate vests in him. If sold during the lifetime of the bankrupt, the surplus, if any, after paying all debts and expenses, is personal property, and goes to the administrator. If sold after the death of the bankrupt, such surplus goes to the heirs at law. *Banks v. Scott*, 5 Madd. 493. See *Denham v. Cornell*, 67 N. Y. 556, 562. Conversion is perfected by operation of law in the lifetime of the bankrupt, and he and his heirs and representatives must take the surplus, if any, as the law leaves it.

In Massachusetts and Pennsylvania it seems to be settled that the damages awarded to an infant for lands owned by him and taken in the exercise of the power of eminent domain are converted by operation of law out and out to personal property, and vest in the infant, and are to be held and treated as such, and that such award, once made and paid or deposited to his use during his lifetime, goes on his death before arriving at full age to his executor or administrator.

In New York, by operation of law, there is an absolute and out and out conversion of the real property of an infant taken in condemnation proceedings to personal property, and the conversion is absolute and perfect when the award is confirmed and the money deposited. The award then ceases to be real estate and becomes personal property. In the absence of a statute to the contrary, it is held as such and should be so dealt with by the courts. It is not for the court to legislate and direct that such award be held and treated as real estate, when in fact and in law it is personal property, and on the death of the infant goes to his executor or administrator. Having been converted by operation of law, it is beyond the power of the infant to reconvert it, and, of course, entirely outside the jurisdiction of the court to do so.

The result is that the sums awarded to the several infant defendants in this action will be directed paid to their general guardians, respectively, on petition accompanied by documentary evidence showing that a bond has been executed by such guardian with two sufficient sureties, approved and filed with the Surrogate's Court, in a penalty double the value of all the personal property of such infant and the probable amount of the rents, etc., of real estate that will come to his hands, as required by the Code of Civil Procedure.

TREDEGAR CO. v. SEABOARD AIR LINE RY. et al.

(Circuit Court of Appeals, Fourth Circuit. March 10, 1910. On Rehearing, December 20, 1910.)

No. 943.

1. RECEIVERS (§ 163*)—CLAIMS—RIGHT TO INTEREST.

Under the rule that interest, when not stipulated for by contract or authorized by statute, is allowable by the courts as damages for the detention of money or property, or of compensation to which claimant is entitled, subject to the exception that, where property of an insolvent passes to a receiver or an assignee in insolvency, the claimant cannot recover interest during the delay necessary to the settlement of the estate, a claimant against a railroad company in the hands of a receiver was entitled to recover interest from the maturity of its claim up to the time of the receiver's appointment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 313; Dec. Dig. § 163.*]

On Rehearing.

2. RECEIVERS (§ 163*)—CLAIMS—RIGHT TO INTEREST.

One holding a lien claim against a railroad company in the hands of receivers was not entitled to recover interest during the time the railroad property was in the hands of the receivers for settlement, on the theory that the railroad company was not in fact insolvent, where the allegations of the bill and cross-bill on which the receivers were appointed, charging insolvency, stood confessed, though after decree entered the corporation by a fortunate change in its circumstances adjusted its financial difficulties and resumed possession of its property in a solvent condition.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 163.*]

3. COURTS (§ 406*)—CIRCUIT COURT OF APPEALS—REVIEW.

The Circuit Court of Appeals will only pass on questions which were before the court below when the decree complained of was entered.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 406.*]

4. RECEIVERS (§ 163*)—INTEREST OF CLAIM—LIQUIDATION BY INSOLVENT CORPORATION.

Damages will not be allowed to a lien creditor of a corporation in lieu of interest during delay in adjudicating and administering the corporation's assets in insolvency, though liquidation is sought by the insolvent itself, where a cross-bill was filed by a trustee representing bondholders, asking similar relief through receivers, and a sale of the corporation's property.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 163.*]

5. RECEIVERS (§ 163*)—LIQUIDATION—PAYMENT OF DEBT.

Where a lien creditor of an insolvent corporation, in accepting payment from receivers of the principal of the debt, did so under the express agreement that such acceptance should not affect the question of the receivers' liability for interest, payment of the principal was not effective to extinguish the debt itself, so as to bar a recovery of interest.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 163.*]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

Claim of the Tredegar Company against the Seaboard Air Line Railway and its receivers. From a decree disallowing interest, claimant appeals. Modified.

Wyndham R. Meredith, for appellant.
L. L. Lewis, for appellees.

Before GOFF, Circuit Judge, and BOYD and DAYTON, District Judges.

DAYTON, District Judge. It appears from the agreed statement of facts that the Tredegar Company had an undisputed claim against the Seaboard Air Line Railway for supplies furnished, amounting to \$8,980.47 for which it perfected a lien in accordance with section 2485 of the Code of Virginia within the time required by section 2486 of said Code; that the said railroad company, some time after incurring this liability, was by the court below placed in the hands of receivers; that in July, 1908, the principal amount of this claim was paid, and a receipt given setting forth that such payment should in no way affect the question of payment of accrued interest on the account, which payment of interest was denied by the receivers, and that, when the question of interest had been finally passed on by the court, the Tredegar Company was to release its lien. The court below subsequently passed upon this question, and determined that the claimant was not entitled to interest, and to review this ruling is the sole purpose of this appeal.

In *United States v. North Carolina*, 136 U. S. 211, at page 216, 10 Sup. Ct. 920, at page 922, 34 L. Ed. 33, it is held that:

"Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation to which the plaintiff is entitled."

And in *Loudon v. Taxing District*, 104 U. S. 771, 26 L. Ed. 923, it is held:

"Lawful interest is the only damages to which a party is entitled for the nonpayment of money due upon contract. His right is limited to the recovery of the money so due and such interest."

In *Brewster v. Wakefield*, 22 How. 118, at page 127, 16 L. Ed. 301, it is held, where a contract is silent as to interest after debt due, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract.

In *Young v. Godbe*, 15 Wall. 562, 21 L. Ed. 250, it is held:

"In a case where interest as a general thing is due (as, ex. gr., in the case of an account stated), the fact that there may be no statute in the place where the account is settled and the transaction takes place does not prevent the recovery of interest. In such a case interest at a reasonable rate, and conforming to the custom which obtains in the community in dealings of the same character, will be allowed by way of damages for unreasonably withholding an overdue account."

In *Cooper & Co. v. Coates & Co.*, 21 Wall. 105, at page 111, 22 L. Ed. 481, it is held:

"A sale of goods without a term of credit given is liquidated when contracted, and after the account is presented, and impliedly admitted, the defendants are in default and chargeable with interest."

This general rule, established by these and very many other authorities, is, however, subject to an exception where the property of an insolvent debtor passes into the hands of a receiver or an assignee in

insolvency, in which case the delay in distribution is held to be the act of the law and a necessary incident to the settlement of the estate. *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *Grand Trunk Ry. Co. v. Central Vt. Ry. Co.* (C. C.) 91 Fed. 569; *Malcomson v. Wappoo Mills* (C. C.) 99 Fed. 633, 635; *Solomons v. Am. B. & L. Ass'n* (C. C.) 116 Fed. 676; *State Trust Co. v. Kansas City P. & G. R. Co.* (C. C.) 129 Fed. 455, bottom page 458.

Under these authorities it appears from the record before us that this case comes under this exception to the general rule touching the payment of interest, and that the court below did not err in disallowing interest from and after the appointment of the receivers. It does appear, however, that the account of plaintiff was stated, due, and payable a considerable period of time before the receivers were appointed, and for such period interest should have been allowed.

It therefore follows that the decree of the court below should be modified, so as to allow plaintiff and appellant interest upon its account from the date it became due and payable up to the date of the appointment of the receivers, and the cause will be remanded, with directions to so modify the decree complained of.

Modified.

On Rehearing.

A very careful consideration of the petitions filed by both sides for rehearing and of the briefs and arguments of counsel had upon such rehearing has convinced us that the original conclusion reached by us is right. The appellant has insisted that it was wrong, in that it held this case to be "subject to an exception where the property of an insolvent debtor passes into the hands of a receiver or assignee in insolvency, in which case the delay in distribution is held to be the act of the law and a necessary incident to the settlement of the estate." And this for two reasons: First, because the debtor, the railway company, is not insolvent; and, second, because appellant's claim is a secured one.

The answer to the first contention is complete, when attention is called to the undisputed facts that the decree complained of was entered by the court below on the 28th of June, 1909, at which time the allegations of the original bill filed by the railway company and of the cross-bill filed by the Continental Trust Company, trustee in the first mortgage, for foreclosure, alleging the railway company to be insolvent, were wholly undenied, and upon the record stood for confessed. In fact the trustee in the mortgage had expressly admitted the insolvency in its answer to the original bill, and the original cause and that arising upon its cross-bill had been consolidated. Under such circumstances this court cannot consider the fact that after this decree was entered the railway company, by a fortunate train of circumstances subsequently arising, was enabled to adjust its financial difficulties and resume possession of its property in a solvent condition. If such result had been anticipated, or if it desired to run the risk of such fortunate outcome arising, the appellant might well have delayed asking for the adjustment of its claim until such contingency had arisen. It did not, but, on the contrary, asked for and secured its adjustment at a

time when the insolvency of its debtor was conceded. This court is a court of appeal, and will only pass upon questions which were before the court below at the time the decree complained of was entered. *Whitney v. Dick*, 202 U. S. 132, 137, 26 Sup. Ct. 584, 50 L. Ed. 963; *McDonald v. Smalley*, 1 Pet. 620, 7 L. Ed. 287; *Union Bank v. City of Richmond*, 94 Va. 316, 320, 26 S. E. 821.

As to the second contention relied upon by the appellant, the Supreme Court, as stated in our original opinion, has held that:

"Interest when not stipulated for by the contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation to which the plaintiff is entitled."

In other words, when a debtor withholds his money or property from his creditor, he injures his creditor by so depriving him of his due, and damages at a fixed rate, ascertained by law to be the value of the use of money, is awarded him for the period his debtor has deprived him of its use. But this presumes that the debtor has the money or property in his possession and is securing the profit arising from its use. On the other hand, when the debtor becomes insolvent and, at the instance of his creditors, his money and property are taken from him by the law, appealed to by creditors for the purpose of ascertaining their rights and priorities to such money and property, it would seem to be unjust to both debtor and to his unsecured creditors to award to secured creditors interest as damages for the law's delays made necessary in the ascertainment and adjustment of the creditors' rights. In such case the debtor is deprived of the use of his property from which he might well secure in profit the damages so assessed against him, while the unsecured creditor may lose a part or the whole of his debt by reason of the absorption of the assets in the awarding of such damages to the secured creditors. It therefore seems to us to be entirely equitable that, while the custody of the law continues in such case, such interest in the nature of damages should not be awarded.

And this seems peculiarly to be so in regard to insolvent corporations. In *Griffith v. Blackwater Boom & L. Co.*, 46 W. Va. 56, 33 S. E. 125, the Supreme Court of Appeals of West Virginia, following the New York decisions, has held that when a corporation is forced into involuntary liquidation its executory contracts become nugatory, and that a contractor having a "supply contract" entitling him to a lien is not entitled, under such conditions, to recover damages for the breach of his contract, but only to a just compensation for the actual expenditure of labor and money by him in fulfillment of his contract, subject to a deduction of all sums paid him thereunder. This ruling was affirmed by the same court, in the same case, upon second appeal (*Griffith v. Blackwater Boom & L. Co.*, 55 W. Va. 604, 48 S. E. 442, 69 L. R. A. 124), and in *Tennis Bros. Co. v. Wetzel & Tyler Ry. Co.* (C. C.) 140 Fed. 193, it is cited and followed, and upon appeal this court affirmed the lower court's action in so doing (*Wetzel & Tyler Ry. Co. v. Tennis Bros. Co.*, 75 C. C. A. 266, 145 Fed. 458).

If, under conditions of insolvency, the contract of the corporation becomes nugatory, and damages will not be awarded for its breach to

the person holding it and having a lien to secure it, surely damages will not be allowed to a lienor, in lieu of interest, during the law's delays in adjudicating the insolvent company's assets. But it may be urged that the rule does not apply where the liquidation is sought by the insolvent corporation itself. The objection, while technical, may be well founded; but as to this we are not called upon here to decide. While the original bill was filed by the railway company, a cross-bill was filed by the trustee representing the mortgage bondholders, asking for such liquidation through receivers and a sale of the property. These two causes were consolidated and heard together, and the decree complained of was pronounced after such consolidation. These facts clearly demonstrate that the insolvency of the company at the time was conceded, and that these proceedings were instituted in good faith, and were inevitable to compel liquidation upon the part of the corporation.

Finally, it is urged by appellee railway company that it was error on our part to modify the decree of the court below, and not affirm in toto; and this for the reason that appellant, by acceptance of the principal of its debt, extinguished the debt itself, and thereby barred recovery of interest. We do not controvert the soundness of this rule when applied to parties dealing with each other. It is well settled in *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781. But in this case the parties were not dealing with each other, but appellant was dealing with the receivers, and with the express agreement that payment of the principal of its debt should in "nowise affect the question of the payment of interest," which question was to be submitted and determined by the court. These receivers were the appointees and agents of the court, to conduct the affairs of the railway corporation to a final liquidation or settlement, subject always to the court's direction and approval of their acts. This agreement was therefore in effect that of the court itself. Under such circumstances this rule cannot apply, for in equity and good conscience no court could refuse to redeem its obligation to determine the right of appellant to demand such interest.

The decree complained of must be modified and affirmed, as directed in the original opinion.

REGAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 14.

1. ALIENS (§ 58*)—ACTION FOR IMPORTING CONTRACT LABORER—EVIDENCE.

On the trial of an action against a defendant charged with having prepaid the transportation of a contract laborer into the United States in violation of Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1909, pp. 450, 451), a proposed manifest for the immigrant on the form prescribed under section 12 of the act filled out by a third person before sailing of the vessel, and which was not used, but which contained the statement that the immigrant's passage was paid by defendant,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was incompetent as evidence against him, as the declaration of a third person not made in his presence.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 58.*]

Importation of contract labor, see note to *United States v. Parsons*, 66 C. C. A. 133.]

2. ALIENS (§ 58*)—ASSISTING IN IMPORTATION OF CONTRACT LABORER—ACTION FOR PENALTY—MEASURE OF PROOF REQUIRED.

In an action brought under Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1909, pp. 450, 451), which provide that it shall be a misdemeanor for any person to assist the importation of a contract laborer, and that for every violation of such provision the person violating it shall forfeit and pay the sum of \$1,000, "which may be sued for and recovered by the United States * * * as debts of like amount are now recovered in the courts of the United States," the government has the burden of proving the violation of the act by defendant beyond a reasonable doubt.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against James B. Regan. Judgment for plaintiff, and defendant brings error. Reversed.

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendant in error, plaintiff below. The action was to recover the sum of \$1,000 by way of penalty for an alleged violation of sections 4, 5, Act Feb. 20, 1907, c. 1134, 34 Stat. 900 (U. S. Comp. St. Supp. 1909, pp. 450, 451), such violation consisting, as it is charged, in soliciting, assisting, and encouraging the importation of a contract laborer into this country. The alien, one Foreau, was a pastry cook who had been employed in the Carleton Hotel, London, and who presented himself with, as he says a letter of introduction from one Neumann, the manager of that hotel to the defendant Regan, proprietor of the Knickerbocker Hotel in New York, who thereupon gave him employment. At the end of 50 days he was discharged. Foreau had never met Regan before the interview at which he presented the letter, and it is the theory of the government that Neumann was the agent of Regan to secure the pastry cook, and that in suggesting his going to the Knickerbocker, in writing the letter of introduction, and in paying his passage—all which Foreau testified that Neumann did—Neumann was acting for Regan or on his procurement.

G. B. Rosenheim and Max D. Steuer, for plaintiff in error.

Henry A. Wise, U. S. Atty. (W. L. Wemple, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Defendant contends that there was not sufficient evidence to take the case to the jury, and that his motion to dismiss at the close of the testimony should have been granted. Neumann was not examined, and the defendant did not take the stand. The only witnesses were Foreau for the government and Mrs. Regan for the defendant. She had acted as interpreter at the interview, because Foreau did not speak English and Regan did not speak French. The evidence to support the government's contention is meager, but we do not find it necessary to discuss it in detail, since there are exceptions in the case which call

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for a reversal, and on a new trial the testimony may be somewhat different.

Section 12 of the act of February 20, 1907, provides that, upon the arrival of any alien by water at any port within the United States, it shall be the duty of the master of the vessel having said alien (i. e., an alien entering the United States) on board to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation of such alien on board such vessel, which shall, in answer to questions at the top of said list, state as to each alien the full name, age, and sex and also certain other particulars. Among these particulars required to be set forth in the manifest is the statement whether the alien has paid his own passage, or whether it has been paid by any other person, and, if so, by whom. These lists are to be verified under oath by the master of the vessel.

A manifest was prepared before embarkation, giving particulars as to Foreau. It may fairly be presumed that such manifest was delivered to the immigration officers, but the government did not produce it nor offer it in evidence.

It appears from Foreau's testimony that a blank form of manifest was obtained from the steamship company's agent, and that it was filled up by Neumann in his office at the Carleton Hotel, witness answering several questions which Neumann put to him when filling it up. For some reason proposed manifest was unsatisfactory to the steamship company, so a new one was prepared and signed when Neumann paid the passage money. Foreau kept the old form and produced it at the trial. When it was offered in evidence defendant's counsel objected, as follows:

"I object to it because it clearly contains a deduction here as to an important item in this transaction, the payment of the passage money, on the grounds that it is immaterial, incompetent, and irrelevant."

The objection was overruled, exception reserved, and the paper admitted. The first part of this objection is not altogether clear, but counsel did specifically call attention to the part of the document which referred to payment of passage money, and objected that the evidence offered was incompetent. The eighteenth question called for a statement by whom passage was paid, and Mr. Neumann's written answer thereto was: "Mr. Regan, Hotel Knickerbocker, New York."

To admit this document was substantially to admit evidence that Neumann had made declarations to third parties, not in the presence of defendant, as to what defendant had done, which would clearly be incompetent. We must also conclude that the introduction of this piece of evidence was harmful to defendant. Indeed, since the only witness for the government was Foreau, it is highly probable that the jury found in this apparently corroborative statement by Neumann sufficient to enable them to reach the conclusion that defendant was guilty of the offense charged.

It may be noted that we are not now expressing any opinion as to whether the original manifest, sworn to by the master of the vessel and duly filed with officers of the government, could or could not be admitted in evidence, as a public document or on any other theory;

that question may be decided when it is presented. The admission of the unused filled up blank form was error calling for reversal.

Exception was also reserved to the court's refusal to charge that, in order to warrant a recovery of the penalty, the evidence must satisfy the jury beyond a reasonable doubt that defendant was guilty of the offense charged. Since there is to be a new trial the question raised by that exception should be now decided.

The sections of the act of 1907, on which the action is founded, are as follows:

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

"Sec. 5. That for every violation of any of the provisions of section 4 of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offence the sum of \$1,000, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid."

Section 4 differs from the same section in the earlier statute in providing that the offense of prepaying transportation and encouraging the immigration of a contract laborer "shall be a misdemeanor"; the earlier act provided merely that it "shall be unlawful."

Over 30 years ago the Supreme Court held that, in an action brought by the government to recover penalties for alleged frauds upon the revenue, the burden rests upon the government to make out its case beyond a reasonable doubt. The statute in that case (section 48, c. 173, 13 Stat. 240, Act June 30, 1864) provided that any person who shall have in his custody or possession any distilled spirits subject to duty for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon shall be liable to a penalty of \$500 (*Chaffee v. U. S.*, 18 Wall. 518, 21 L. Ed. 908). There seems to us to be no difference in substance between the provision that one "shall forfeit and pay" and the provision that one "shall be liable to a penalty." That the act charged to have been committed by defendant in the case at bar was a crime is indisputable. The statute expressly makes it a misdemeanor.

In *Lilienthal's Tobacco v. United States*, 97 U. S. 271, 24 L. Ed. 901, it was pointed out that the rule laid down in *Chaffee v. United States*, *supra*, did not apply to informations in rem against property which the court says differ widely from "an action against the person to recover a penalty imposed to punish an offender." In no other case which we have been able to find in the Supreme Court reports is the *Chaffee* Case criticized or distinguished in any way. In the Court of Appeals for the Eighth Circuit there is an elaborate discussion of the question citing many authorities. *U. S. v. Shapleigh*, 54 Fed. 126,

4 C. C. A. 237. In that case the government brought suit to recover the double damages and penalty of \$2,000 prescribed by section 3490, U. S. Rev. St. (page 2328, U. S. Comp. St. 1901), against any person presenting a false or fraudulent claim against the United States. The conclusion reached was that the government "might have maintained a civil suit for the single damages it sustained if any, from the wrongful acts of the defendant without establishing its case beyond a reasonable doubt. But that, when under the form of this civil suit the government sought to punish the defendant for felonies by recovering the penalty of double damages and \$2,000, for each offense, it makes this proceeding criminal in its nature and purpose and invoked the application to it of the rules of evidence applicable to criminal trials."

The counsel for the government insists that the question was decided adversely to the contention of defendant in *Hepner v. U. S.*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739. In that case, upon the trial of a cause of action in all respects like the one at bar, the trial judge directed a verdict for the plaintiff (the United States). Writ of error was sued out to this court which certified to the Supreme Court the question whether in such a suit verdict could be directed for the plaintiff. The certificate stated that it appeared by undisputed testimony that defendant had committed an offense against sections 4 and 5 of the act of 1903 (Act March 3, 1903, c. 1012, 32 Stat. 1214). This was the earlier statute which did not provide expressly that the offense should be a misdemeanor. The Supreme Court discusses the subject at some length, holding as had been held before in numerous cases that the action before it was a civil suit, but not overruling the decisions in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and *Lees v. U. S.*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150, which held that in such suits defendants could not be compelled to be witnesses against themselves. "The Lees and Boyd Cases," says the court, "do not modify or disturb, but recognize, the general rule that penalties may be recovered by civil actions, although such actions may be so criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense." The court in the *Hepner* Case held that the *Boyd* and *Lees* Cases did not negative the proposition that the court may direct a verdict for the plaintiff in a civil action to recover statutory penalties or forfeitures, but it does not necessarily result from that decision that recovery, even in a civil action, of an arbitrary penalty prescribed for a misdemeanor may be had when there is a reasonable doubt as to whether the defendant was guilty of the offense.

In the *Hepner* opinion the court is careful to say, more than once, that the certificate states that the evidence was undisputed, which, "in effect, requires the court to assume as the basis of any answers to the question that, according to the undisputed testimony the Government proved the alleged violation of law. In such a case there are no facts for the jury to consider." It may be added that, if there

are no facts for the jury to consider, no question of reasonable doubt can possibly arise. We conclude, therefore, that *Hepner v. U. S.* does not warrant the lower federal courts in disregarding the holding in *Chaffee v. U. S.* and are of the opinion that it was error to refuse the request to charge the jury that the government must prove its case beyond a reasonable doubt.

It will be understood that we now decide only the concrete case before us under this particular statute. What may be the proper rule under some other statute is a question which will be dealt with when it is presented.

Objection was raised to the accepting as interpreter of an employé of the government. We do not find error in this, but are clearly of the opinion that, since the government does not furnish official interpreters for the use of the courts, it would be better practice for the trial court to refuse to accept the services of any one as interpreter who is in the employ of either party, except upon the consent of both sides.

The judgment is reversed.

In re BANZAI MFG. CO.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 50.

1. BANKRUPTCY (§ 288*)—JURISDICTION OF COURT—SETTLEMENT OF ACCOUNTS OF ASSIGNEE.

Where the assignee of an insolvent corporation, after it was adjudged bankrupt, consented to a reference of his accounts to the referee in bankruptcy and their settlement by the bankruptcy court, such court had jurisdiction to order him to pay to the trustee a sum found due from him to the estate on the accounting.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 288*)—ORDER COMMITTING FOR CONTEMPT—RIGHT TO NOTICE AND HEARING.

A person, ordered to pay over money to a trustee in bankruptcy as property of the estate, is entitled to notice and a hearing before judgment for contempt is entered against him for failure to obey such order; and a notice that an ex parte application for an order for punishment for contempt would be made, without stating time nor place, is insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*]

3. BANKRUPTCY (§ 288*)—CONTEMPTS—ORDERS ENFORCEABLE BY CONTEMPT PROCEEDINGS.

An order of a court of bankruptcy, directing a prior assignee of a bankrupt corporation to pay over to its trustee a sum found to be due from him to the estate on a surcharging of his accounts, is not one which may be enforced by imprisonment for contempt as to items which he actually paid out in the administering of the property, although improvidently, and which it is admitted he no longer has in his possession.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*]

Petition to Review Orders of the District Court of the United States for the Southern District of New York.

In the matter of the Banzai Manufacturing Company, bankrupt. On petition by Oscar B. Bergstrom to revise orders of District Court. Petition dismissed as to two orders. Third order reversed.

See, also, 100 C. C. A. 664, 177 Fed. 1002.

John M. Coleman (O. B. Bergstrom, of counsel), for petitioner.
Paul C. Schnitzler, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. On October 8, 1907, petitioner was appointed assignee of the property and estate of the Banzai Manufacturing Company. He accepted the trust, took possession of the estate, and continued to act as assignee, conducting the business, until William H. Smith was appointed trustee in bankruptcy of the same company early in 1908. Thereupon all the property, papers, books of accounts, and assets belonging to the insolvent were delivered to the trustee in bankruptcy. Shortly afterwards petitioner filed a claim against the estate for a balance alleged to be due him, and also a statement of account as assignee, showing the items of receipt and disbursement which resulted in such alleged balance. The claim and the statement of account was sent to a referee as special master. At the outset of the hearing Bergstrom stated in response to questions that he was willing that the items of his account should be taken up with the referee, that he had no objection thereto, and that he would consent that his account be passed upon by the court. A number of hearings were had, witnesses were examined, and the referee reported that the account should not be passed but that Bergstrom be required to file a further account.

The District Court, on February 18, 1909, entered an order confirming the referee's report, and directing that Bergstrom file another and further account within 10 days, or be charged with \$6,053.27. This time was extended by the court, and on April 20, 1909, he moved for an order, referring his accounting as assignee to the referee, and an order to that effect was made April 29, 1909. A number of hearings were had, further testimony was taken, and the referee on November 30, 1909, made a report that the difficulty of accounting had been greatly enhanced by the methods of the assignee in allowing the business to be conducted by other persons, instead of himself personally; that there was nothing brought out on the second accounting which called for any modification of his first report, in which he had found that Bergstrom should be charged with \$6,053.27, and should not be credited with the various payments and expenditures, which, as he alleged, exhausted this amount, because the items "salaries," "wages," "rent," etc., were not shown to have been "properly made in the execution of his trusts." On January 5, 1910, the District Court confirmed this second report, and ordered that the prior order of February 18, 1909, directing Bergstrom to pay \$6,053.27, be "in all respects confirmed." These two orders of February 18, 1909, and January 5, 1909, are those in respect to which it is contended that petitions to revise were not filed in time.

It will not be necessary to examine the questions raised upon the

motion to dismiss, because it is apparent from the above narrative of transactions that Bergstrom consented to a judicial examination of the items of his account by the referee and the court, and is therefore bound by their determination of the question whether, as a result of his transactions as assignee, the estate of the Banzai Company owed him or he owed the estate. Of course, if he owed the estate, it was proper to direct him to pay the amount due to the trustee in bankruptcy, who had taken title to that estate. Errors in determining the items which made up the amount found to be due would be reviewable; but this petition does not bring up any such questions, nor does the brief of counsel discuss a single item of the amount surcharged against Bergstrom.

On January 12, 1910, a copy of the order of January 5, 1910, was served on Bergstrom and his attorney, and with it was served a written demand for payment, coupled with a "notice" that upon failure to comply with the orders of February 19, 1909, and January 5, 1910, application would be made to the District Judge "ex parte for an order directing the punishment of Oscar B. Bergstrom for contempt of this court in refusing to comply with the said orders." The notice did not state when or where such application would be made, except that such application would be ex parte. Bergstrom did not pay the money, whereupon, on January 19, 1910, upon the former orders and affidavits of the trustee and his counsel, showing noncompliance with the orders, the District Judge adjudged Bergstrom in contempt for failure to comply, and directed a warrant to issue to the marshal to commit him to close custody until the sum found due by him be discharged. He was taken into custody and so held until he made a deposit with the marshal of \$6,290.47 to obtain his enlargement pending review by this proceeding.

The Court of Appeals in the First Circuit had a similar order before them in *First Nat. Bank of Biddeford v. Cole*, 144 Fed. 392, 75 C. C. A. 330, where a bankrupt had been adjudged in contempt for failing to pay over money of the estate which it was alleged she had in her possession. The court held that the issue whether an order should run against the bankrupt, requiring her to make payment to the trustee, is of a purely civil character, and therefore that part of the order before them which directed payment may be supported by a mere preponderance of evidence, presumptions, or inferences. As to the other part of the order the court (Putnam, C. J., writing) said:

"We think, however, that there was error, in that the District Court entered in substance a judgment for contempt, accompanying an affirmative order for committal. It is plain that a proceeding for contempt is of a different character from one resulting in a mere order for the payment of money to a trustee in bankruptcy. It is claimed that it is criminal in nature, while an order for the mere payment of money is purely civil; that it would be justified only by the proofs, and the amount of proofs, requisite on ordinary criminal issues; and that it is in effect an independent proceeding, which can be initiated only after an order for payment of money has been disobeyed, and an order to show cause, or some other new notice, given to the person alleged to be in fault. It is sufficient now to say that the record does not show that Mrs. Cole had any day in court on the issues involved in that part of the order in question. Without undertaking to say in what manner the issue may be so pre-

sented as to justify a proceeding for an alleged contempt, and entering a penal judgment on account thereof, we are of the opinion that the record should show that the issue had been made in some way, and that the person adjudged guilty of contempt had had an opportunity to be heard in reference thereto. *Rapalje on Contempts* (1881) 126, 127, 128. For this reason, the order to which the petition relates must be annulled, except only so far as it confirms the decision of the referee, which directed that the money in question should be paid to the trustee."

The same point was considered incidentally by this court, in *Re Stavrahn*, 174 Fed. 330, 98 C. C. A. 202, and we expressed the opinion, touching orders of commitment for disobedience of orders directing the turning over to the trustee of money or other property of the bankrupt:

"Of course, he should have notice of the motion to punish him for such disobedience, and have his day in court, when he may present what he may have to urge against such motion and an opportunity to be heard."

See, also, *In re Hausman*, 121 Fed. 984, 58 C. C. A. 260.

In the case at bar *Bergstrom* had his "day in court" on the question whether or not he owed the estate money which he should pay to the trustee; but he certainly, so far as this record shows, has not had his day in court on the question whether he should be committed to jail for failure to pay such money. For that reason the order of January 19, 1910, should be reversed.

The result of this decision will presumably be to bring the question of contempt again before the District Judge on proper notice to *Bergstrom*. It seems, therefore, desirable that there should be an expression of opinion upon another branch of the case which has been fully argued before us. The sum of money, \$6,053.27, which *Bergstrom* was ordered to turn over to the trustee, was not entirely money or property of the bankrupt which he has in his possession. Some of the items may come within that category. For instance, he charged the estate with \$330 for commissions to himself for his services as assignee. Since he has not paid that sum out to any one except himself, it may be considered as still in his possession. Possibly there are other similar items; but the great bulk of the amount found due from him consists of payments which he made to others out of the proceeds of the estate while it was in his possession, which payments the referee and the court have found were improvidently made, and therefore should be surcharged against him.

Counsel for the trustee conceded on the argument that substantially the entire claim against *Bergstrom* consisted of such surcharges. He was not an officer of the District Court, carrying out trusts with reference to an estate which that court had committed to him. He had prior to bankruptcy come into possession of the property of the bankrupt; but, so far as this record shows, that property had also prior to bankruptcy passed out of his hands, mainly in payment of expenditures for salaries, wages, rents, merchandise, etc., incurred while carrying on the bankrupt's old business with the property he received. By reason of his improvident conduct in so doing it has been found that he ought to make good to the estate the whole or the greater part of these disbursements, and he is a debtor to the es-

tate for that amount; but it does not necessarily follow that his indebtedness is of such a sort that he may be imprisoned for non-payment. The situation differs from that which has frequently come before the courts where a person—the bankrupt or some one else—has had property of the estate in his possession and testifies that he had paid it out or distributed it in some way, but the referee and the District Judge have disbelieved his testimony, and have ordered him to return the property or be imprisoned for disobedience to such order.

It is not understood that in the case at bar the trustee disputes the statement of Bergstrom that he actually did pay out the money, or substantially all of it. More would be required than appears in this record to warrant an order punishing Bergstrom for failure to pay \$6,053.27 which he owes the estate as a result of his transactions while assignee.

The order of January 19, 1910, is reversed.

STIRLEN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910. Petition for Re-hearing Overruled November 18, 1910.)

No. 1,603.

CRIMINAL LAW (§ 695*)—TRIAL—EVIDENCE—LETTERS BETWEEN CO-CONSPIRATORS—SPECIFIC OBJECTION.

On the trial of a defendant, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to commit an offense against the United States, a letter passing between others of the alleged conspirators held competent against the defendant as tending to prove the conspiracy, in the absence of specific objection to the part of it referring to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1637; Dec. Dig. § 695.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

John Stirlen was convicted of a criminal offense, and brings error. Affirmed.

The case is stated in the opinion

Philip D. Clear and Wm. J. Custer, for plaintiff in error.

Edwin W. Sims, U. S. Atty., and Fletcher Dobyns, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion: ~~THE COURT~~

The conviction of plaintiff in error, in the Court below, was under section 5440 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3676), which makes it a crime for two or more persons to conspire to commit an offense against the United States—the offense charged in the indictment being the using of the mails in furtherance of a scheme to defraud. The conspirators named in the indictment were plaintiff in error, Thomas P. Daniels, alias Thomas E. Cameron, Frederick C. Struckmeyer and Isaac L. H. Holton—

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Daniels pleading guilty and Holton and Struckmeyer nolo contendere,—the latter two being sentenced to terms in the penitentiary.

The initial step in the scheme to defraud was an advertisement in the newspapers as follows:

"\$125,000 or any part for investment in some good enterprise without services, T. E. Cameron, Central Building, Milwaukee."

The purpose being, that whoever was attracted by such advertisement, should be led to believe that to realize the proposed investment, it was necessary that they should organize corporations and issue bonds secured by trust deeds; the promoters of the scheme holding out that, under such circumstances they would sell the bonds to raise the money required by the victims. And the profit in the scheme was in the fees that the promoters received from the victims in the way of organizing the corporations, and in the way of going to and inspecting the properties upon which the bonds were to be issued; such so-called expenses and compensation being divided between the promoters of the scheme—the victims being turned off finally by some pretended obstacle purporting to make the loans undesirable. As an illustration of the care with which the ground was prepared to look encouraging at the start, but to carry no obligation for failure at the end, the following passage, in a so-called proposition from the imaginary investor to the inserter of the advertisement (to be shown, of course, to the proposed victim), is given:

"I will purchase these bonds provided the property is as represented and after an examination by an expert, the report of the expert discloses no disparaging comments upon the property of the company and upon the company and its personnel and prospective, the examination to be without cost to me."

The part charged against plaintiff in error, in the conspiracy, was that he was to act as the pretended trustee of the bonds; and that, in many cases, in pursuance of such conspiracy, he did act as such trustee, receiving certain sums of money in pretended compensation therefor.

The assignments of error relied on were:

(a) That there was not sufficient evidence to go to the jury to show plaintiff in error guilty of conspiracy; and

(b) That the Court erred in permitting certain evidence, offered by the Government, to go to the jury.

There was abundant evidence going to the jury that this was a conspiracy to commit the crime charged, and there was sufficient evidence to submit to the jury the question whether plaintiff in error, having in fact taken the part assigned to him in the indictment (on that there is no controversy), had taken such part conscious of its purposes. This assignment of error, therefore, may be dismissed without further comment.

It was the duty of the Government, of course, to prove guilty knowledge, and the substance of the second assignment of error is that a letter was permitted to go to the jury, written by one of the conspirators to another, in which it was stated, "I have now secured a new trustee" (referring to plaintiff in error), "who fully understands the whole proposition and is O. K. in every respect"; and that the tes-

timony of a post office inspector, detailing what was said to him by some of the conspirators other than plaintiff in error, was permitted to go to the jury, although at that time the operation of the conspiracy had been broken up by the arrest of the parties. Whether the conversations referred to were incompetent, we need not decide, for there was nothing whatever in them, so far as they related to plaintiff in error, that was prejudicial to him.¹ Respecting the letter, from which

¹ William G. Means: Post Office Inspector located at Jacksonville, Ill., investigated the business of T. E. Cameron, I. L. H. Holton, Struckmeyer and John Stirlen.

Q. Which one of these men did you see first?

A. Mr. Struckmeyer.

Q. Where did you see him?

A. At his office in the Hartford Building this city.

Q. About when?

A. On the 13th day of September, 1906.

Q. What conversation did you have with him on that date?

A. I told Mr. Struckmeyer my name and occupation and informed him that I had received his complaint from the Tropical Fruit and Decorated Plant Company, that he had misled them concerning the purchase of certain bond issue, and I wanted to ascertain what he knew about the matter, why he did not take the bonds, when he agreed to purchase them and he said, I had such bonds under consideration and made a proposition to purchase them, but after examination was made I looked the matter over and the bonds were absolutely worthless. They had no property so I declined them. I asked him if he had purchased any other bonds from this same house of Cameron. He said he had not. But made an offer in two or three other issues, and told me that he would send me the names of these companies, which he did not do, and that was about all the conversation at that time.

Four or five days after the arrest of Mr. Daniels, otherwise Cameron, Inspector Bird and myself came to Chicago from Milwaukee and called upon Mr. Struckmeyer and had a conversation with him. He gave us the names of some six or seven bond companies that he had made proposals to purchase. He stated that he had found the security not ample in this case and could not afford to purchase them. He was expecting to purchase these bonds and sell them on the market making a margin. He denied that there was any collusion between him and Cameron and Holton in regard to the handling of these bonds.

Q. When did you first see Mr. Holton and where?

A. On the 13th day of September we went to Mr. Struckmeyer's office and Mr. Holton's office in the Reaper Block.

Q. Did you have any conversation with Mr. Holton?

A. We did.

Q. What was said?

A. We asked Mr. Holton—we told him who we were and asked him about the examination he had made of the different companies and he assured us that he had made them in good faith, and we asked him particularly in regard to the bond issue of the Diamond Sheet Mining Company and the Federal Development Company of Idaho. He had received for making of an examination of these properties, he told us \$1500, and upon questioning him he admitted that he had not gone within possibly 100 miles of the mines but had made his report upon what a man had told him who claimed to be a mining expert. He also informed us that we—we asked him first when he had seen Mr. Cameron and I think he said the day before or a day or two before. Mr. Cameron and Mr. Donovan, his attorney, from Milwaukee, had been down and that he, Mr. Struckmeyer and Mr. Stirlen had a conference in this city.

I talked to him about the proposition of the Southern Land and Lumber Company and he told me that it was a good proposition, and that there was some good timber on the land, and when I informed him that I worked in the country and had driven across the tract of land, and knew something about it, and then he asked about the land in southern Louisiana.

the passage above has been quoted, it is sufficient to say that, as an entirety, the letter was competent to show the existence of the conspiracy and the conduct of such conspirators in furtherance thereof.* Had objection specifically been made to the line or two quoted that plaintiff in error complains of, and the Court had failed to pay attention to such objection, a question might be raised. But no such objection was specifically made. The objection was to the letter as an entirety, and the letter as an entirety was competent evidence to show a conspiracy, and what the conspirators were doing.

The judgment of the District Court is
Affirmed.

In re CHARLES W. ASCHENBACH CO.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 70.

BANKRUPTCY (§ 474*)—COSTS OF RECEIVERSHIP—POWER OF COURT TO TAX AGAINST PETITIONING CREDITOR.

Where a petition in involuntary bankruptcy is dismissed as unfounded, the court has authority in its discretion in the first instance to direct that the costs and expenses of a receivership be paid by a petitioning creditor, on whose application the receiver was appointed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. § 474.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

2 January 8, 1906.

Mr. T. E. Cameron,
Milwaukee, Wis.

Dear Sir:

Enclosed please find receipt in two trusteeships signed by me. I will step down to the law maker's office and get his receipt. I was down there a few minutes ago and he was out. I have been extremely busy for the past week, or you would have heard from me before. I had a case in court which occupied every minute of my time.

I have now secured a new trustee who fully understands the whole proposition and is O. K. in every respect. His name is John Stirlen, 98 Jackson Boulevard. He is a very bright, bold lawyer and an old friend of mine and is just the man we want. When you are down this way again I will take you over and introduce you to him. He has good looking offices at room 608 Monadnock Building.

Some man called on me Saturday and wanted to ask me a good many questions about Old Caney bond issue. He declined to tell me who he was, but he is undoubtedly some Chicago lawyer. I told him that it had come to me in the usual course of business, and that that was really all I knew about it. He asked me how much I received and I told him \$350. I do not see how they can do anything about this, as we both did all we agreed to. In a matter of this kind, where there is a chance for disagreeable litigation, it seems to me that you might pay about ten per cent. on the face of the receipt, which would leave a balance due me of \$25. What do you think about it?

Yours very truly,

F. K.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
183 F.—20

In the matter of the Charles W. Aschenbach Company, alleged bankrupt. On petition by David G. Way to revise order of District Court. Affirmed.

See, also, 98 C. C. A. 290, 174 Fed. 396.

Henry Hoelljes (Leo Oppenheimer, of counsel), for petitioner.
Michael Kirtland, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Way and other creditors filed a petition on April 2, 1909, praying that the company be adjudged an involuntary bankrupt. On the same day, upon the application of Way, an order was made appointing a receiver, who took possession of the property and in compliance with the instructions of the court carried on the business of the alleged bankrupt until April 30, 1909. On April 29th an order was made dismissing the petition and vacating the receivership. This order was carried up and subsequently affirmed by this court. On April 30th the receiver returned all the property to the alleged bankrupt. The receiver duly accounted. His accounts were sent to special master and have with modifications been approved by the court.

There seems to be no dispute that the amount awarded to the receiver for his fees and petty disbursements is correct. What is challenged is the propriety of so much of the order as directs that the petitioning creditor, who instituted the proceeding and upon whose petition the receiver was appointed, should pay such amount to the receiver. Abundant authority for such order is found in the opinion of this court in *Re Lacov*, 142 Fed. 960, 74 C. C. A. 130. Reference is made in the briefs to a later decision in the Court of Appeals for the Seventh Circuit (*In re T. E. Hill Co.*, 159 Fed. 73, 86 C. C. A. 263); but we find in it nothing at all in conflict with our former decision. It holds that the bankruptcy court has power to direct that the needful expenses and compensation of the receiver be paid in the first instance out of the property in his hands and that his rights are not dependent on the equities of the parties to the proceeding; all of which is true enough, but cannot fairly be construed as holding that the bankruptcy court has no discretion to assess the expenses in the first instance against the person ultimately responsible, if it thinks that is the wiser and more efficient course to pursue in some particular case. In the case at bar it certainly seems that it is the better practice, settling the entire matter as in fairness and equity it should be settled, without requiring the injured party to bring an independent action against the petitioning creditor to recover the loss to his estate consequent upon payment of receiver's expenses.

In some other and different case, where there was doubt as to the petitioning creditor's solvency, or the value of his bond, or where it might be difficult to effect service upon him, the other course might be the only one which would secure the receiver against loss. It is suggested in the brief that the *Lacov Case* only decided that the receivership expenses are ultimately chargeable to the petitioning creditor, and did not hold that they might be collected from him in the first in-

stance. This is an entire misconception of the case. From the latter part of the opinion it will be seen that the question came up on petition to review an order adjudging a petitioning creditor in contempt for his failure to obey a former order directing him directly to pay the expenses of receivership, and the contempt order was affirmed.

Pending an appeal from the order dismissing the proceeding in involuntary bankruptcy, the petitioning creditor and the bankrupt made some stipulation between them, and the former paid the latter an agreed sum of money in cash and a note. It does not appear to us that this circumstance changes the situation in any way. If this payment, in addition to what this order requires him to pay, exceeds the amount of damages for which he made himself liable by prosecuting an unsuccessful proceeding against the alleged bankrupt, he may recover the excess by some appropriate proceeding against the company.

The order is affirmed.

In re CAPONIGRI.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 25.

BANKRUPTCY (§ 446*)—REVISION PROCEEDINGS—MATTERS REVIEWABLE.

On a petition to revise an order in bankruptcy in matter of law, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the master's findings of fact, approved by the District Judge, are not reviewable, and the questions of law reviewable are only those arising upon the facts as so found.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of Pasquale Caponigri, bankrupt. On petition by Isaac S. Voorhis to review an order of the District Court. Affirmed.

This cause comes here upon a petition to review in matter of law, as provided in Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), an order made by the District Court, sitting in bankruptcy, confirming the report of a referee sitting as special master. The petitioner instituted this proceeding for the purpose of establishing its ownership of a specific fund of \$5,000 (or the balance thereof still remaining). The special master wrote an elaborate opinion, reaching the conclusion, on several different grounds, that petitioner was not the owner of the fund. The District Judge "entirely concurred with the referee's report" and confirmed the same. •

Charles L. Hoffman (H. A. Friedman, of counsel), for petitioner.

W. T. Hope, for respondent.

Masten & Nichols, for trustee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Caponigri, the bankrupt, became a depositor in the Northern Bank on

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

November 26, 1907, and continued to deposit and draw until January 13th, when the account was balanced showing a credit in his favor of \$789.46. The contention of the bank is that on December 27, 1907, Caponigri drew a check on said bank to the order of the comptroller of the city of New York and requested the bank to certify the same; that, in order to induce its officers to certify, he stated that he was about to make a bid to the department of street cleaning for a contract for trimming and unloading scows, and that he would have to deposit with his bid a certified check for \$5,000; that such check (or the money it represented) would not be kept by the comptroller unless the bid were accepted, but that in the event of a rejection of the bid the same would be returned to the bidder; that Caponigri further stated and represented and agreed with the bank that, in the event of the rejection of his bid for the contract above referred to, he would return to the said bank the said certified check (or its proceeds); that these statements and representations of Caponigri were false and untrue, and known to him to be so, and that on December 30th, the bank paid the check to the comptroller. The bid was rejected, and the proceeds remained with the comptroller until, after the initiation of bankruptcy proceedings, they were paid over to the receiver.

The brief submitted in support of the petition to review is voluminous and covers many different points; but it is manifest that, unless the averments of fact on which petitioner's claim is founded are established, it is idle to enter upon any discussion of the law. This is not an appeal, but a petition to review in matter of law, under section 24b, and for the facts we may refer to the special master's report, which was confirmed by the District Judge. He says:

"I think, therefore, that it must be found that no such promise or agreement was made by Caponigri on the 27th of December, or in connection with the certification of the check here in question."

This follows a discussion of the evidence. Inspection of the record shows that there are conflicting statements in the evidence which petitioner adduced to show that the particular certification of December 27th, out of which the fund in controversy arose, was obtained upon the representations and promises averred in the petition. Schlessinger, the vice president, says that they were made in the presence of Banome, assistant receiving teller; but the latter says he was present only at two interviews between Schlessinger and Caponigri, and that one of these was on December 11th, when a certification was solicited and obtained for a different \$5,000 check to accompany a bid on another contract. The second interview he fixes as taking place January 10th or 11th.

It is well settled that in these proceedings on petition to review in matter of law, the master's findings of fact, approved by the District Judge, are not brought up for review. Accepting the master's finding that Caponigri did not make the statements and promises with regard to the disposition of this particular certified check, which petitioner contends that he did, there is no foundation for petitioner's claim, and it would be a waste of time to discuss legal propositions which might be presented if the facts were different.

The decree is affirmed, with costs.

CHAPIN et al. v. DOUGHERTY et al.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1910.)

No. 2,059.

EQUITY (§§ 165, 227*)—JURISDICTION—WAIVER OF OBJECTIONS.

Objections to a bill to quiet title by demurrer or in the nature of pleas in abatement, such as *lis pendens*, adequate remedy at law, or challenging the jurisdiction of the court as shown by the bill, should be pleaded in limine, and insisted on before the taking of evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 399, 513; Dec. Dig. §§ 165, 227.*]

Appeal from the Circuit Court of the United States for the Southern District of Texas.

Suit in equity by James E. Dougherty and others against D. B. Chapin and others. Decree for complainants, and defendants appeal. Affirmed.

James B. Wells and F. W. Seabury, for appellants.

Wm. Aubrey and Duval West, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Equitable jurisdiction to remove clouds from title to real estate is old and well-settled. Objection to the exercise of the same by demurrer or in the nature of pleas in abatement, such as *lis pendens*, adequate remedy at law, or challenging the jurisdiction as shown by the bill, should be pleaded in limine and decisions thereon provoked before taking evidence. See Equity Rule 39; 1 Daniel Chan. 555; *Livingston v. Story*, 11 Pet. 352, 9 L. Ed. 746; *Wickliffe v. Owings*, 17 How. 47, 15 L. Ed. 44; *Wood v. Mann*, 1 Sumn. 578, Fed. Cas. No. 17,952; *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934; *Perego v. Dodge*, 167 U. S. 160, 164, 16 Sup. Ct. 971, 41 L. Ed. 113.

While in the answer in this case the defendants say "that the complainants have a complete and adequate remedy at law for the determination of their title," no insistence appears to have been made thereon until final hearing. Further than this, we find that in the suits at law, wherein the defendants claim that the complainants had a complete and adequate remedy, the parties were not the same, nor were the issues involved such as to permit full and adequate relief. In the transcript are several so-called bills of exceptions showing defendants' objections to certain documentary and other evidence offered by the complainants, and admitted by the court. Treating these alleged bills as continuing motions to suppress evidence, we conclude that they are not well taken, and that as to the admission of said evidence the court correctly ruled.

We find the evidence in the case establishes the contentions of the complainants below, and as they are proved to have been in possession and control under title or color of title, so far as in the nature of the case such possession could be established, for over 50

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

years, and have paid all taxes upon the land in question, we think that the lower court correctly decreed in their favor, confirming their title and removing clouds thereon.

Affirmed.

In re WHITE et al.

CUMMINGS v. DAY.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,669.

BANKRUPTCY (§ 351*)—PROVABLE CLAIMS—NOTES OF PARTNER PLEDGED BY FIRM.

Where a partner, acting for the firm, pledged as collateral security for a loan to the firm, for which he was indorser, among other collateral, individual notes made by himself to the firm for borrowed money, which were afterward sold by the pledgee in accordance with the terms of the pledge, the purchaser took the same title and rights as though the notes had been those of a third party, unaffected by the fact that the maker was also indorser on the principal debt, and was entitled to prove the notes against the estate of the maker in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 351.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of George E. White and James D. Kline, individually and as copartners under the firm name of George E. White & Co., bankrupts. From an order disallowing a claim against the individual estate of George E. White, Edmund S. Cummings appeals. Reversed.

Edmund S. Cummings, Harry G. Colson, and Theodore Johnson, for appellant.

Charles B. Haffenberg, John D. Hood, A. A. McClanahan, and Jacob G. Grossberg, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion:

The appeal is from an order of the Court below, setting aside an order of the Referee in Bankruptcy allowing the claim of appellant against the estate of George E. White, individually, for \$75,000., and sustaining the objections of the trustee to the allowance of said claim, and rejecting the same except as to the sum of \$425.

George E. White was a copartner in the firm of George E. White & Company, that went into bankruptcy at the same time that George E. White and James D. Kline, the copartners, individually went into bankruptcy. The trustee is the same in both cases. The transaction disclosed in the proof shows, that to secure a loan of money made to him by the firm of George E. White & Company, George E. White individually executed to the firm his notes for \$75,000., one for \$50,000., and another for \$25,000., secured by a trust deed to James D. Kline, as trustee, upon certain real estate in Cook County; that contempo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

aneously, George E. White & Company were borrowers from one Lusch, a loan broker, upon a line of credit that ran sometimes as high as \$180,000; that at the time of the bankruptcy proceedings, George E. White & Company owed Lusch about \$40,000.; and that to secure this loan of the firm from Lusch, the notes of George E. White, individually, before mentioned, to George E. White & Company, had been given as collateral security to Lusch under a written agreement "by and between George E. White, party of the first part, and Harry B. Lusch, doing business as H. B. Lusch and Company, party of the second part," wherein, after reciting that George E. White & Company had executed and delivered to Harry B. Lusch various promissory notes bearing the endorsement of George E. White individually, and that it was contemplated that from time to time other notes bearing the same endorsement should be delivered, some of such notes to be purchased and retained by Lusch and others to be sold by him as a note broker, it was agreed that, to secure all liability of George E. White & Company to Lusch, George E. White had deposited, and would from time to time thereafter deposit, various stocks, bonds, and notes, and other securities, as collateral security; with the further agreement that, in case of the nonpayment at maturity of the notes of George E. White & Company held by Lusch, the holders of the notes might sell such collateral publicly or privately without advertisement, the party having the right, in case the sale was made publicly, to become the purchaser of such collateral himself. The two notes amounting to \$75,000., above mentioned, were included in this collateral given to Lusch, together with the mortgages securing them, which, after the beginning of the bankruptcy proceedings, Lusch sold to appellant at public sale, the terms of the contract, in that respect, being followed—appellant having first relinquished the mortgages; relying solely, for the payment of these notes, upon the personal responsibility of White.

It will be observed that the contract respecting the collateral was "between George E. White, party of the first part, and Harry B. Lusch, doing business as H. B. Lusch and Company, party of the second part," from which it is urged that the notes, as notes belonging to George E. White & Company, though actually put up as collateral under the contract, do not fall within the terms of the contract in that it is not shown that the contract, as such, was ever adopted by George E. White & Company. This objection, however, disappears in the face of the evidence that whatever may have been contemplated in the original contract of pledge, with respect to its being White's collateral solely that was to be put up, White in fact put up the collateral belonging to the firm, of which he was a member, and for the benefit of that firm, from which, in the absence of other evidence (and there is no other evidence) we think it follows, as a presumption, that the terms of the contract were adopted by the firm. Indeed, to rebut this presumption, it would be necessary to show that White had no authority from his firm to do what he did do in pursuance of the contract.

But White being an endorser individually upon the indebtedness due from the firm of George E. White & Company to Lusch, amount-

ing to \$40,000., it is said that these notes, put up as collateral, are "double evidence" of the same indebtedness. We think not. The obligation that was put up as collateral, is the obligation of White to the firm, wholly independent of the obligation of White as endorser of the firm to Lusch—as wholly independent as if the notes had been the notes of a stranger to the firm—a collateral that the creditor had the right to ask, that the debtor had the right to give, and that, in the asking and giving, increased the security of the original debt of the firm to Lusch. True, the collateral could not have been used to an extent beyond the debt to which it was collateral, and the debt cannot be allowed except to the extent that the collateral has not paid it, but the sale of the collateral having amounted to but a small proportion of the debt, and the question here being the responsibility of White individually and not of his firm, these questions do not arise.

The order appealed from is reversed, with instructions to allow the claim.

WROCLAWSKY v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,655.

1. COUNTERFEITING (§ 16*)—MAKING DIES OR MOLDS—INDICTMENT.

An indictment under the first clause of Act Feb. 10, 1891, c. 127, 26 Stat. 742 (U. S. Comp. St. 1901, p. 3686), which makes it a criminal offense to make any die, hub, or mold in the likeness of any die, hub, or mold designed for the coining of any of the coins of the United States "without authority from the Secretary of the Treasury," must aver the want of such authority, and a general averment that the die, hub, or mold was "unlawfully and feloniously" made by defendant is not sufficient.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 23-37; Dec. Dig. § 16.*]

2. CRIMINAL LAW (§ 984*)—SENTENCE—CONVICTION ON DIFFERENT COUNTS.

Where a general verdict of guilty is returned under an indictment containing a number of counts charging separate offenses, some of which are good and some not, judgment should be entered only on the good counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2504-2509; Dec. Dig. § 984.*]

In Error to the District Court of the United States for the Northern District of Illinois.

Leo Wroclawsky, alias Leo Klemens, was convicted of a criminal offense, and brings error. Remanded for correction of judgment.

Thomas D. Knight, Frank R. Reid, and Elwood G. Godman, for plaintiff in error.

Edwin W. Sims, U. S. Atty., and Seward S. Shirer, Asst. U. S. Atty.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. Section 1, of the Act of February 10, 1891 (chapter 127, 26 Stat. 742 [U. S. Comp. St. 1901, p. 3686]),

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

makes it punishable to make any die, hub or mold, in the likeness of the design, or inscription of any die, hub or mold designated for the coining of the coins of the United States, or to willingly aid or assist therein, or to cause or procure the same to be made, "without authority from the Secretary of the Treasury of the United States or other proper officer."

The same section, in a subsequent clause, makes it punishable to have in one's possession any such die, hub or mold "with intent to fraudulently or unlawfully use the same, or permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States."

Plaintiff in error was indicted in four counts, the first two under the clause of the statute first recited, and the second two under the second clause of the statute recited. In neither of the first two counts is it charged that the making of the die, hub or mold was without authority from the Secretary of the Treasury of the United States. But it is charged that the mold, die or hub was "unlawfully and feloniously" made, and it is urged upon us that the use of these words, "unlawfully and feloniously" are the equivalent of "without authority from the Secretary of the Treasury" upon the authority of *State v. Taylor*, 7 S. D. 533, 64 N. W. 548; *Schley v. State*, 48 Fla. 53, 37 South. 518.

Unquestionably, where the words used in the indictment include the offense charged, notwithstanding the fact that the offense is not charged in the language of the statute, a verdict will not be set aside upon the ground that the indictment fails to state an offense; and without doubt, too, the word "unlawfully" would include that element of an offense expressed in the phrase "without authority of law." And this is all that is decided in *State v. Taylor* and *Schley v. State*, supra. But is "unlawfully" or "feloniously" either inclusive of, or the equivalent of "without authority from the Secretary of the Treasury," as used in the statute? We think not. "Without authority from the Secretary of the Treasury" is, we think, broader than "unlawfully" or "without authority of law;" for one might have the authority of the Secretary of the Treasury and still be without the authority of law, because the Secretary of the Treasury himself might be without authority of law in granting the permission. Indeed, "authority," as the word is here used, is not what the Secretary of the Treasury had the power to grant, but what he purported to grant. And though "feloniously" implies intent, it is intent only to commit the crime set forth, and does not supply the omission where, by omitting some element other than intent, no crime is set forth.

But the second two counts charge that plaintiff in error "unlawfully and feloniously had in his possession, with the intent to fraudulently and unlawfully use the same," certain dies, hubs and molds for making and forging counterfeit coin of the United States—a charge that clearly falls within the second clause of the statute. Two of the counts, therefore, state an offense under the statute and two fail to state an offense under the statute. The verdict was a general verdict of guilty upon the four counts. No question was raised except upon the sufficiency of the indictment upon a motion in arrest of judgment.

The case thus falls within *Ballew v. United States*, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388, which requires that the general judgment rendered by the Court below should be reversed and the cause remanded to that Court, with instructions to enter judgment upon the third and fourth counts of the indictment, and for such proceedings with reference to the first and second counts as may be in conformity with the foregoing opinion.

And it is so ordered.

DOWAGIAC MFG. CO. v. MINNESOTA MOLINE PLOW CO. et al.†

SAME v. SMITH et al.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1910.)

Nos. 3,041, 3,042.

1. PATENTS (§ 312*)—INFRINGEMENT OF IMPROVEMENT PATENT—PROFITS RECOVERABLE.

The Hoyt patent, No. 446,230, for a grain drill, is for a combination of old elements with a single novel element added for the purpose of giving an independent spring pressure to each of the shoes of the drill, and, in order to entitle the owner to recover profits from an infringer, it is indispensably necessary that the proofs should enable the court to apportion the profits between the novel and only patentable feature and the remainder of the structure.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.*

Accounting by infringer for profits, see note to *Brickill v. City of New York*, 50 C. C. A. 8.]

2. PATENTS (§ 325*)—SUITS FOR INFRINGEMENT—COSTS OF ACCOUNTING.

Where, on an accounting in an infringement suit, complainant is awarded only nominal damages, it may properly be taxed with all the costs of the accounting, including the hearing on exceptions to the master's report.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607-612; Dec. Dig. § 325.*]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suits in equity by the Dowagiac Manufacturing Company against the Minnesota Moline Plow Company and Thomas H. Martin, and by the same complainant against Ernest F. Smith and Luppó Zimmer. Decrees awarding complainant nominal damages only in each case, and it appeals. Affirmed.

See, also, 118 Fed. 136, 55 C. C. A. 86.

Fred L. Chappell, for appellant.

Thomas A. Banning (Banning & Banning, on the brief), for appellee Minnesota Moline Plow Co.

Julius S. Starr, for appellees Ernest F. Smith and Luppó Zimmer.

Before HOOK and ADAMS, Circuit Judges, and McPHERSON, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 8, 1910.

ADAMS, Circuit Judge. These were suits in equity to enjoin the infringement of United States patent No. 446,230, granted to Will F. Hoyt, February 10, 1891, and for an accounting of damages and profits. The Circuit Court sustained the patent, awarded an injunction against infringement, and referred the causes to a master to take the account. He reported for nominal damages only. The Circuit Court confirmed the report and entered final decrees accordingly. Complainant appeals.

The only question is whether the proof warranted a finding for substantial damages. The invention was for an improvement in grain drills of a well-known pre-existing type, the "shoe drill." Its object, as stated in the specification of the patent, was "to provide an independent spring-pressure for each of the shoes and covering-wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering-wheels may be raised from the ground when the implement is not in use or when transporting it from one field to another."

The patent assumes the existence of practically all the elements of well-known grain drills then in existence except the means for exerting an effective pressure upon the shoes in order to elevate or depress them as occasion required. The claims provide for a certain spring metal pressure rod to accomplish this purpose. The interposition of this rod, in combination with old elements, constituted the invention of the patent.

The principle and scope of the invention have been the subject of considerable judicial inquiry, and the results may be briefly stated: In *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 Fed. 716, 721, 41 C. C. A. 627, 632, it was said:

"Grain drills were old. Shoes and press-wheels are elements found in other structures. * * * That Hoyt's drill is a marked improvement over older structures is most clear. * * * Hoyt was not a pioneer. But this invention is clearly a meritorious one. * * *"

In *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 55 C. C. A. 86, 89, 118 Fed. 136, 139, this court had the Hoyt patent under consideration and said of it:

"The function of the device in the Hoyt patent was to control the depth of the cut of the shoe by a regular pressure easily exerted by means of a lever, and by the same means to regulate the shoe in uneven ground, and to raise the shoe from the ground when not in use. The principle of the combination was old. The result attained old. * * * Hoyt, it is true, was not a pioneer."

It was there said by Judge Thayer, in a dissenting opinion not differing in this respect from the majority, as follows:

"Hoyt's patent, confessedly, does not cover a pioneer invention, but merely a new combination of old elements to accomplish a result which had previously been accomplished. * * * When the Hoyt patent was issued, what are termed 'shoe drills' were in common use, and various means had been employed by the manufacturers of such drills for applying pressure to the shoes, and for elevating them when the operator desired to do so."

See, also, *Dowagiac Mfg. Co. v. Fowler*, 58 C. C. A. 643, 121 Fed. 988.

In *Dowagiac Mfg. Co. v. Brennan & Co.*, 62 C. C. A. 257, 259, 127 Fed. 143, 145, the Circuit Court of Appeals for the Sixth Circuit, in considering this patent, said:

"The objects which the inventor had in view were twofold: First, to provide means for depressing the shoes of the drill to meet the requirements of its movements when in operation upon differing and uneven surfaces; and, second, to provide means for lifting the shoe and its attachments off the ground while the drill is being moved from place to place. There were in use devices for both these purposes, but they lacked the desired simplicity, convenience, and ease of management. * * * Some, perhaps all, of these advantages had, in a way, been supplied by the former art; but they had not, so far as we can see, been so completely gathered together or attained in so simple and useful a way."

In view of these decisions, it is unnecessary to enter upon any independent discussion of the scope of the patent. While its claims call for all the elements of a then well-known grain drill, namely, transporting wheels, frame, hopper, shoe, draft-rods, clamping-plates, etc., the spring metal pressure rod used in combination with those elements constitutes the pith of the invention. It rests in the improvement of a specific part of a well-known structure.

Its character and scope have been thus briefly adverted to because they are important in determining the true measure of recovery for its infringement. The general rule in patent cases, like all others, is that a complainant is entitled to recover damages for the loss he has sustained by reason of the wrongful acts of the infringer, and the burden is on him to show how much it is. This was laid down by Mr. Justice Field, speaking for the Supreme Court, in the case of *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371. He said:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated."

And quoting from Mr. Justice Blatchford, who was the trial judge in the case, he added:

"The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative."

Authorities to the foregoing general effect are numerous, and their citation would be useless.

Complainant offered proof tending to show the profits made by defendants in sales of the entire structure without making any apportionment of them to the patented feature, as distinguished from the balance of the drill. It claimed the doctrine of apportionment to have no application, first, because, although the patent contains but one novel element, the combination of that element with the others constitutes an appropriation of all of them in combination. In other words, the contention is that, because the Hoyt patent is a combination patent in which one novel feature is combined with several not novel, each and all of the elements, associated in that combination, are, for

the purposes of an accounting, to be considered as appropriated by the patentee, and, if there is an infringement of the novel feature, all the profits made by the infringer upon the whole combined structure are recoverable, and that proof of those made by reason of the novel feature alone is unnecessary. Reliance for this contention is placed upon the cases of *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 89 C. C. A. 26, 160 Fed. 948, and *Brennan & Co. v. Dowagiac Mfg. Co.*, 89 C. C. A. 392, 162 Fed. 472.

Without now analyzing these cases, it serves our present purpose to say that if they support the contention of the complainant they seem out of harmony with the doctrine of the Supreme Court and our court as disclosed in many cases and particularly the following: *Garretson v. Clark*, *supra*; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; *Crosby Valve Co. v. Supply Valve Co.*, 141 U. S. 441, 453, 12 Sup. Ct. 49, 35 L. Ed. 809; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 147, 14 Sup. Ct. 295, 38 L. Ed. 103; *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co.*, 173 Fed. 361, 97 C. C. A. 621.

These cases have recently been considered by us in an opinion written by Van Devanter, Circuit Judge, in the case of *Brown v. Lanyon Zinc Co.*, 179 Fed. 309, 102 C. C. A. 497, where a conclusion was reached adverse to complainant's present contention.

These authorities make it clear, we think, that an apportionment of profits between the patented and unpatented parts of the drill was indispensably necessary. The invention did not inhere in the entire machine as an entity, but was only an improvement in a single element of an otherwise well-known device.

It is next contended that the entire value of the machine as a marketable article was properly and legally attributable to the particular patented feature, that it was derived from the Hoyt invention exclusively, and, therefore, within the rule laid down in the cases already cited and *Westinghouse v. New York Air Brake Co.*, 72 C. C. A. 61, 140 Fed. 545, it was entitled to recover all the profits which the defendant made by the sale of the grain drills embodying the novel feature.

This depends upon the facts of the case, and they upon the evidence of the witnesses. The master who took the evidence heard the witnesses, observed their demeanor, and formed his conclusion as a result of all those considerations which appropriately affect the mind of a trier of facts. His conclusion was reviewed on exceptions by the learned trial judge. Both of them found against the contention. There being no obvious error of law or serious mistake of fact, their findings will be accepted as true. *Moline Plow Co. v. Carson*, 18 C. C. A. 606, 72 Fed. 387; *Brown v. Lanyon Zinc Co.*, *supra*. In this case not only is their conclusion presumptively correct, but a careful examination of the proof convinces us that it is actually so.

Complainant next argues that its grain drill was so peculiarly adapted for use in what was known as the Northwest Territory that it had superseded all other grain drills in that territory and could and

would have been supplied with reasonable promptness by the complainant if the defendants had not entered the field, and for that reason, within the rule laid down in *Manufacturing Co. v. Cowing*, 105 U. S. 253, 26 L. Ed. 987, it was entitled to recover as damages all it would have made by selling its machine to all the persons who purchased from the defendants in that territory. This contention also depended upon the proof. The master and the court below found against complainant on it, and there is not only ample evidence to support their finding, but, in our opinion, gathered from a careful review of the proof, they could not well have found otherwise.

One question remains for consideration. The costs of the accounting were large, and, in view of the fact that complainant recovered only nominal damages, the trial court ordered it to pay all costs attending the accounting, including the hearing on the exceptions to the master's report. We think this was right. Common practice in such cases seems to be to award the costs of the accounting against a complainant who without legal cause necessitated them. *Kirby v. Armstrong* (C. C.) 5 Fed. 801; *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040; *Robbins v. Illinois Watch Co.* (C. C.) 78 Fed. 124; *Kansas City Hay Press Co. v. Devol* (C. C.) 127 Fed. 363.

While it is a rule of general application that the award of costs in equity rests in the sound discretion of the chancellor and is made according to the facts and circumstances of each particular case, we think the practice referred to should be a general guide.

The decrees as rendered must be affirmed.

NOTE.—The following is the opinion of Amidon, District Judge, in the court below:

AMIDON, District Judge (orally). These suits in their previous stages have established the validity of the complainant's patent, and have established that the defendants have infringed that patent. The causes were referred to masters for an ascertainment of the extent of the complainant's damages by reason of such infringement.

The rule in a patent cause is not different from what it is in any other cause in this particular, that the burden of proving the extent of his damages is upon the plaintiff. He comes forward with the charge, not only that the patent has been infringed, but that he has been damaged; and it is incumbent upon him to prove the character and the extent of the damage in order to justify the court in entering a judgment in his favor.

In the presentation of his cause before the masters the complainant sought to recover both the profits which he claims the defendants secured by reason of their unlawful sale of his invention and also the damage which he claims that he suffered by reason of such sales.

In order to pass upon the question of damages in these cases, it is of the first importance that the court ascertain the extent of the complainant's invention—not the extent of his manufacture, but the extent of his invention. The wrong that has been done him is a violation of the patent securing to him the invention.

Now in his claims and specifications he sets forth his invention in this language:

"This invention relates to new and useful improvements in grain drills commonly known as 'shoe drills'; and it consists in a certain construction and arrangement of parts, as hereinafter more fully set forth, the essential features of which being pointed out particularly in the claims.

"The object of the invention is to provide an independent spring pressure for each of the shoes and covering wheels of the drill, whereby the work of

the drills is rendered efficient in uneven ground, and to provide means whereby said shoes and covering wheels may be raised from the ground when the implement is not in use or when transporting it from one field to another."

The essential feature, therefore, of his invention, is not a press drill, but it is this spring pressure device for pressing the shoes into the ground. This is his invention, and it is the invasion of that that constitutes the defendants' wrongdoing.

The complainant, having made that invention and secured a patent for it, proceeded to manufacture the entire structure in which it is embodied, making a grain drill, consisting of tongue, frame, seed box, and wheels, and all the other elements of a large and complicated machine. His profits accrued from the manufacture of that machine and its sale, not from the manufacture and sale of his invention.

The defendants, in their infringement of the patent, sold structures that consisted of entire grain drills. Their profits were derived from the entire structure, and not from the subordinate improvement of the complainant's invention. And now the complainant comes forward and says: "It cost you to manufacture this grain drill, the entire structure, \$20, and you sold it at \$40"—I am not attempting to give the exact figures, but only something by way of illustration—"therefore there was a profit upon each grain drill that you sold, embodying my invention, of \$20; therefore I am entitled to recover of you for every grain drill that you sold the sum of \$20." That is not only unreasonable, when brought to the standard of common sense, but it is in violation of the well-established principles of law. Where an invention consists simply in an improvement of an established structure or machine, and there is an infringement of the patent, the patentee, when he seeks to recover damages, is bound to apportion the profits according to the extent of his improvement, when estimated in the light of the entire structure. He is bound to bring forth evidence himself upon that subject that will make plain, reasonably plain, the extent of his damages by reason of the infringement of his patent. The complainant here has not attempted to do that. There is nothing in the record from which any finding could be made. On the contrary, the complainant says: "My invention is a combination invention, and I have specified in my claims all the elements of a grain drill, and therefore my structure is an entirety, and whoever sells a structure embodying my invention is accountable to me for the entire structure which he sells." I think the complainant has proceeded upon an unjustifiable ground.

Then, upon the other branch of the case, the complainant says: "If the defendants had not sold their infringing machines, I should have sold as many more of my machines as they sold of the infringing machines." But the evidence shows that this was not an open field, in which the complainant's machine and the defendants' machines were the only competitors. The evidence shows clearly that there were a large number of other grain drills on the market, and that at an early stage of the period of infringement there entered the field a new device, known as the 'disc grain drills,' and that that form of structure has proven so much more efficient than the shoe drills that it had well-nigh driven the shoe drills out of the market by the close of the year 1902.

The only evidence there is that, if the infringing structures had not been sold, the complainant's structure would have been sold in a number equal to the infringing structures, is that those infringing structures embodied the complainant's grain drill, although they were sold under another name. But the evidence satisfies me, as it satisfied the masters, that there were many other considerations that were important and sometimes controlling considerations in the determination of what grain drill a purchaser would buy. It does not follow by any means that a farmer who bought a McSherry drill, if he had not gotten it, would not have purchased a Monitor, or a Van Brunt, or some of the other numerous grain drills that were on the market, and surely during the greater part of the period of the infringement it does not follow that if the purchaser had not obtained the McSherry drill, for example, he would not have purchased the disc, as the considerations which lead and control a purchaser are the way the subject is presented to him, the fact that he has had other dealings with the jobber, often the fact of credit, and

a hundred and one of those minor considerations which we all know are very efficient in determining, with the ordinary purchaser, where and what he will buy, and that the simple structure is not the only element to be taken into consideration.

The authorities are plain that a presumption of fact does not arise from the mere fact that infringing devices have been sold, that if they had not been sold the patented structure would have been sold, and yet that is the only evidence that is before me on the subject.

Considerable has been said in the argument to the effect that these defendants are "wanton" infringers of the complainant's patent. I do not think the evidence justifies any such finding. The fact that these defendants saw fit to contest the suit for infringement, acting upon the belief that their structure in fact did not infringe, does not make them out wanton and willful infringers of the complainant's rights. The cases in which that term has been most frequently applied are those in which a party, having a license for the sale of a patented article, has proceeded to sell the patented article after the cancellation of his license—some such situation as that.

We all know that whether a given structure is an infringement of a patent is a matter depending upon many nice considerations of fact, and many difficult questions of law, and that they are matters as to which laymen and lawyers and even courts entertain divergent opinions. In some features of the great body of litigation that has grown up on this patent for the Dowagiac drill, it has appeared that some considerable divergency of judicial opinion has arisen as to what constituted an infringement of the patent. Now, it would be a serious and unjustifiable charge to say that every defendant who saw fit to litigate his rights in court under such circumstances was a wanton and willful infringer of the complainant's invention.

In the case before Judge Clark, it seems that the evidence there was such as to lead him to believe that the defendants in that particular case were guilty of wanton and willful infringement. The evidence in that case is not before me, but sufficient excerpts from it have been presented here to show that the conduct of the defendants in that litigation was wholly different from the conduct of the defendants here. There the defendants were guilty of evasion and misrepresentation, setting up from time to time wholly different and inconsistent theories, and saying that statements which they had produced as to their business were given under a misapprehension at one time, and starting in upon an entirely different basis at another time, and of course a defendant who acts in that way does give a just ground for the inference that his conduct is willfully wrong.

Here the defendants have come forward with perfect frankness, have given a full and complete disclosure, and have met every requirement of open, frank, and honest dealing that the litigation could require of them.

A presumption exists that the findings and decision of a master in such cases as these are correct. The burden is upon the party excepting to point out and satisfy the court that the masters have erred. I have not been satisfied by the arguments presented to me that the masters were guilty of any error in either of these cases. I have examined with considerable care Mr. Hitchcock's very full and complete review, both of the facts and of the law in this case, and have been greatly aided by the same. I believe he has presented the case fairly and justly, and that his conclusions are amply supported by the facts and the law.

The exceptions to the reports of the masters will be overruled, and a judgment entered in each of the cases in accordance with their reports.

COMPTOGRAPH CO. v. BURROUGHS ADDING MACH. CO. (two cases).
(Circuit Court of Appeals, Seventh Circuit. October 14, 1910. Petition for
Rehearing Overruled November 18, 1910.)

Nos. 1,674, 1,679.

PATENTS (§ 214*)—LICENSES—GROUNDS FOR CANCELLATION—REPUDIATION OF
CONTRACT BY LICENSEE.

The fact that a licensee under a patent for the full term of its life, under a contract which he has fully executed by payment of the agreed consideration, although he was to pay further royalties if the patent was sustained in an infringement suit brought by the licensor against a third party, by leave appeared by counsel in the appellate court in such suit and filed a brief in aid of the defendant, attacking the validity of the patent, did not constitute a repudiation of the license contract which entitles the licensor to its cancellation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.*]

Appeals from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suits in equity by the Comptograph Company against the Burroughs Adding Machine Company. From a decree (175 Fed. 787, 792) in each case dismissing the bill, complainant appeals. Affirmed.

The bill, No. 1674, was to restrain infringement of letters patent No. 628,176, issued to Dorr E. Felt, July 4, 1899, for a Tabulating Machine; to which appellee pleaded that it was licensed under said patent, and, on account of said license, could not be held for infringement—counsel for appellant stating upon the record that appellant would not claim that appellee had infringed any of the claims of the patent in suit other than those covered by the plea; and upon this plea issue was joined, and proof had. The decree appealed from held that the plea was proved, and dismissed the bill for want of equity.

The bill, No. 1679, was for cancellation of the license above mentioned; to which a general demurrer was filed, which, upon hearing, was sustained and a decree entered dismissing the bill. Practically, the same questions are presented on the appeals in both cases. The two appeals will, therefore, be considered together in this opinion. The facts are stated in the opinion.

John W. Munday, for appellant.

Edward Rector and Robert H. Parkinson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion:

The patent, involved in these suits, was before this Court in the case of the Universal Adding Machine Company v. Comptograph Company, 146 Fed. 981, 77 C. C. A. 227, and was held invalid on the ground that it was either anticipated by the Hiett and Cable patent, which had been issued before this patent was applied for, or that, accepting the contention that the invention was conceived in 1890, so as to carry the concept back of the Hiett and Cable patent, the same had been abandoned by non-use. The correctness of that decision is not involved in this case; nor is any evidence brought into this case that was not in that case, except as it may bear upon the question of whether the license agreement of January 20th, 1904,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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has been renounced, repudiated, or forfeited by the conduct of appellee and its counsel in that case, as contended for now by appellant.

The original license agreement is admitted. The contention is that it has been renounced. The agreement, as executed, after reciting that appellant is the owner of the letters patent above described, relating to adding machines equipped with transversely-movable wide-frame paper-carriages, and that appellee's assignor, the American Arithmometer Company, had been and was then engaged in the manufacture and sale of adding machines employing transversely-movable wide-frame paper-carriages, claimed by the appellant to embody a material part of the invention patented, in consideration of the payment of the sum of \$5000 in cash by the American Arithmometer Company to appellant, releases and discharges the said American Arithmometer Company, its agents and customers, from all claims whatsoever, growing out of said letters patent, on account of the machines manufactured by the said American Arithmometer Company prior to the first day of January, 1904; and grants to the said American Arithmometer Company an exclusive license, except as against appellant's right to manufacture, use and sell such machines, for the full term of the patent. The agreement then further provides as follows:

"3. Said first party (appellant) agrees to promptly bring suit upon said letters patent against existing and future infringers thereof, and to diligently and vigorously prosecute such suit or suits to a final determination, for the purpose of judicially determining the scope and validity of said letters patent and of suppressing infringements thereof and securing a monopoly of said invention to the parties hereto.

"4. Said second party (American Arithmometer Company, appellee's assignor) agrees, upon the terms and conditions herein specified, to pay the first party the following royalties upon all machines embodying the invention described and claimed in said letters patent which said second party may manufacture on and after the first day of January, 1904, and during the full term of said letters patent, and all re-issues and extensions thereof:

"a. On all machines manufactured by the second party during the pendency of the first suit of the aforesaid litigation, and prior to a final determination thereof, the sum of one dollar per machine.

"b. On all machines manufactured by the second party after a final determination of the first suit of said litigation which shall result in an adjudication establishing the validity and scope of said letters patent in such manner as to control and monopolize under it all adding machines employing transversely-movable wide-frame paper-carriages of the general nature and purpose of the machines now being manufactured by the parties hereto, the sum of ten dollars per machine until an aggregate royalty at that rate of the sum of two hundred thousand dollars shall have been paid by the second party to the first party.

"c. On all machines manufactured by the second party after the payment of said sum of two hundred thousand dollars, and during the remainder of the term of said letters patent and any re-issues and extensions thereof, the sum of five dollars per machine.

"5. Said second party agrees to pay the first party a minimum sum of ten thousand dollars prior to a final determination of the first suit of the aforesaid litigation, on account of the royalties provided for in clause 4 hereof, but the payment of five thousand dollars upon the execution of this instrument, as hereinbefore provided, shall be considered a part of and an advance payment upon said sum of ten thousand dollars. Said final determination of the first suit shall be secured, if possible, on or before December 31, 1905, but if not had by such date party of the second part shall be relieved of the

payment of any royalties whatever upon any machines manufactured by it between December 31, 1905, and the date when such final determination shall be had."

After making provision for the keeping of true, full and accurate accounts by appellee's assignor under the license, with prompt remittance for royalties due thereunder, the license agreement further provides:

"7. This contract is based upon the assumption that the aforesaid letters patent are good and valid in law, and that they can be and will be sustained by the courts and given a construction which will secure to the parties hereto a substantial monopoly of the manufacture, use and sale of all adding machines employing a transversely-movable wide-frame paper-carriage, and is to be construed and enforced between the parties accordingly; and if, as a final result of the litigation hereinbefore mentioned, or as a final result of any subsequent litigation upon said letters patent, said letters patent shall be declared invalid or shall be so construed by the court as to fail to substantially cover and control all adding machines employing such transversely-movable wide-frame paper-carriages, then, and in such event, said second party shall have the right to surrender this agreement and license and be relieved of any further obligations thereunder."

Under this license agreement, appellee and its assignor has paid appellant \$12,209, which, admittedly, covers all the royalties due or claimed to be due thereunder, at the time that the conduct took place which is said to have been a repudiation, renunciation or forfeiture, upon the part of appellee, of the license; and up to that time, too, appellee is admitted to have fully performed all its obligations to appellant under the license contract.

The conduct of appellee, urged as a repudiation, renunciation or forfeiture of the license, was the filing of a brief by appellee's counsel in this Court, on behalf of appellee, in the suit of appellant against the Universal Adding Machine Company, *supra*, brought by appellant pursuant to, and in accordance with, the terms of the license contract, and determined first in favor of appellant in the Circuit Court, and subsequently, on appeal, against appellant in this Court, as above stated; the brief being filed by leave of this Court, obtained upon application of counsel for appellee, of which due notice was given to the parties in the then pending case, including counsel for appellant.

The record before us does not disclose any intention, upon the part of appellee, in the filing of that brief, to consciously repudiate, renounce or forfeit the license contract; on the contrary, it was clearly stated that they were appearing as persons interested in the license contract and under the terms of that license. The record does not disclose that appellee took any part in the making of the record in the case of the Universal Adding Machine Company v. Comptograph Company. So far as anything going into the record was concerned, in the way of facts upon which the judgment of the Court was to be invoked, nothing was either added or subtracted by the brief filed by appellee. The conduct of appellee was confined to an interpretation solely of that record for the benefit of the Court. There is nothing in the record before us showing that the appearance of appellee, by brief, resulted in the appellant's changing its position

in any respect; all that appellant did, after appellee's brief was filed, was to write a letter to appellee, stating that it took the filing of that brief as a repudiation and renunciation of the license; to which no reply was sent. True, appellee in its brief interpreted the evidence as showing facts different from the interpretation put upon the same evidence by appellant; and true, also, appellee, in its brief, stated the law applicable to the evidence differently from the law as stated by appellant; but, unless a licensee, situated as this licensee was, must remain silent at the peril of losing his license, even though, thereby, the Court may be misled into misinterpreting the facts or misapplying the law, this appellant has set up no sufficient answer to the plea of appellee in case No. 1674, nor has it set out in its bill, in case No. 1679, facts which would warrant a court of equity in decreeing cancellation of the license contract. Is it, therefore, the doctrine of the law that a licensee, situated as this licensee was situated, may not inform the Court of its views as to what interpretation should be put upon the evidence, and what application should be made of the law (having had no part in the making of the record), except at the peril of losing its license?

We think not. No case is called to our attention that applies the doctrine, that a licensee or tenant may not deny the landlord's title, to cases like this. *Indiana Mfg. Co. v. J. I. Case Threshing Machine Co.*, 154 Fed. 365, 83 C. C. A. 343, is cited, emphasis being laid upon the sentence in that case that the patentee has the right to the licensee's "silence respecting the validity and prima facie scope of the patent." But in that case, the licensee was in default on its contract, and was refusing to pay the stipulated royalties on the ground that the patent was invalid; the Court simply holding, that in such a suit, to enforce the contract, the patentee, like the landlord, was entitled to have the case heard, as if the contract, as between the parties thereto, was conclusively presumed to be valid and binding. *Willison v. Watkins*, 3 Peters, 43, 7 L. Ed. 596, was the case of a plaintiff seeking to obtain possession of land, which had been in the possession of the defendant and his father continuously for over thirty years—five years adverse possession under the law of the state being sufficient to defeat the landlord's title—and defendant, during all that time, having refused to admit that he held under plaintiff's title. The Court held that such adverse possession defeated plaintiff's title, and dealing with the limitation within which the suit must be brought, used the language quoted by appellant, to-wit:

"If the tenant disclaims the tenure, claims the fee adversely in right of a third person or his own, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry."

But the "disclaimer" or "attornment to another," here spoken of, is, of itself, a breach of the tenant's contract relations with the landlord, if any such relation once existed—a breach, too, that if persisted in for a sufficient length of time would transfer, by operation of law, the title from the landlord to the tenant, and for that reason

alone gives a right of action to recover possession the moment it occurs. *Steam Cutter Company v. Sheldon*, 22 Fed. Cas. 1161, was a license to use a patented invention in a single machine in the licensee's quarry, and nowhere else; provided, however, that additional machines might be used upon the payment of certain additional stipulated sums. Covering the single machine to be used in the quarry, the royalty was paid, and thereby the license fully performed; but without paying the additional sums, the defendant undertook to use additional machines and thereupon was sued for infringement; the Court holding that the license contract was divisible, the portion relating to the single machine in the quarry becoming absolute upon the payment of the stipulated royalty, and the portion of the contract relating to possible additional machines being merely options that, upon failure of acceptance by payment when the machines were used, constituted such use of the machines, independently of the original machines, infringements of the plaintiff's patent. Certainly, no such proposition as appellant contends for here, was involved in that case.

The true principle, it seems to us, is set forth by the Supreme Court in *Blight's Lessee v. Rochester*, 20 U. S. 547, 5 L. Ed. 516 (partly quoted by appellant). The attempt there was to apply the principle of legal policy, that forbids a party denying the title under which he has received a conveyance, to vendor and vendee. That principle of legal policy is stated as follows:

"If he is bound in law to admit a title which has no existence in reality, it is not on the doctrine of estoppel that he is bound. It is because, by receiving a conveyance of a title which is deduced from Dunlap, the moral policy of the law will not permit him to contest that title. This principle originates in the relation between lessor and lessee, and so far as respects them, is well established, and ought to be maintained. The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, he holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor, without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtains and holds possession, and breaking that faith which he has pledged and the obligation of which is still continuing, and in full operation."

Or, to put the doctrine on a more practical basis, where suit is brought by the landlord against the tenant to enforce the landlord's title, recognized in the contract under which the tenant obtained possession, the Courts will not, at the instance of, or as a matter of defense by the tenant, put the landlord in the position of proving his title before he can collect his rent—the tenant, in the meantime, remaining in a position where he may eat off of the stock, while the title of the one who gave him the stock is being settled.

But neither the moral policy, nor the practical consideration, on which this doctrine is founded, is present in this case. The suit in which appellee appeared by brief was not the case of the licensor against the licensee to enforce the contract. No license money was due under the contract. There was no refusal to pay license mon-

ey. There was no putting of the licensor, as against the licensee, to prove his title while the licensee was eating off the stock. There was no reason or moral policy why the brief should not be filed. Indeed, appellee was standing squarely upon its contract with the appellant. It had, as assignee of the American Arithmometer Company, settled and paid up for all past infringements; it had settled and paid up for all royalties thus far accrued; it agreed that in case the patent embodied a substantial monopoly of adding machines employing a transversely-movable wide-frame paper-carriage, and after such monopoly had been judicially determined, it would pay additional royalties. These royalties were large; the monopoly itself, if upheld, was extremely valuable; and the question whether the monopoly had been judicially determined, was, therefore, a matter of deep consequence to appellee. Why may not the appellee, without violation of its contract, or violation of any ethical duty it owes to appellant, contribute toward clarifying the vision of the Court by which this judicial determination is to be made both right and final? We see nothing in the conduct of appellee that is a renunciation, repudiation or forfeiture of its contract; on the contrary we see simply a precaution upon its part that the judgment of the Court, upon which its additional obligations and its additional advantages alike depend, shall be as free from error as a full discussion of the record before the Court can make the judgment, that is to follow, free from error. The decree of the Circuit Court is affirmed in each case.

CHICAGO GRAIN DOOR CO. v. McGUIRE-CUMMINGS MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,648.

PATENTS (§ 328*)—INFRINGEMENT—BRACKET FOR CAR DOORS.

The Hill patent, No. 527,792, for a bracket for car doors, fastened to the car body by a lag screw having its head countersunk in the bracket, so that it cannot be unscrewed except by rotating the bracket, which is prevented by the car door when in closed position, is not for a generic invention, in view of the prior art, but is limited to the specific method in which a previous concept is embodied. As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit in equity by the Chicago Grain Door Company against the McGuire-Cummings Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

Otto Raymond Barnett, for appellant.

Charles K. Offield, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion:

Experience has pointed out that thieves are much more likely to break open freight car doors, and steal the contents of the car, where

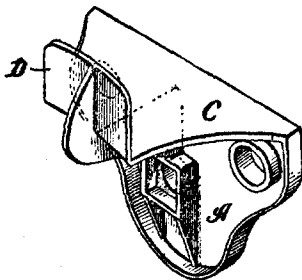
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

the fact that the car has been broken open is not susceptible of quick discovery, than where it is capable of ready detection and discovery; for a quick discovery of the fact that the car has been broken open is followed by an immediate trailing of the thieves. The inventions involved in this suit, both the one relied upon by appellant, and the one used by appellee, were to expose to quick discovery (usually within a day or two at most), by the railway inspectors, the fact that the car had been opened up. And to this end, the purpose of the inventions was to so construct and apply a bracket which could not be removed and replaced while the car door was closed.

The common type of box car is provided on opposite sides, midway of its length, with doorways, through which freight is loaded and unloaded—the doors hung on rollers on an overhead track, sliding along outside of the car and overlapping it—as distinguished from a different type of car in which the doors slide into and fit flush in the doorway. To keep these doors from being swung outward at the bottom, metal brackets or keepers are provided, whereby the lower edge of the door is confined to the side of the car when in a closed position. And to prevent pilfering of the cars, prior to the conception of the idea which appellant's patent was intended to further, reliance was placed upon a locking of the forward edge of the door by means of a staple and interweaving wire or metal strip, the ends of the wire or metal strip being fastened together by a lead seal. With the ordinary bracket then employed, this use of a seal, and the notice that its breaking gave to the next inspector examining it, was avoided by simply taking out the lag screws with which the bracket was fastened, whereupon the door could be pried out sufficiently to permit of the entrance of a thief, and, the work of stealing accomplished, the bracket restored without any indication of its having been removed, or of the door having been opened. The Hill patent prevents this by so combining the car door bracket with the ordinary commercial form of lag screw, and with the car door itself, that so long as the car door is closed, the lag screws cannot be removed without first opening the door, which, of course, involves the breaking of the seal. The device is illustrated in the following cut:

and its operation is described in the patent as follows:

"In accordance with my invention, I so construct the bracket that after one of its retaining-screws has been partially placed in position, it is necessary to rotate the bracket with the screw, after the manner of a wrench, until the screw has been effectively driven home and the bracket secured to its proper operative position; the bracket being held in such position by the screw. It is obvious that, in order to remove a plate so secured to the car-body, it is necessary first to rotate the plate with the screw, in the opposite direction from that in which it was previously rotated, in order to effect its detachment, and it is also obvious that so long as the car-



HILL THIEF PROOF BRACKET.

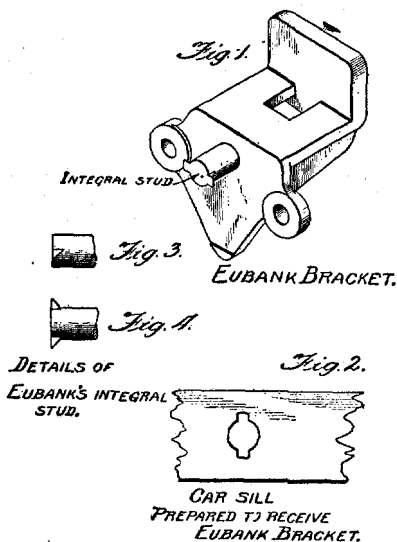
door extends across such plate and in contact therewith, such reverse rotation of the bracket for the purpose of detachment is rendered impossible."

The claims are as follows:

"1. The combination with a sliding-door, of a bracket and an attaching-screw or bolt having non-rotative engagement with the bracket; said bracket having movable contact with a part of the structure in such manner as to prevent rotation of the bracket, substantially as set forth.

"2. The combination with a sliding-door, of a guide-bracket engaged, and held against rotation by the door and a retaining-screw or bolt having non-rotatable engagement with the bracket, substantially as and for the purpose described."

Before inquiring if appellee's bracket infringes this device, we must inquire what is the scope of the Hill patent. In the prior art is the Eubank patent, No. 512,467, illustrated as follows:



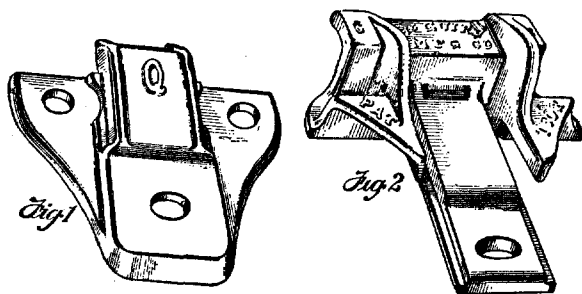
Its purpose is described by the patentee (Eubank) as follows:

"It is well known that great loss is sustained continually by reason of the imperfect fastenings of car doors and that unauthorized persons by removing the nuts and bolts of the ordinary L-shaped guide that is universally employed may pry or spring one corner of the door a sufficient distance from the opening to give access thereto, and this may be accomplished without the breaking of the seal or otherwise giving evidence of the tampering by any external appearance of the car so that the loss is not discovered until the car has arrived at its destination and an inventory of its contents taken.

"The objects of my invention are to so construct the guides for the door that even though the bolts are removed yet it is impossible to remove the guide and open the door without a rupture of the seal."

It accomplishes this purpose by having, in the center of its rear side, an integral stud with inclined binding shoulders. These binding shoulders are placed at the rear end of the stud and arranged diametrically opposite to each other. An opening, of the same shape as the rear end of the stud, is made in the sill of the car, and in applying the bracket, it is turned at a right angle to its normal position when in use, so that the binding shoulders will pass through the grooves provided for in the socket or opening in the sill of the car. The bracket is then pushed backward, and when its flange is against the surface of the wall of the car, it is given a quarter turn, the inclined or binding shoulders cutting their way into the fiber of the wood and serving to draw the bracket snugly against the wall of the car. The bracket cannot now be drawn out again, except by rotating it back again so as to bring the binding shoulders of the stud into the grooves,—such rotation being prevented by the foot of the door when in a closed position. An inspection of the drawings and description of this patent show that

the difficulty that Hill intended to overcome was fully appreciated and overcome by Eubank, both patentees using the foot of the door to prevent the bracket from being rotated—Eubank utilizing a stud, with binding shoulders mounted on its rear end, forced into the grain of the wood; and Hill utilizing, to the same end, the ordinary form of commercial lag screw, with a square or polygonal head countersunk into the metal of the bracket. The Hill patent, therefore, is not generic, nor is it the first to use the foot of the door to prevent the bracket from being rotated. Its merit consists entirely in countersinking the bolt heads into the metal of the bracket in such a way, that for the last few turns of the bolt, in applying the bracket, the bracket itself can alone be used as the wrench for this purpose. The alleged infringing bracket is illustrated as follows:



and consists of two members; the first of which has a wide groove, longitudinally of its inner surface and in the center thereof, and is fastened to the body of the car by one or more screws of any suitable description. The second member consists of the usual L-shaped guide at its upper end, below and on each side of which are wings carrying small cap-plates, adapted to cover the heads of the screws in the first member when the whole is assembled and applied. At the lower end of the second member is a tongue, adapted to fit in the groove of the first member. In applying the bracket, the first member is fastened to the body of the car, usually by three screws of any suitable kind, and the tongue of the second member is inserted in the groove of the first member. When the second member is in place, as above stated, the cap-plates cover the heads of the screws of the first member, thereby preventing their removal without withdrawing the second member, which cannot be done while the car door is in a closed position with its lower edge resting upon the guide. This device cannot be employed as a wrench, and its nearest possible approach to the Hill patent is in the use of the cap-plates to prevent removal of the screws with which the first member is fastened to the body of the car. But we do not understand that there is any such patentable novelty in that concept, standing alone, that would entitle Hill to say that appellee had borrowed one of his ideas. Indeed, to prevent the removal of screws or bolts by these means is plainly obvious.

Proceeding on the idea, then, that Hill's patent is not for a generic invention, but is limited to the specific method in which a previous

concept is embodied, we think the alleged infringing device does not infringe.

The decree of the Circuit Court is affirmed.

INTERNATIONAL HARVESTER CO. v. RICHARDSON MFG. CO.

(Circuit Court of Appeals, First Circuit. December 6, 1910.)

No. 854.

PATENTS (§ 328*)—INFRINGEMENT—MANURE SPREADER.

The Kemp patent, No. 632,124, for an improvement in manure spreaders, narrowly construed, as it must be to sustain its validity, in view of the prior art, *held* not infringed by the device of the Brown patents, Nos. 731,539 and 821,779.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Suit in equity by the International Harvester Company against the Richardson Manufacturing Company. Decree for defendant (172 Fed. 436), and complainant appeals. Affirmed.

Robert H. Parkinson and Thomas A. Banning (Banning & Banning, on the brief), for appellant.

Guy Cunningham and Fish, Richardson, Herrick & Neave, for appellee.

Before PUTNAM and LOWELL, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The Kemp patent concerns a manure spreader.

Certain claims having reference to a tailboard, which holds the manure away from the beater, and prevents it from clogging while the load is being put into the box, and prevents the manure from coming in contact with the beater before the beater is put in operation to do the work of spreading, and to a stop, which prevents the bottom of the cart and the beater from being actuated before the tailboard is raised from between the manure and the beater, were held by the court below to be valid, with the faint praise that the problem involved was not a difficult one, and that the complainant was therefore not entitled to a broad patent or a broad construction of the claims. The case in the Circuit Court was reported in 172 Fed. 436.

What the patentee intended to provide was something for raising the tailboard by a mechanism starting at the front of the wagon near the driver's seat, and connecting with the rear part of the wagon, whereby the tailboard could be raised, and the beater set in motion to operate upon the load of manure, thereby spreading it upon the ground—together with a stop which should prevent the mechanism designed to move the bottom of the cart box and its load rearward upon the beater from being thrown into gear before the tailboard or gate is raised.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The patent in these respects was held valid upon such a characterization of the problem involved as would not entitle it to be accepted as a broad patent, and there was no considerable argument before us upon any question as to its validity. Still, as we have to deal with the question of infringement, involving equivalents, it is perhaps not out of place to say that, upon the view we take of the patent, it would at best not receive a more favorable construction in respect to merit than that expressed by the Circuit Court.

We see no reason for disagreeing with the decision of the court below on the question of infringement. Apparently the range of equivalents, as applied to this particular case, was made to depend very much upon the nature of the invention, and, in view of the fact that to sustain the patent the invention must be held to be narrow, the rule in respect to a liberal range of equivalents is, of course, inadmissible. Thus, denying the liberal rule of equivalents, and limiting the Kemp patent to one covering the particular arrangement or means devised and described for accomplishing the result of locating a tailboard in front of the spreader, with means for raising and lowering it, and for preventing the starting of the machine before the board is raised, the learned judge proceeds to a very careful and exhaustive analysis and description of the Kemp device and that of the alleged infringing device and mechanism, with the result of showing that they are substantially different in structure, and in mode of operation. We entirely agree, because we think the circumstances warrant it, with the observation of the Circuit Court that this is not a case in which a defendant has taken the substance of a patent, and has sought to evade infringement through constructing a machine like the patented one with simple changes in details. We do not expressly affirm that part of the decision below which deals with the question of invention involved in the Kemp patent, but leave it with the faint indorsement which that court accorded to it, and, fully agreeing, as we do, with the reasoning and the result as to noninfringement, we have no occasion for reviewing and restating the various substantial differences in the mechanism of the two machines.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

In re SUSSMAN.

(District Court, M. D. Pennsylvania. December 2, 1910.)

No. 1,501, in Bankruptcy.

BANKRUPTCY (§ 399*)—EXEMPTIONS—FORFEITURE OF RIGHT BY FRAUD—CONCEALMENT OF PROPERTY BY OMISSION FROM SCHEDULES.

A bankrupt, who omitted from his schedules certain life insurance policies held by him, and on his first examination denied having such policies, which he had in fact turned over to his father, with the purpose of retaining them for his own benefit, was guilty of fraudulently trying to conceal property from his creditors, which, under the Pennsylvania statute, forfeited his right to his exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of Benjamin Sussman, bankrupt. On review of order of referee disallowing exemption. Affirmed.

Abraham Salsburg, for bankrupt.

W. H. Goodwin, for trustee.

ARCHBALD, District Judge. If the bankrupt was guilty of fraudulently trying to conceal any of his property, he forfeited, according to the state law, his right to the \$300 state exemption. And that he tried to cover up the fact that he had two insurance policies there can be little question. Not only was there no mention of these policies in his schedules, but when he was examined with regard to his property he explicitly denied having any such policies. And it was only at a subsequent hearing, when he was brought face to face with the fact that his books showed the payment of premiums, that he admitted having had two policies; his explanation of his previous denial being that they had been turned over to his father, in consideration of his paying the last premium, and that he thought the creditors had nothing to do with them. The right of the father to hold the policies, upon this plea, was tried out in a separate proceeding, and found to be of no substance, and from what was there disclosed it is clear that this story was merely trumped up to enable the bankrupt to keep his hold on them. It is not as though there was a well-grounded dispute with regard to the ownership, on the strength of which the bankrupt omitted the policies in making up his schedules, or was advised to do so after consulting counsel. In *re Alleman*, 20 Am. Bankr. Rep. 745, 162 Fed. 693; In *re Kyte*, 23 Am. Bankr. Rep. 414, 174 Fed. 867. The omission, as I am convinced, was willful, with the idea of getting the benefit of the policies; the claim of the father being brought forward to make it effectual.

The referee was therefore right in refusing the exemption, and his action is affirmed.

UNITED STATES v. CHIN KEN.

(District Court, N. D. New York. November 22, 1910.)

ALIENS (§ 32*)—PROCEEDINGS FOR DEPORTATION OF CHINESE—BURDEN OF PROOF.

On proof that a defendant, arrested for deportation as a Chinese laborer unlawfully in the United States, is a Chinese person and a laborer, the burden rests on him to show his right to remain in the United States, and he gains no rights by standing mute, but, on the contrary, such conduct justifies his being held strictly to his technical rights.

[Ed. Note.—For other cases, see *Aliens*, Dec. Dig. § 32.*]

Arrest and detention under the Chinese exclusion laws for deportation of Chin Ken, Chin Kit, Toy Sing, and Yew Fung. Order of deportation in each case.

Geo. B. Curtiss, U. S. Atty.

Defendants, pro se; one B. W. Berry claiming to represent and asking to appear for Chin Ken and Chin Kit.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. There was a separate complaint, warrant, and examination in each of these cases, and there will be a separate order and judgment in each.

These persons above named, and who give their names as Chin Ken, Chin Kit, Toy Sing, and Yew Fung, respectively, were found loitering near the depot at Malone, Franklin county, N. Y., about 16 miles from the Canadian border, on the evening of November 10, 1910, without baggage or business, so far as can be ascertained, and thereupon arrested and taken to the Franklin county jail at Malone, and on the morning of the 12th were brought before me and complaints made in writing that they are Chinese persons, laborers, aliens, and found and being unlawfully in the United States in violation of the Chinese exclusion laws. Deportation is sought by the United States.

When brought before me, after issue and service of warrant, Mr. B. W. Berry, an attorney at Malone, appeared also, and, when the case of Chin Ken was called, claimed to appear for him. His right and authority to appear for Chin Ken was challenged by Hon. Geo. B. Curtiss, United States attorney for the Northern District of New York, who was present representing the United States. Mr. Berry said he was willing to be sworn and was sworn in the presence of the defendant Chin Ken, who gave no sign of recognition, and who on three different occasions has refused to claim Berry as his attorney or counsel, and who finally, November 21, 1910, states he does not want an attorney or lawyer now, but later. He speaks and understands English. Mr. Berry claims that he was in the jail the evening of the arrest of these four defendants to see another person, a Chinese person held on the charge of being unlawfully in the United States, and that these defendants came into the room, and that this fifth person asked this defendant if he wanted Berry to appear for him, and that defendant said "Yes." No interpreter was present, but Berry says this fifth person spoke English to that extent. Berry had been informed there were four more Chinese in the jail before they came into the room where Berry was. He says, in effect, he then telegraphed to New York the names of these four defendants, and told his partner, R. M. Moore, these defendants, giving their names, were arrested, and asking if he should defend them, and Moore answered "Yes." He says he did not ascertain the cause of their arrest or the charge against them, but assumed it was for being unlawfully in the United States. Mr. Moore is not an attorney of this court.

Mr. Wallace, an experienced Chinese interpreter of good standing, was sworn as interpreter, and Chin Ken was examined as was Chin Kit, in the presence of Berry, and each asked if he had any lawyer or attorney; if he desired to send for one; told if he did to make it known; that he had a right to send for one or employ one; that he had a right to be represented by counsel, if he desired to be represented by counsel. Also, later if he had employed an attorney or lawyer, and was again informed of his right to be represented by an attorney and of his right to produce witnesses. He was also asked, in the presence of Mr. Berry, if he

knew any one in the room, and if he had had any talk with any one in the room. To all questions except giving his name he refused to answer and stood mute. Proof was taken that he understood what was said. It finally appears that he can and does speak and understand the English language to quite an extent. It was perfectly evident the defendant did not know Berry, and I find as a fact that Berry had not been employed by the defendant, and was unknown to him. The same course was taken with Chin Kit in Berry's presence, and Chin Kit stood mute. Berry was not present at the examinations of Toy Sing and Yew Fung, having left the court. After the examination of the defendants, having explained to each the charge against him and his right to witnesses, counsel, etc., and taking evidence, the cases were held open to November 14th, and then to November 21st, to enable the defendants to produce witnesses, and obtain counsel if they desired so to do. No witnesses have been produced, and no counsel has opposed. Chin Ken speaks English, and can understand it. A further examination was held November 21, 1910, and Chin Ken said in the presence of all the defendants he wanted no lawyer now, by and by, and that he had not had a lawyer. They have written and sent letters and received letters. Proof was taken that the defendants are Chinese persons and laborers. The burden was then on them respectively to prove they are citizens of the United States or for some reason entitled to be and remain in the United States. Sections 2, 3, Act May 5, 1892, c. 60, 27 Stat. 25 (U. S. Comp. St. 1901, pp. 1319, 1320); *Ah How v. United States*, 193 U. S. 65, 76, 24 Sup. Ct. 357, 48 L. Ed. 619; *In re Ching Jo* (D. C.) 54 Fed. 334; *United States v. Wong Dep Ken* (D. C.) 57 Fed. 206; *In re Li Sing*, 86 Fed. 896, 30 C. C. A. 451; *United States v. Lung Hong* (D. C.) 105 Fed. 188; *United States v. Chun Hoy*, 111 Fed. 899, 50 C. C. A. 57; *United States v. Sing Lee* (D. C.) 125 Fed. 627; *Lee Yue v. United States*, 133 Fed. 45, 66 C. C. A. 178; *Low Foon Yin v. United States Immigration Com'r et al.*, 145 Fed. 791, 76 C. C. A. 355; *Toy Tong v. United States*, 146 Fed. 343, 76 C. C. A. 621; *Lee Yuen Sue v. United States*, 146 Fed. 670, 77 C. C. A. 96; *United States v. Hoy Way* (D. C.) 156 Fed. 247; *Ex parte Lung Wing Wun*, 161 Fed. 211.

No rights are gained by standing mute. *United States v. Sing Tuck et al.*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, where as here the defendant stood mute except in giving name. "They were offered a way to prove their alleged citizenship and to be set at large, which would be sufficient for most people who had a case and which would relieve the courts. If they saw fit to refuse that way, they properly were held down strictly to their technical rights," said the court. Also:

"On the contrary, the parties were told that, if they could produce two witnesses who knew that they had the right to enter, their testimony would be taken and carefully considered, and various other attempts were made to induce the suggestion of any evidence to help establish the parties' case, but they stood mute."

Here the defendants have been given more than one opportunity and a week's time to assert they had counsel or witnesses or both, or

to obtain counsel or witnesses or make any statement they desired to make. They stand mute. They have written letters to persons which have been duly mailed by the sheriff, but there is no appearance. They have also received letters. They have been requested to produce papers showing their right to be here, but produce none. Chin Kit had a head tax certificate issued to one Chan Kut by the Dominion of Canada showing that such a person had paid a head tax June 28, 1910, in that Dominion, and that he landed at Vancouver, B. C., June 25, 1910, from Empress of Japan, a steamer running between China and Vancouver. Chin Ken had a certificate signed by United States collector of internal revenues at Portsmouth, N. H., April 11, 1893, showing that one Chin Tia You, a laborer, aged 16 years, was registered at that time. Evidently this is not the same person. If Chin Kit is Chan Kut, it shows him recently in Canada. Chin Ken makes no claim he is the person named in the internal revenue collector's certificate having a photograph attached. Alien Chinese laborers, coming from China to the United States, are now crossing the Canadian border into the United States in several different modes. Some come in the night, some by day driven to a point near the border line, and then walking in, and some have come packed with hay bales in freight cars. They are coming in bunches of from 3 to 15. As a rule they stand mute and are represented by the same attorney who opportunely turns up at the right time, and who, it is stated, is frequently seen in Canada at about the time the Chinese leave and occasionally on the same train with them. When arrested, communication is had with a Chinese person in Boston, New York, or Brooklyn, and then Chinese witnesses are produced to testify that the detained persons were born in the United States, etc. In most cases it is demonstrated that the case is a fraudulent one. "Coaching" is sure to present a fairly good case, but, in the absence of this process, there is no pretense of a case for admission. The safest way is to remain mute. In my judgment Chinese persons born in the United States have no reason to prevaricate, remain mute, or avoid the usual and legal modes of coming into the United States. To my mind clandestine or surreptitious modes of coming and a refusal to speak are badges of illegality, and, to an extent, are admission of want of right to enter. Chin Ken and Chin Kit have been requested to explain their possession of the papers found with or produced by them, but refuse to do so. Chin Kit speaks and understands some English. I can see no good reason why a citizen of the United States should voluntarily enter his native country surreptitiously, and then stand mute when his right to be here is in question. And I can see no justification for aiding and abetting this course of proceeding, whether done by attorneys of this court or others. It does not meet my approval, and cannot until pronounced to be in accordance with the law of the land and its approved mode of procedure by a competent tribunal, when I will lend it all the aid and encouragement its merits demand as it will be my duty to do. And I may add that combinations to illegally import Chinese are as obnoxious as those to control trade and commerce and defraud the rev-

enue laws, and should meet equal disfavor. In my opinion the Chinese exclusion laws contemplate and plainly provide that the burden shall be and is on all Chinese persons to present legal evidence of their right to be and remain in the United States when questioned, and that a failure to do so justifies a deportation to China or to the country of which they show themselves to be subjects.

There will be an order or judgment of deportation to China in each case.

THE MARGARET THOMAS.

(District Court, D. Maryland. September 30, 1910.)

1. ADMIRALTY (§ 28*)—TOWAGE (§ 19*)—INJURY TO BEACON LIGHT—LIABILITY OF VESSEL IN ADMIRALTY—VESSEL IN TOW.

While a court of admiralty has jurisdiction of a libel in rem against a vessel for damages caused by its negligently running into a beacon fixed in the channel, all the rules of admiralty proceedings are applicable in such suit, and where the vessel was in tow, and the towing tug was alone in fault, it alone is responsible, and there can be no recovery against the tow.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 278-288; Dec. Dig. § 28; * Towage, Cent. Dig. § 41; Dec. Dig. § 19.*]

2. TOWAGE (§ 19*)—LIABILITY OF VESSEL FOR INJURY TO BEACON—VESSEL IN TOW—FAULT OF TUG.

A tug towing a schooner down the channel from Tampa when about half the length of her hawser beyond a light beacon on her port side turned abruptly to the eastward, losing for the time her control of the schooner by ceasing to pull, and then pulling her against the beacon which she struck and destroyed. By the tug ceasing to pull on the hawser the schooner also lost her ability to direct her own course in time to avoid the beacon. *Held*, that the fault was solely that of the tug, and the schooner was not liable for the injury caused.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 41; Dec. Dig. § 19.*]

In Admiralty. Libel in rem by the United States against the schooner Margaret Thomas. Decree for respondent.

The schooner Margaret Thomas, loaded with phosphate rock, on a voyage from Tampa to Baltimore, was being towed by the tug De Witt C. Ivins on a 120-fathom hawser down the dredged channel. The schooner came in contact with the south cut Lower No. 6 Beacon in Old Tampa Bay, belonging to the United States, and destroyed it. The United States libeled the schooner for the damages.

John Philip Hill and J. Craig McLanahan, for libelants.

Robert H. Smith and Harry N. Abercrombie, for respondents.

MORRIS, District Judge (orally). In the case of *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, it was decided by the Supreme Court that admiralty had jurisdiction of a libel in rem against a vessel for damages caused by its negligently running into a beacon light fixed in a channel. But, when you proceed in such a case in admiralty, all the rules of admiralty proceedings are ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plicable. If this was a case of collision between this schooner which was being towed out and another vessel, it could not be said that the schooner was to bear the damage if it was not at fault. If it was the fault of both the schooner and the tug, which was towing the schooner, then they would be both liable. But, if it was found as a fact, that the tug was in fault and the schooner was not, the vessel damaged could not proceed against the schooner and hold the schooner liable for the damages, but the whole damages must be borne by the tug. If the tow alone is at fault, it alone is responsible; if the tug alone is at fault, it alone is held responsible. Hughes on Admiralty, p. 219; Spencer on Maritime Collisions, § 122. It seems to me that is the rule which must apply in this case, although counsel for the United States contend that the schooner, having run against and destroyed the beacon, is primarily liable, and that if it has any remedy, then its remedy is against the tug that caused it to run against the beacon. I do not think that is the admiralty rule governing this case. It becomes necessary, then, to consider whether it was the fault of the tug or of the schooner. The rule in the United States with regard to the relative liabilities of tug and tow is very clearly stated in *The Margaret*, 94 U. S. 494, 24 L. Ed. 146. That was a case where a tug was towing a brig into the port of Racine, Wis. The tug took the sailing vessel in charge and undertook to take her into port. In doing so she made an abrupt turn in order to go around a pier on one side of the channel. In making that sudden turn, the tug ceased to haul upon the tow, and the tow lost her headway and drifted against the pier and was destroyed.

The facts are thus stated on page 496:

"The tug laid her course in a southwesterly direction towards the end of the north pier. Upon reaching it she made a short turn to the starboard around it and entered the harbor. The brig followed. She had entirely lost her steerageway, and ceased to obey her helm. The tug had lost all control over her. She sagged off toward the south pier, and grounded on a bar, which she struck repeatedly with the rise and fall of the water. The tug stopped and then resumed her traction. The port line broke. Presently the starboard line broke also. The brig was thrown by the force of the swell upon the end of the pier."

In some respects that occurrence is similar to the situation here. If it be true that the tug made a sharp turn to eastward and lost control of her tow, and the tow lost her headway, and for that reason drifted up against the bank on which the beacon was established, then it seems that the case comes within the rule, which holds the tug to be in fault. The rule is thus stated by the Supreme Court in *The Margaret*, on page 497, 94 U. S., 24 L. Ed. 146:

"The tug was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequences."

It seems to me that there can be no doubt from all the proof, not only from the proof adduced by the respondent, but all the proof, that the tug, taking this schooner down the channel, in making an abrupt turn to the eastward, did not maintain her pull on the schooner.

er until she had passed the beacon; but when the tug was about half the length of the hawser beyond the beacon she turned abruptly to the east. It seems to me that it is almost conceded that the tug lost control of the schooner by ceasing to pull on her, and the schooner in consequence lost her ability to direct her own course because her headway was dying down. Making that turn—an abrupt turn to the eastward—the tug pulled the schooner in that direction and eventually against the beacon. Those facts, it seems to me, under the proof can hardly be disputed. I had some doubt in my mind when the case was stated and as the case proceeded whether there was not something which those in charge of the schooner could have done to prevent the accident; that is, to put her head to starboard and keep the schooner away. Now, it is possible that something of that kind might have been done, but it is not fair in considering a case of this kind to imagine what might have been done if everything could have been foreseen. This schooner was in charge of her captain and a licensed pilot. Their primary duty was to follow after the tug. If they saw a danger which they could avoid by putting the schooner's helm to port, they should have done so, but they must have a little time to see the danger and consider it and act. According to the testimony of the master of the schooner, they did put their helm to port, but they had not sufficient time to change their course, because the tide was against them and their headway was very slight. I cannot find from the testimony, therefore, without straining it unduly, that the schooner was in fault. If they were both in fault, the government could proceed against either and collect the damages. In this case I do not think the schooner was at all in fault. It seems to me that she did her duty in following after the tug, relying on the tug having the proper knowledge and skill to take her out through the channel without danger. This could have been done and is done constantly. It seems that the trouble arose in this way: The master of the tug, not being as skillful and as familiar with the business as he might have been, was fearful if he did not begin to turn early that his tug would not have the power to turn the schooner eastward into the channel as the change in the direction of the channel required, so he began too soon to pull her eastward and in that way brought the schooner against the bank.

I do not think the schooner was in fault, and not being in fault—even though it was the schooner that knocked down the beacon—she cannot be held.

In re LINEBERRY.

(District Court, N. D. Alabama, S. D. December 3, 1910.)

No. 10,579.

1. BANKRUPTCY (§ 238*)—JURISDICTION OF COURT—ADVERSE CLAIMS.

The holder of an assignment of money due a bankrupt from a third person at the date of the bankruptcy is an adverse claimant, and the bankruptcy court is without jurisdiction of a summary proceeding to re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quire him, over his objection, to submit his claim to the money to such court for decision.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 104*)—LIENS—ASSIGNMENT OF WAGES EARNED AFTER ADJUDICATION—JURISDICTION OF BANKRUPTCY COURT.

An assignment to secure a debt of wages to be earned in the future creates no lien until the wages have been earned, and where prior to that time the debtor is adjudged a bankrupt, and is subsequently discharged, the debt is extinguished from the date of the adjudication, and no lien arises as to wages earned thereafter, which become the property of the bankrupt, free from the claims of all creditors, including the assignee; and in the meantime, until the question of discharge is determined, the court of bankruptcy has power, under Bankr. Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), to protect the rights of the bankrupt by enjoining the assignee from collecting or receiving such wages.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 104.*]

In the matter of A. A. Lineberry, bankrupt. On review of order of referee. Affirmed in part.

W. T. Ward, for petitioner.

J. R. Tate and W. T. Stewart, for bankrupt.

GRUBB, District Judge. This matter comes on to be heard upon a petition filed by the Birmingham Loan & Discount Company to review an order of the referee, requiring it to come into the bankruptcy court and propound its claim to certain wages earned by the bankrupt, and due him from the Southern Railway, and ordered by the referee to be paid into the registry of the court. Part of the wages were earned before and part after the adjudication. As to the part earned before adjudication, the case is ruled by the case of *Copeland v. Martin* (decided by the Circuit Court of Appeals for this [Fifth] Circuit) 182 Fed. 805, and as to such wages this court is without jurisdiction as to the claimant, and the petition of the bankrupt to that extent should be dismissed, and the rule nisi discharged.

As to earnings after adjudication, the case is different. Such earnings form no part of the bankrupt estate, but belong to the bankrupt. As against dischargeable debts, the bankrupt is to be protected in the enjoyment of them, unless they are affected with a lien at the date of adjudication. In *Mosby v. Steele & Metcalf*, 7 Ala. 301, the court said:

"It would seem, therefore, entirely reasonable that, in the interval which must elapse between the decree and final hearing for the bankrupt's discharge, he should be permitted to hold property, subsequently acquired, as otherwise he would not be able to support himself and family. * * * Doubtless the bankrupt has an inchoate right to the enjoyment of such property, free from the claims of his scheduled creditors. How is he to be protected in the enjoyment of this right?"

The court there determined that the state chancery court had jurisdiction to stay proceedings to effect a seizure and sale of such property until the bankrupt's right to a discharge was determined, and upon equitable terms to the creditor. The present bankruptcy law (Act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]) confers adequate power on the bankruptcy court to protect the bankrupt in such a case. It would be a strange procedure for the bankruptcy court to remit its suitor to the state court for such protection, pending the bankruptcy proceedings. The case of *In re Hicks* (D. C.) 133 Fed. 739, 13 Am. Bankr. Rep. 654, is an authority for the jurisdiction of the bankruptcy court to give such protection.

Upon these premises, the bankrupt, as to earnings acquired after adjudication, would be entitled to the protection of the bankruptcy court, if the claimant's debt is a dischargeable one and was not secured by a lien on subsequently earned wages, at the date of adjudication. The referee has decided that the transaction between claimant and bankrupt constituted a loan, and I am persuaded that his decision is correct. If so, it will be a dischargeable debt. The subsequent earnings of the bankrupt, in that event, should not be subjected to its payment, unless the creditor had a lien on them at the date of adjudication.

An assignment of wages to be earned in the future is, at most, an executory agreement to transfer them when earned. It creates no lien on them, except when and as they come into existence by being earned. At the date of the adjudication, the subsequent wages of the bankrupt had not been earned and were not in existence, and the creditor had no lien on or title to them, by virtue of his assignment, which the bankrupt law could preserve. The bankrupt law does not continue a dischargeable debt for the purpose of permitting a lien to be created after the adjudication, but only to preserve and enforce a lien in existence at the date of the adjudication. The discharge, when granted, relates back to the date of adjudication, and property acquired by the bankrupt, intervening the filing of the petition and the granting of the discharge, is not appropriated to payment of his debts. In support of these views are cited the cases of *In re West* (D. C.) 128 Fed. 205, 11 Am. Bankr. Rep. 782, *Leitch v. Northern Pacific Ry. Co.*, 95 Minn. 35, 103 N. W. 704, 14 Am. Bankr. Rep. 409, and *In re Home Discount Co.* (D. C.) 147 Fed. 538, 17 Am. Bankr. Rep. 168. *Contra*: *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233, 13 Am. Bankr. Rep. 210.

In the case of *In re West* (D. C.) 128 Fed. 205, 11 Am. Bankr. Rep. 782, the court said:

"The theory of a lien upon the earnings of future labor is not that it attaches to such earnings from the moment of contract of pledge or assignment, but from the moment of their existence. It is needless to say that there can be no lien upon what does not exist. A pledge or assignment of future wages under an existing employment is said to create an equitable interest in such wages. *Stott v. Franey*, 20 Or. 410 [26 Pac. 271] 23 Am. St. Rep. 132. This is true of wages earned upon a general employment, as well as those earned upon a definite contract. In this case the railroad company was under no obligation to employ the bankrupt, nor he to work for the company. If future earnings in such a case can be said to have a potential existence, they are the subject of an agreement for a lien; but the lien, or so-called equitable interest, does not attach until the wages come into existence, and until the lien does attach there is no lien. The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only

does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors. Collier on Bankruptcy, 509. These debts cannot escape the operation of the bankruptcy law by an agreement for a lien upon what the debtor expected to earn, but did not earn until after the adjudication in bankruptcy."

The view here expressed is in conformity with the three cases first cited. If its correctness was doubtful, it would be the part of orderly practice in this court to follow the opinion of the senior District Judge until the Circuit Court of Appeals has passed upon the question.

As to wages earned by the bankrupt, after adjudication, an order will be entered, restraining the Birmingham Loan & Discount Company from attempting to collect or from receiving the subsequently earned wages from the railroad company until the expiration of 12 months from the date of adjudication herein, unless the bankrupt shall sooner apply for a discharge, and in such case until the question of such discharge shall be determined.

THE AURELIA.

THE UMATILLA.

(District Court, N. D. California. September 21, 1910.)

Nos. 13,491, 13,492.

1. COLLISION (§ 7*)—REGULATIONS—SUPERVISING INSPECTORS' RULES.

Regulations to guard against collision established by the board of supervising inspectors under authority of Rev. St. §§ 4405, 4412 (U. S. Comp. St. 1901, pp. 3017, 3020), have the force of law; but they are only valid and obligatory in so far as they are not inconsistent with statutory regulations.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. COLLISION (§ 76*)—STATUTORY RULES—CONSTRUCTION.

Inland Navigation Rules, art. 28, 30 Stat. 102 (U. S. Comp. St. 1901, p. 2884), which provides that "when vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle," is to be construed as it reads as applying in all cases when vessels are in sight of one another, and is not limited by rule 6 of the pilot rules, adopted by the supervising inspectors, that whistle signals shall be given and answered by vessels "passing or meeting at a distance within half a mile of each other."

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 124-137; Dec. Dig. § 76.*]

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

3. COLLISION (§ 76*)—STEAM VESSELS PASSING—MUTUAL FAULTS.

A collision occurred in the bay about 2,000 feet off the San Francisco piers in the daytime between the steamships Aurelia and Umatilla. The Umatilla had just backed from her pier to go out, and when 1,000 feet from the end of the pier gave a passing signal of two whistles to the Aurelia, which was in sight inward bound for Oakland. The signal was answered, but the Umatilla continued to back for two or three minutes at full speed without giving any signal of such fact. She was in full sight of the Aurelia, however, which did not materially change her course until the vessels were too near together to avoid collision. *Held*, that both

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vessels were in fault; the Umatilla for failing to give the signal required by the rules to indicate that her engine was going full speed astern, and the Aurelia for not keeping a proper lookout which would have enabled her to avoid the collision notwithstanding the fault of the Umatilla.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 137; Dec. Dig. § 76.*]

In Admiralty. Cross-suits for collision by the Pacific Coast Company against the steam schooner Aurelia, and by the Russell & Rogers Company against the American steamer Umatilla. Decree against both vessels dividing damages.

George W. Towle, for libelants.
McClanahan & Derby, for claimants.

FARRINGTON, District Judge. October 27, 1905, the steamer Umatilla, owned by the Pacific Coast Company, having on board a full cargo of merchandise and a large number of passengers, destined for Victoria, lay at Broadway pier in the harbor of San Francisco. At 19 minutes past 11 o'clock on the morning of that day, after casting off her moorings and giving one blast of her whistle, the Umatilla backed out of her berth slowly, then at full speed astern, and finally her propellers were operated at full speed ahead. The purpose of this maneuver was to enable the ship to swing her head to the north and proceed on her outward voyage. In the meantime, the steamship Aurelia, owned by Russell & Rogers Company, heavily laden with lumber, inward bound from northern ports, having discharged a portion of her cargo at Meigg's wharf, was passing along the sea wall bound for Oakland long wharf. As soon as the Umatilla had cleared the Broadway wharf, the two vessels were in sight of each other. The Umatilla backing at right angles to the pier line, at a point about 1,000 feet from the end of the wharf, gave two whistles, thus indicating her intention to go ahead and her wish to pass the Aurelia on her starboard side. The Aurelia immediately assented by blowing two whistles. Notwithstanding her signal, the Umatilla continued to move backward several minutes before her sternway was overcome. A collision took place on the northerly line of Broadway wharf, and about 2,000 feet out from the end of the wharf. Both vessels were injured, and libels are filed against each of them.

On the part of the Aurelia, it is contended that the Umatilla backed out further than was necessary, and that she failed to give three whistles when she came in sight of the Aurelia, to indicate that her engines were working full speed astern. On the part of the Umatilla, it is alleged that the Aurelia did not alter her course when the two whistles were exchanged, that the sternway of the Umatilla could have been known by the master of the Aurelia had he maintained a proper lookout, and that there was ample seaway within which the Aurelia could have been so navigated as to involve no danger of collision, but that, notwithstanding this, the Aurelia continued her course at a speed of $7\frac{1}{2}$ knots per hour, without taking the obviously necessary and reasonable precautions which would have prevented the collision.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The testimony on behalf of the Umatilla tends to show that her engines, by direction of her master, were operated as follows: From 11:19 o'clock a. m. to 11:20 o'clock a. m. at slow speed astern; from 11:20 a. m. to 11:22 a. m. at full speed astern; and from 11:22 a. m. to 11:25 a. m. at full speed ahead. At 11:20 o'clock a. m. the stern of the Umatilla was about 200 feet beyond the end of the wharf. The Umatilla being but 310 feet in length, and the full speed backward movement having been initiated at this point, she quickly cleared the wharf, and was in the open bay. Here the end of Lombard street wharf must have been in plain sight from the bridge of the vessel. While her engines were thus at full speed astern, the Umatilla's captain saw the Aurelia to the north of the Lombard street wharf. At the time the Umatilla cast off her moorings, she properly gave one whistle, but failed to give any further signal until she was about 1,000 feet from the pier's end. Then the order was given to set her engines at full speed ahead, and two whistles were blown. At this time the vessels were from 1,500 to 2,200 feet apart. Owing to the fact that her engines were of an early type, it was about 30 seconds before the propellers were reversed. In failing to signal that her engines were operating at full speed astern, the Umatilla was clearly at fault.

In the regulations applicable to rivers, harbors, and inland waters (Act June 7, 1897, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2883]), it is provided that:

"When steam vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signal as in the case of vessels meeting at a bend (one long blast of the steam whistle), but immediately after clearing the berths so as to be fully in sight they shall be governed by the steering and sailing rules." Article 18, Rule 5 (2 Fed. St. Ann. p. 179).

Article 28 of the steering and sailing rules reads thus:

"When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle." 2 Fed. St. Ann. p. 181; 30 Stat. 102 (U. S. Comp. St. 1901, p. 2884).

"A vessel is 'under way,' within the meaning of these rules, when she is not at anchor, or made fast to the shore, or aground." 2 Fed. St. Ann. p. 174 (U. S. Comp. St. 1901, p. 2876).

It is impossible to determine with any degree of accuracy the distance between the two vessels at the time the Umatilla cleared her wharf, and when her engines were first set at full speed astern. The vessels, however, were plainly in sight of each other, and were somewhere between 3,000 and 3,700 feet apart. They were approaching at an angle of about 45 degrees. The Aurelia had a speed of $7\frac{1}{2}$ knots per hour, or 750 feet per minute, and the Umatilla had a speed of not to exceed 500 feet per minute.

Counsel seeks to avoid the force of this rule by urging that the words "in sight of," in article 28 of the act, mean within half a mile of, and that it is only when vessels are within half a mile of one another that a steam vessel under way, whose engines are going at full speed astern, shall indicate that fact by three short blasts of the whistle.

In support of this view, reference is made to rule 6 of the pilot rules for Atlantic and Pacific Coast inland waters, adopted by the board of United States inspectors January, 1902, and approved by the Secretary of Commerce and Labor July 6, 1904, which is as follows:

"The signals, by the blowing of the whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting 'head and head' or nearly so, but at all times when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port."

Section 4405 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3017) authorizes the board of supervising inspectors to "establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of Commerce and Labor, shall have the force of law."

Section 4412 of the same title (52) empowers the board to "establish such regulations to be observed by all steam vessels in passing each other, as they shall from time to time deem necessary for safety." (U. S. Comp. St. 1901, p. 3020).

Regulations established by the board of supervising inspectors undoubtedly have the force of law, but they are only valid and obligatory in so far as they are not inconsistent with statutory regulations. The *Grand Republic* (D. C.) 16 Fed. 424, 427; *United States v. Miller*, (D. C.) 26 Fed. 95, 97; *The T. B. Van Houten* (D. C.) 50 Fed. 590; 7 Cyc. 321.

It is not within the power of the board by its regulations to relax or nullify plain rules which have been enacted by Congress itself to guard against collisions.

The statute declares the signal must be given under certain conditions when the vessels are in sight of one another. If the board has the power to say that this shall be construed to mean "within half a mile of one another," it may with equal authority declare that the signal need be given only when the vessels are within 500 feet of each other. To admit that article 28 must be interpreted by the rules of the board is simply to admit that the board can amend or nullify an act of Congress. Article 28 must be understood as it reads. No other interpretation is permissible.

The wisdom of the rule as enacted by Congress is obvious. Whether propellers are working ahead or astern cannot always be determined easily by the man on a distant lookout. To an approaching vessel this is information of the highest importance. If the engines are still, and the vessel is moving merely with a previously acquired momentum, its speed is diminishing, and one may determine with reasonable accuracy where he may with safety cross its course. But, if the engines are working full speed astern, the vessel is probably gathering both speed and momentum, and the shipmaster who wishes to cross its course has a very different and difficult problem. If he is approaching at an acute angle at the rate of two knots an hour, it may be sufficient that he is informed as to the movement of his neighbor's engines when the vessels are within half a mile of each other; but if he is approaching at a right angle to his neighbor's course at a speed of 10 knots per

hour, with favoring wind and tide, such notice may be wholly insufficient. Tides, currents, and winds, the relative speed and courses of vessels, as well as other conditions whose influence can neither be known nor measured in advance, make it unwise to fix by law any arbitrary distance beyond which it is unnecessary, and within which it is necessary, to give the notice required by the rule. Whenever there is a possibility of collision, whether the approaching vessels in sight of each other be far or near, the vessel operating her engines full speed astern should signal that fact. The purpose of the statutory rule is to insure the highest degree of safety; and strict obedience to that rule, construed precisely as it reads, will eliminate accidents which may result from erroneous judgment as to the distance between the ships, as to the necessity of the notice itself, or as to the possibility of a collision.

Spencer; in his work on Marine Collisions (section 75), says:

"The term 'when in sight of each other' is to be taken in its usual sense, meaning that signals are to be used when vessels are sufficiently near each other to make the use of signals necessary to an understanding of each other's course."

The master of the Umatilla should have given three blasts of his whistle when his vessel emerged from the pier; the long blast when the moorings were cast off was not sufficient. Rio Grande (D. C.) 38 Fed. 849.

Without giving the warning required by the rule, he moved backward for two minutes at the highest speed his engines were capable of producing. He knew, or should have known, that his engines could not be reversed instantly, and also that when this was accomplished some little time must elapse before his sternway could be overcome. There is undisputed evidence that under substantially similar conditions the Umatilla had been stopped in 55 seconds; yet on this occasion the Umatilla continued her backward course for three minutes after the order full speed astern had been given, and the two whistles were blown. It does not seem to me that this was good seamanship. Had the rule been observed, the attention of the Aurelia's master would in all probability have been awakened in season to stop or turn aside his vessel. The captain of the Umatilla had no right to presume that those on board the Aurelia would understand his movements and avoid a collision if he ignored the rule.

Here were two vessels rapidly approaching each other at an angle of about 45 degrees, the Aurelia moving ahead at the rate of 750 feet per minute, and the Umatilla proceeding at a constantly diminishing speed, and becoming more and more helpless. As the more manageable vessel of the two, it was the duty of the Aurelia to keep a careful lookout, and if possible to avoid a collision, no matter how poor the Umatilla's seamanship, or how unnecessary it may have been for her to back out so far into the bay. Poor seamanship on the part of the Umatilla is no excuse for negligence and inattention on the part of the Aurelia.

The sky was clear, the bay calm, the tide slack. There was ample seaway, and the nearest vessel was 500 or 600 feet northeast of the

point of collision. Careful navigation by the Aurelia certainly could and should have avoided the accident.

It appears from Capt. Erickson's testimony that he answered the Umatilla's two whistles with two blasts from the Aurelia, thus agreeing that the Aurelia should pass the Umatilla on her starboard side. He steadied his course on a vessel anchored in the bay west of Goat Island, and somewhat further north than its southern extremity. Thereafter Capt. Erickson, though he stood on the bridge of the Aurelia, does not appear to have noticed the Umatilla until the vessels were within from 150 to 600 feet of each other. Then he put his helm hard astarboard, but it was too late. There was nothing to prevent Capt. Erickson from observing the movements of the Umatilla, and her increasing helplessness. There was a time before the collision became inevitable when it could have been avoided had the Aurelia maintained a proper lookout, and had she been navigated with the care and vigilance which the law requires under such circumstances. The fact that the Umatilla failed to give notice that her engines were operating astern, and that she gave two blasts of the whistle at 1,000 feet from the wharf, thus indicating that she was about to complete her maneuver by moving forward toward the north, does not excuse Capt. Erickson's inattention, and it did not absolve him from the duty to exercise the utmost care and vigilance.

In *Foster v. Miranda*, 9 Fed. Cas. 560 (No. 4,977), there was a collision in the nighttime between a brig and a schooner on Lake Michigan. It was shown that the brig, sailing at the time on the starboard tack, displayed a white light. This was in violation of an act of Congress which, under such circumstances, requires a red light. It also appeared that the schooner failed at the time of the collision to maintain a competent lookout. It was held that both vessels were at fault, and the loss was divided equally.

In *H. S. Beard* (D. C.) 134 Fed. 648, two towboats, dragging a submerged scow in New York Harbor, were held negligent because they had failed to place a signal on the scow. The yacht which came in collision with the scow was held to be in fault also because it failed to maintain a competent lookout.

"Such a lookout," said the court, "might have seen the scow as it was dragged from time to time to or near the surface of the water, or he might have discovered the position of the scow from the hawser with which it was being towed."

In *John T. Williams* (D. C.) 68 Fed. 938, the schooner John T. Williams backed out of her slip in Jersey City, but wore around so slowly before she was straightened out down the North river that she came in contact with a dumper which was going up the river in tow of the tug Moran. The schooner was held to be in fault for dilatoriness and inattention for not making a reasonably speedy turn; the Moran for failing to give due attention to the slow maneuvering of the schooner, and for failing to take measures to avoid the collision, and keep away from the schooner.

Under all the circumstances, I must find both the Umatilla and the Aurelia at fault. The usual order of reference will be made, and the damages and costs will be divided equally.

UNITED STATES v. AARON et al.

(Circuit Court, W. D. Oklahoma. September 6, 1910.)

No. 395.

1. INDIANS (§ 15*)—LANDS—RESTRICTION ON ALIENATION BY ALLOTTEES—RIGHT OF UNITED STATES TO ENFORCE BY SUITS.

The United States may maintain a suit to set aside a conveyance of lands allotted to an Indian of the Osage Tribe in Oklahoma, in violation of the restrictions imposed by Congress on their alienation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 37; Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—LANDS—RESTRICTIONS ON ALIENATION—POWER OF CONGRESS.

While the title of the Osage Indians to their lands in Oklahoma, acquired from the Cherokee Nation, pursuant to the treaty with such nation, of July 19, 1866 (14 Stat. 804), was in fee simple, such title was in the tribe, and did not vest in the individual members, and it was within the power of Congress to provide for their allotment in severalty, to prescribe the manner of their conveyance to the allottees, and to impose restrictions upon their alienation by the allottees, as it did in Act June 28, 1906, c. 3572, 34 Stat. 539.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*]

3. INDIANS (§ 13*)—LANDS—ALLOTMENT IN SEVERALTY—VALIDITY OF CONVEYANCE TO ALLOTTEE.

Under Act June 28, 1906, c. 3572, 34 Stat. 539, providing for the allotment in severalty of the lands of the Osage Indians in Oklahoma, which requires the deeds to the allottees to be executed by the principal chief of the tribe and to be approved by the Secretary of the Interior, such approval is essential to the validity of the deed, and without it the grantee acquires no title.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

4. INDIANS (§ 15*)—LANDS—ALLOTMENTS OF OSAGE LANDS—CONVEYANCE BY HEIRS.

Act March 3, 1909, c. 256, 35 Stat. 778, which authorizes the Secretary of the Interior, pursuant to rules and regulations prescribed by him, to sell the "surplus lands" of any member of the Osage Tribe of Indians, and requires his approval before any such sale has validity, is applicable to the lands of deceased allottees.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*]

5. INDIANS (§ 15*)—LANDS—RESTRICTIONS ON ALIENATION OF ALLOTTED LANDS.

In Act June 28, 1906, c. 3572, 34 Stat. 539, providing for the allotment in severalty of the lands of the Osage Tribe of Indians, the provision of section 2, subd. 4, that the land allotted as a homestead "shall be inalienable and nontaxable until otherwise provided by act of Congress," is impersonal to the allottee, and runs with the land, and is effective against alienation after the land has descended to the heirs of the allottee.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*]

In Equity. Suit by the United States against W. H. Aaron and M. L. Levin. On demurrer to amended bill. Overruled.

John Embry, U. S. Atty., and Isaac D. Taylor, Asst. U. S. Atty.
George B. Denison and Burford & Burford, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COTTERAL, District Judge. In this suit the complainant seeks a decree enjoining the defendants from surveying, platting, selling, or interfering with certain lands allotted to Cena June, an Osage Indian, and declaring void and canceling the deeds under which they assert title to such lands. By the averments of the amended bill, it appears that the lands involved consist of a portion of the homestead and the entire surplus land, selected as the share of Cena June in the Osage Indian lands in Oklahoma, pursuant to Act of Congress, approved June 28, 1906 (chapter 3572, 34 Stat. 539). It is alleged that after her death the principal chief of the Osages executed a deed for the homestead to her heirs, with the approval of the Secretary of the Interior, but that the Secretary has not approved the deeds for the surplus land; that she died on May 15, 1907, at the age of 29 years, leaving her husband, Howard Buffalo, as her sole heir; that no certificate of competency was issued to her; and that she made no application to the Secretary for the sale of any of these lands. It is further alleged that on March 5, 1909, Howard and Pearl Buffalo, and Joseph and Agnes Buffalohide, who never obtained certificates of competency and never applied to the Secretary for authority to sell any of the lands in controversy, executed and delivered two deeds of conveyance, purporting to convey to the defendants the said homestead tract and surplus lands allotted to Cena June, said deeds being of record in the office of the register of deeds of Osage county, that the deeds were never approved by the Secretary, and that the sales which they represent were without his approval or consent. It is also alleged that no consideration was ever received by the government, its agents or officers, for these lands, but that the considerations paid by the defendants of \$1,000 for the homestead tract, and \$700 and certain notes (amount unknown) for the surplus lands, are inadequate and fraudulent, that the defendants are trespassers on and taking possession of these lands, and their deeds, it is charged, are illegal, clouds upon the title, and should be removed.

The grounds of the demurrer may be summarized as follows: (1) That the government has no authority to sue as guardian or sovereign, or by request of any allottee, and is without interest entitling it to maintain the suit; (2) that the lands involved are "inherited lands," and were subject to unrestricted alienation by the adult heirs of the allottee; (3) that the court is without jurisdiction over the controversy.

An objection thus taken by the defense to the authority of the government to prosecute the suit is that its guardianship does not extend to the Osage Indians because it is dependent upon their want of citizenship; and it is contended that, inasmuch as these Indians are citizens by virtue of the provisions of the Oklahoma statehood enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), they alone have the capacity and right to conduct litigation for relief in respect of conveyances of their lands. Various cases are cited as being contrary to this view, but it is said that the case of *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, puts the subject at rest

in favor of the defense, and "in effect reversed all the earlier decisions in so far as they held that citizenship did not terminate government guardianship." That case primarily involved and denied the existence of the federal police power after it had been surrendered by a grant of citizenship and a subjection of the allottees to the police power of the states by virtue of section 6 of Act Feb. 8, 1887, c. 119, 24 Stat. 390, but that act, by the terms of section 8, does not apply to the Osage Indians, and, furthermore, they have not been declared subject to the police laws of the state. It may be noted that the act of June 28, 1906, which provides for the distribution of lands among the Osage Indians, recognizes a continuation of the tribe. Section 9. As no question of police power is here presented, controversies on that subject may be appropriately considered when they involve its exercise. But in the *Heff Case* it was said that "Congress may enforce and protect any condition which it attaches to its grants," and that "the proper tribunal may at the instance of the rightful party enforce all restraints on alienation."

The Osage lands, which constituted their reservation in Oklahoma, were acquired from the Cherokee Nation, pursuant to the treaty between that nation and the federal government of July 19, 1866, which stipulated for the settlement of friendly Indians in the Cherokee country west of 96° and the conveyance of the lands in fee simple "to each of the tribes to be held in common or by their members as the United States may decide." 14 Stat. 804. Payment was made to the Cherokees out of the proceeds of the lands of the Osages in Kansas. Act March 3, 1873, c. 228, 17 Stat. 538. On the ground that the Cherokee title was owned in fee simple, it is argued that the Osages acquired an equivalent title, and that, as title may be fully vested by treaty or law, they acquired "an absolute and unqualified title to these lands" upon the selection of allotments under the act of Congress with the consent of the government. But such title as the Osages obtained was held in common, and was in no sense vested in the individual members of the tribe. Their lands were set apart and confirmed as their reservation by Act June 5, 1872, c. 310, 17 Stat. 228. As was held with respect to the Cherokee lands, the disposition thereof is an administrative subject, under the sole control of Congress. *Cherokee Nation v. Hitchcock*, 187 U. S. 295, 23 Sup. Ct. 115, 47 L. Ed. 183. The actual transfer of the Osage lands appears to have been made by deed of the Cherokee Nation to the United States in trust for the benefit of the Osage Indians. It was entirely competent for the government to determine upon and execute its own plan for the division of these lands among the members of the tribe. While it is doubtless true that the titles to the lands of Indians may be vested in tribes or their members by either law or treaty, such titles do not vest in the individual members without the sanction of the government, and certainly not in a manner contrary to restrictions declared by Congress. Otherwise, the members have no power or capacity to divide or alienate their tribal lands. It was held in the case of *Ligon v. Johnston*, 164 Fed. 670, 90 C. C. A. 486:

"The disposition of tribal property of the Indian tribes falls within the legislative domain. The power of Congress is supreme, and its action is conclusive on the courts." *Hayes v. Barringer*, 168 Fed. 221, 93 C. C. A. 507.

Congressional action must therefore be looked to in this case as controlling any lawful division or transfer of the lands involved, and as a basis of determining whether any interest or duty justifies the government in its present attack on the attempted conveyances to the defendants.

The original plan and regulations adopted by Congress in the case of the Osage lands are found in the act of June 28, 1906, *supra*. This act provides that the selection and division of the lands shall be under the supervision of a commission, consisting of one member of the tribe to be selected by the Osage Council, and two persons to be selected by the Commissioner of Indian Affairs, subject to approval by the Secretary of the Interior, all controversies between the Indians as to their selections of lands to be settled by the commissioner, and the schedules of selections and divisions to be subject to the approval of the Secretary. Section 2, subd. 6. The deeds are required to be executed by the principal chief for the Osages, and are not valid until approved by the Secretary of the Interior. Section 8. Each member of the tribe is entitled to three selections of 160 acres each, one of them to be designated by him as a "homestead," and the other two to be known as "surplus land." Section 2, subds. 1, 2, 3. The remaining lands are to be divided as equally as practicable by a commission, etc. Section 2, subd. 5. Subdivisions 4 and 7 of section 2 and section 6 are as follows:

"Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections; Provided, that all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a 'lot.' Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

"Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, that the surplus lands shall be nontaxable for the period of three years from the approval of this act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress. * * *

"Sec. 6. That the lands, moneys, and mineral interests, herein provided for,

of any deceased member of the Osage Tribe, shall descend to his or her legal heirs, according to the laws of the territory of Oklahoma, or of the state in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, monies, and mineral interests must go to the mother and father equally."

The fact alleged as to the "surplus land" of Cena June is that the Secretary of the Interior has never approved the deeds therefor. For this reason, as provided by section 8, the deeds, although they may have been executed by the principal chief of the tribe, are still without validity. The presumption which must obtain is that the approval of the Secretary is lawfully withheld. As Congress controls the disposition of these tribal lands, and it thus made the approval of the Secretary requisite to the validity of the deeds, it must be held that the surplus lands were not effectively allotted or divided, and that title was not vested in the heirs of Cena June, nor, in turn, in the defendants as their grantees.

But in this connection some question has arisen as to whether Act March 3, 1909, c. 256, 35 Stat. 778, which authorizes the Secretary of the Interior, pursuant to rules and regulations prescribed by him, to sell the "surplus lands of any member" of the tribe, applies to the lands of deceased allottees. In the opinion of the court it is so applicable. There is nothing in the act which refers to any personal application for the privilege of sale, and the language used appears to be descriptive of the character or class of the lands to be sold. The act in authorizing the Secretary to sell the surplus lands in keeping with rules and regulations prescribed by him requires his approval before such sale has validity. As his approval is negated by the allegations of the amended bill, the attempted conveyances to the defendants of the surplus lands are contrary to limitations imposed by Congress, and therefore for this reason are invalid.

With reference to the homestead tract, it is conceded that the deed therefor was executed by the principal chief of the tribe with the approval of the Secretary. The allotment was therefore complete. And the question is presented whether that tract descended to the heirs of the allottee, free of restriction upon alienation. The contention of the defendants is that lands which have thus descended to the heirs are no longer either "homestead" or "surplus land," and are at once subject to alienation. This, it is claimed, is clear from the act itself, and upon various other considerations which aid in its correct interpretation. On the other hand, counsel for complainant insists that the restriction is impersonal to the allottee and runs with the land; and is effective against alienation after it has descended to their heirs. In the view of this court, the latter position is correct. The act furnishes its own policy and limitations. The language used relative to the homestead in subdivision 4 of section 2 is that it "shall be inalienable and nontaxable until otherwise provided by act of Congress." The expression of the act is not that the allottee or member shall not alienate, but that the land shall be inalienable. The restriction, therefore, runs with the land, and the policy of the law is that its protection ex-

tends as well to the heirs as to the original allottees. *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525.

To the restriction thus generally imposed, an exception is contained in subdivision 7 of section 2, which provides that the Secretary of the Interior may issue a certificate of competency, under the conditions named, authorizing any adult member of the tribe "to sell and convey away any of the lands deeded to him by reason of the act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee." However, we are not concerned with this exception, since no certificate of competency has ever been issued by the Secretary, and the terms of this subdivision pertaining to the homestead appear to be applicable only in cases where such certificates have been issued. In the absence of a certificate as thus provided for, the homestead remains inalienable "until otherwise provided by act of Congress."

We have thus seen that the deeds assailed in this case were unauthorized and void. They were executed in violation of valid limitations imposed by Congress upon the division and alienation of the lands in question. A preliminary averment of the amended bill is that the suit is brought at the instance and request of the Secretary of the Interior and by direction of the Attorney General. The last section of Act June 28, 1906, provides:

"Sec. 12. That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

Under the circumstances, can the government resort to this court and obtain relief for the purpose of asserting and enforcing the policy adopted by Congress with respect to the lands of the Osage Indians for the protection of the Indians and others concerned? The question has been authoritatively answered in the affirmative by the Circuit Court of Appeals for this circuit at the last May term, in an opinion rendered in the case of *United States v. Allen et al.*, 179 Fed. 13. Aside from the question as to any estate or property of the government in these lands, the holdings in the case referred to are decisive upon the right of the government to prosecute suits in the federal Circuit Courts for the enforcement of its policy as declared by Congress, and to avail itself of appropriate remedies in equity for the cancellation of deeds executed in violation thereof, irrespective of any allegations charging fraud, or inadequacy of consideration.

The demurrer will therefore be overruled.

QUINN CONST. CO. et al. v. JAMES B. CLOW & SONS.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1910.)

No. 2,047.

SALES (§ 154*)—ACTION FOR BREACH—DEFENSES.

Pending final negotiations which it was expected would result in a contract between the United States and the lowest bidder for the construction of a naval training station, defendants made a bid to the contractor for doing the plumbing work, and also entered into a contract with plaintiff for the supplying of certain fixtures conditioned on their obtaining the subcontract, and also subject to the approval of such fixtures by the proper officer of the government, as required by the specifications, which provided that plates of the fixtures proposed to be furnished should be submitted and samples as called for. Plaintiff sent plates of its fixtures to defendant to be furnished to the general contractor and unofficially arranged with the government officer to inspect the samples at its place of business, and so notified defendants. Defendants, on obtaining their subcontract, immediately assigned it to another, and did not take the supplies from plaintiff. *Held*, in an action for breach of the contract, that plaintiff had done all that was required of it in the way of furnishing plates, and in regard to the inspection of samples; it being the business of the contractor to submit the plates and arrange for the inspection, and was not chargeable with any breach of its contract, which prevented its recovery.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 154.*]

In Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

Action at law by James B. Clow & Sons, a corporation, against the Quinn Construction Company and the Quinn Supply Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Boudeman, Adams & Weston, for plaintiffs in error.

Newton Wyeth and Henry T. Heald, for defendant in error.

Before WARRINGTON, Circuit Judge, and COCHRAN and TAYLER, District Judges.

TAYLER, District Judge. In the spring of 1907 the United States government called for bids for the construction of buildings at the naval training station, North Chicago, Ill. When the bids were opened about May 1st, it was found that the proposal of the Noel Construction Company, of Baltimore, was so much lower than those submitted by the other bidders as to justify the expectation that its proposition would be accepted. However, as the total amount of its bid was slightly in excess of \$1,500,000, which was the maximum amount available for the purpose under the act of Congress, some later negotiations were entered into for the purpose of reducing the quantity of work to be done, so that, on the basis of the original bid, the work required would be done for the maximum amount available; and, resulting from that, such a contract was entered into between the government and the Noel Construction Company.

Meantime, the Noel Construction Company had been carrying on negotiations with prospective subcontractors, and these subcontractors

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes
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with other subcontractors. The Quinn Supply Company, or the Quinn Construction Company, or both, it is immaterial at this point to determine which, had proposed to the Noel Construction Company to do the particular work covered by the government specifications which included heating, plumbing, and other related work, and the Quinn Construction Company and the Quinn Supply Company were similarly engaged in negotiations with James B. Clow & Sons for a certain portion of the plumbing. It is quite obvious that the Quinn Company could not make a final contract with the Noel Construction Company until the latter company had entered into its contract with the government, and that Clow & Sons could not enter into a contract with the Quinn Companies until after they entered into a contract with the Noel Construction Company, the chief contractor.

In contemplation, however, of these eventualities, the plaintiff below, James B. Clow & Sons, a corporation, on the 7th day of May, 1907, addressed to the Quinn Supply Company the following communication:

"Chicago, May 7, 1907.

"Quinn Supply Co., Kalamazoo, Mich.

"Dear Sir: We are pleased to quote you \$62,036.63 for the following material as specified U. S. Naval Training Station, No. Chicago, Illinois.

"The quantities and descriptions are supposed to be according to plans and specifications, but we do not guarantee that they are correct, therefore you should verify the same and notify us if any discrepancies exist. We will furnish only the quantities stated for the amount named.

"If freight is allowed goods are still shipped at buyer's risk and are not insured unless so ordered. Marble and slate are figured at the 'released' freight rate and are shipped at buyer's risk unless we are authorized by buyer to ship at full rate for which there will be an extra charge.

"We are not liable for damages on account of delays occasioned by strikes, fires, accidents, or other causes beyond our control.

"Terms: Net cash.

"The above quotation is based upon our being privileged to substitute our product for goods specified as per paragraph No. 877, specification, description and plate of fixtures fully described as per attached list, paragraphs 882 to 939 inclusive, and 3208 to 3224 inclusive.

"[Then follows a list of the buildings for which the plumbing is to be supplied, with the amount to be paid for each building.]

"Soliciting your valued order, we are

"Yours truly,

James B. Clow & Sons,

"[Signed] S. McKeeby."

On this letter the following indorsement appears:

"We hereby accept this proposal subject to the approval of the fixtures by the proper officer of the U. S. government. The proposal and our acceptance to constitute a contract which is to go into force and become valid only on the date of our signing of our contract for the equipment with the Noel Construction Company.

"By S. A. Quinn, for the Quinn Supply Company."

The amounts set out in the proposal were afterwards changed in consequence of the reduction of the entire price of the maximum amount allowed by the act of Congress. This circumstance has no bearing on the controversy between the parties.

The paragraphs of the specifications referred to in the Clow letter which have a bearing on the questions before us are Nos. 877 and 878, which are as follows:

"877. The plate numbers referred to are given only to indicate the character and quality desired. It is not the intention to restrict competition as to the maker, and any other makes of plumbing fixtures which are in all respects equal or superior to those indicated will be acceptable. Bidders, however, who desire to submit fixtures other than those specified must submit full specification, description, and plates of fixtures for approval by the officer in charge. Samples shall be submitted as required.

"878. Where dimensions and weights are given, it is intended that a reasonable variation from sizes and weights specified may be allowed in order to suit sizes and weights of various manufacturers. This variation in sizes and weights is not to be more than 5 per cent, but the design, operation, construction and quality are to be equal in every respect."

October 14th the Quinn Construction Company entered into a contract with the Noel Construction Company whereby it agreed for the consideration of \$226,000, subject to certain relatively unimportant reductions, to supply the materials and install the plumbing and other fixtures in certain named buildings of the naval training station. This contract covered the work and materials included in the proposal of Clow & Sons. The parties proceeded after the 1st of July on the assumption that a contract had been entered into between the Quinn Construction Company and the Noel Construction Company, and vague and indefinite reference to such an earlier contract is made in the testimony of one of the witnesses for the Quinn Company. Clow & Sons do not seem to have known until long afterwards that the final contract on which the plumbing was to be installed was not actually entered into until October 14th. When this last contract was entered into, Clow & Sons' proposed materials had not been approved or even considered by the government, nor had samples, photographs, or specifications of the fixtures which Clow & Sons proposed to furnish been submitted to the government. October 16th the Quinn Construction Company, which two days before had entered into its contract with the Noel Construction Company, assigned the contract to Edward J. McDonough and Byron E. Van Auken, thus putting it out of the power of the Quinn Company to carry out its contract with Clow & Sons.

So far as the testimony discloses, Clow & Sons did not learn of the assignment to McDonough and Van Auken until some time in December, and shortly thereafter this suit was brought, seeking to recover damages for breach of the contract of May 7th. A trial was had and a verdict rendered in favor of Clow & Sons for \$6,311.71. From the judgment of the court entered on the verdict these error proceedings are prosecuted.

A preliminary question arises which will be disposed of before taking up the main issue in the case. The suit is brought against the Quinn Construction Company and the Quinn Supply Company, two corporations having their place of business at Kalamazoo, and both under the management of Sylvester A. Quinn. It is contended that the Quinn Supply Company was not a party to the contract, and that Clow & Sons after the contract was entered into dealt with the situation on that theory.

It will be observed that the contract is signed "Quinn Construction Company, by S. A. Quinn for the Quinn Supply Company." This

signature implies that the Quinn Supply Company assumed authority to sign for the Quinn Construction Company. The court, by a proper instruction, submitted the question to the jury as to what was the purpose of the parties at the time the contract was entered into, and as to whether or not their minds met on the proposition that both companies were obligated by the contract. The jury by its verdict found against the contention of Quinn Supply Company and returned a verdict against both of them. We see no ground for denying the soundness of this conclusion, and as between Clow & Sons, on the one hand, and Quinn Construction Company and Quinn Supply Company, on the other, the question is of little practical importance, since a bond in the sum of \$10,000 has been given by each of the defendants, and thus the payment of the judgment, if affirmed by this court against either defendant, has been assured.

Coming now to the main question in the case. Counsel for plaintiffs in error insist that Clow & Sons failed and refused to submit to the government samples and specifications of the fixtures which they proposed to furnish. It was in the contemplation of the parties as manifested by the contract that Clow & Sons were to have the privilege, if the government would consent, to substitute for the particular articles specified appliances of their own manufacture. But, in any event, they were bound to furnish fixtures which would meet the government requirements. Clow & Sons claimed on the trial that they were ready to furnish whatever the government required, but were sure that, as their own appliances came within the general terms of the specifications, they would be accepted by the government, and this seems to be the effect of paragraph No. 877 of the specifications; for, where reference was made in other parts of the specifications to fixtures of certain manufacture, these were only referred to to indicate the character and quality desired. Paragraph 877 provides also that:

"Bidders who desire to submit fixtures other than those specified must submit full specification, description, and plates of fixtures for approval by the officer in charge. Samples shall be submitted as required."

Some correspondence occurred in July and August between Clow & Sons and Quinn Construction Company respecting the submission by Clow & Sons of samples of plumbing fixtures, and plaintiffs in error insist that it became the duty of Clow & Sons to submit the same to the government officers. What Clow & Sons did do was to turn over to Quinn Construction Company a full line of photographic representations, with specifications, of the fixtures proposed to be furnished, some 40 or 50 in number, entitled "United States Naval Training Station, North Chicago. Selections from J. B. Clow & Sons." It would seem to be self-evident that no direct relation existed between Clow & Sons and the Noel Construction Company or the United States government. The parties with whom they contracted were the Quinn Companies, and the turning over to the Quinn Construction Company by Clow & Sons of the plates and specifications to which reference has just been made would seem to be a performance, as between the parties to this litigation, of all the duty which up to that time the Clow Company owed to the Quinn Company.

Specification No. 877 provides, as before indicated, that:

"Bidders who desire to submit fixtures other than those specified must submit full specification, description, and plates of fixtures for approval by the officer in charge. Samples shall be submitted as required."

Two pertinent observations are to be made with respect to this provision of the specifications. The word "bidders" does not mean subcontractors. The government dealt primarily only with bidders for the whole contract and, after the contract was made with the Noel Construction Company, it remained the only bidder with whom the government had direct relations. The submission, therefore, required by paragraph 877 would be a submission by the Noel Construction Company, who, of course, would look to their subcontractor, the Quinn Construction Company, for submission to it, and the Clow Company would be required to submit its specifications, descriptions, and plates to its contracting party, the Quinn Companies. The other observation to be made with respect to this paragraph 877 is that samples were not to be submitted except as required, and there is no proof that Clow & Sons were ever called upon to submit to the Quinn Company or to the government any samples of fixtures which they proposed to furnish, except as shown by the following correspondence.

On September 25, 1907, the Quinn Construction Company addressed the following letter to Clow & Sons:

"Kalamazoo, Mich., Sept. 25, 1907.

"James B. Clow & Sons, No. 342 Franklin St., Chicago, Ill.

"Dear Sirs: We understand that the government proposes to select the plumbing fixtures to be installed in the buildings at the new Naval Training Station at Lake Bluff not later than October 15, next, and presume that you are advised in the matter and will submit your samples.

"Yours Very Truly,

Quinn Construction Company,

"By W. A. Quinn."

On September 28th Clow & Sons sent the Quinn Construction Company the following reply:

"Chicago, Sept. 28-07.

"The Quinn Construction Co., Kalamazoo, Mich.

"Gentlemen: In answer to yours of the 25th inst., you are respectfully informed that samples are ready for inspection. Unofficially we are informed by the commandant of the Naval Training Station that he would not be averse to make an inspection at our sample room, therefore we ask that you notify the Noel Construction Co. of such readiness on our part to comply with the requirements of the government affecting the order that you placed with us for the plumbing fixtures to be used in the buildings to be constructed at the U. S. Naval Training Station, No. Chicago.

"We request that we be given at least two days notice prior to the inspection.

"Yours truly,

James B. Clow & Sons,

"S. McKeeby,

"Mgr. Specialty Dept."

This was the last of the correspondence on this subject between Clow & Sons and the Quinn Construction Company, and the letter of Clow & Sons was manifestly in accord with the proprieties, not to say the necessities, of the situation. The information from the commandant of the Naval Training Station was, as it must have been, unofficial, because the commandant could have no official relations with the Quinn Company's subcontractor.

It was entirely proper that the inspection should be made at a sample room near by, in the city of Chicago. Every requirement of convenient and efficient inspection could be better there complied with than at the training station, which had not far advanced in the work of construction.

It was a very proper request to make that the Quinn Company should notify the party with whom it contracted, to wit, the Noel Construction Company, which was the main contractor, and therefore in immediate relations with the government, that Clow & Sons were ready to comply with the requirements of the government affecting the supply of plumbing fixtures to be used in the Naval Training Station buildings, and it was obviously proper that they should ask that two days' notice should be given prior to the inspection. This particular correspondence, the last correspondence between the parties, regardless of what had gone before, was entirely sufficient to make compliance both with the request of Quinn Construction Company in their letter of September 25th and with the general propriety and requirements of the situation. Instead of complying with these reasonable and sufficient requests, the Quinn Company took no further steps to assist in having an inspection made of the Clow & Sons' fixtures, but disposed of their contract and washed their hands of the whole business.

So the question arose: Did Clow & Sons fail to perform their duty in respect to the matter of submission of full specification, description, and plates of fixtures other than those specified, and did they refuse to submit samples as required? The trial judge fully and correctly charged the jury on this point. He told the jury that, if the failure to secure the government's approval of the fixtures which Clow & Sons proposed to furnish was due to Clow & Sons' fault, then their verdict must be for the defendants, and if, on the contrary, such failure was not due to the fault of plaintiff, Clow & Sons, then there was a breach. We do not find that the court either misconceived the question at issue or failed to properly define what would constitute a breach of the contract and under what circumstances, if at all, the Quinn Companies would be liable; so that, considering the case solely on the assumption that a contract had long prior to October 14th been entered into between the Noel Construction Company and Quinn Construction Company, we think that Clow & Sons did all that under the contract they were required to do in respect to the submission for approval of fixtures which they proposed to substitute for those described in the specifications.

But, in addition to this, it appears that the only contract between the Noel Company and Quinn Construction Company which was offered in evidence was entered into October 14th and two days thereafter, as already stated, Quinn Construction Company, by assigning the contract to McDonough and Van Auken, put it out of their power to carry out its contract with Clow & Sons. It is not unlikely that there was a previous understanding between the Noel Company and the Quinn Company that the latter was to secure the plumbing and heating contract, but if we assume, as we probably would be required

to do, if necessary to a determination of the case, that the only contract between them which we have a right to consider was that executed October 14th, then it is so manifest as to need no argument to support it that Clow & Sons could do nothing in the way of submitting descriptions or samples of fixtures until after that date. If that be true, the conclusion that the Quinn Company was guilty of a breach is obvious. But, apart from that, we are of the opinion that the trial judge properly instructed the jury on all of the points involving any controversy and that there was no error in the proceedings or in the judgment of which the Quinn Companies can properly complain.

The judgment of the lower court is therefore affirmed, with costs.

NOTE.—The decision in this case was announced by the court after the death of Judge Tayler.

TOWN OF PACKWAUKEE v. AMERICAN BRIDGE CO. OF NEW YORK.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,672.

1. CONTRACTS (§ 170*)—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

Where a written contract is fairly susceptible of the interpretation placed on it by the parties during performance, such construction should be given it by the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

Practical construction of contracts by parties, see note to Davis v. Alpha Portland Cement Co., 73 C. C. A. 392.]

2. CONTRACTS (§ 262*)—BUILDING CONTRACTS—PERFORMANCE—APPROVAL BY OWNER'S REPRESENTATIVE.

Where a contract for a building or other structure gives the owner the right to supervise and inspect the work as it progresses by his representative, with power to approve or reject material or workmanship, after the building or structure has been completed and the owner has the use of it, he cannot rescind the contract and refuse to pay the contract price on the ground of defects in material or workmanship which was approved by his representative.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1181-1183; Dec. Dig. § 262.*]

3. BRIDGES (§ 20*)—CONTRACT FOR CONSTRUCTION—PERFORMANCE—APPROVAL BY SUPERINTENDENT.

A contract with a township for the construction of a bridge did not expressly provide that the town should have an inspector on the work, nor that material or work should be accepted or rejected in the course of construction, but was susceptible of such construction, and was evidently so understood by the parties; the town board, as authorized by statute, appointing a person to superintend the work, who exercised the right to approve or reject material and workmanship as the work progressed. The contractor sublet the construction of the substructure, and accepted and paid for the same only after the material and workmanship had been approved by the town's representative. *Held* that, after the bridge had been completed and opened to public travel the town could not refuse to accept and pay for it on the ground of alleged defects in the substructure which, if they existed, were obvious to its superintendent when the work

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was being done; its remedy, if any, being the recovery of damages for breach of the contract.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-47; Dec. Dig. § 20.*]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

At Law. Action by the American Bridge Company of New York against the Town of Packwaukee. Judgment for plaintiff, and defendant brings error. Affirmed.

The town of Packwaukee, plaintiff in error, a township municipality of Wisconsin, entered into a contract in writing for construction by the corporation, defendant in error, of a bridge across Fox river, within the township, for highway purposes, for which \$6,690 was to be paid by the town. Upon alleged completion of the bridge thereunder the representatives of the town refused to pay for the work, and notified the contractor that acceptance was refused, and the bridge must be removed, for various alleged departures from the contract. The defendant in error brought suit to recover the contract price, and trial of the issues to a jury resulted in direction by the court of a verdict against the town for such recovery, with verdict and judgment entered accordingly. For reversal thereof this writ of error is prosecuted by the town, with numerous errors assigned on rulings of the trial court, in such direction of verdict, and in the admission and rejection of testimony. The issues, facts, and questions presented are sufficiently stated in the opinion.

D. W. McNamara (A. J. Schmitz, of counsel), for plaintiff in error.

Frank M. Hoyt (Thomas M. Kearney, of counsel), for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The judgment against the town of Packwaukee, plaintiff in error, is for the contract price of a bridge, constructed by the American Bridge Company, plaintiff in the suit, for a highway crossing over Fox river, with complete performance of the contract as the ultimate fact at issue under the pleadings. In the plaintiff's complaint, after statements of authority for entering into the contract, and that it was made between the parties, full performance is averred on the part of the plaintiff, and refusal of the town to accept and pay for the work. It further specifies objections raised by the town for failure to comply with the contract in various requirements, alleges such claims to be "wholly without foundation," and compliance with the contract in each instance referred to. The answer admits all the allegations, except such performance, and sets up various specifications of failure therein, which include change in location of the bridge, and insufficiency of piling, both in material and work provided by the contract, and of stone and mason work in abutments and center pier, whereby such structures were insecure, so that the bridge work placed thereon failed to operate in conformity with the contract requirements. Aside from minor counterclaims set up for alleged useless expense incurred by the town in inspection and in building highway approaches, the defense rests entirely on denial of liability, in whole or in part, for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

want of substantial performance by the contracting plaintiff; and these averments, if both provable under the contract provisions and circumstances in evidence and proven in fact, may well defeat recovery upon the contract, under the utmost liberality of authorities cited in reference to performance of like work beneficial to the defendant. On the trial of the issues thus presented, much testimony was received tending to support the alleged departures from the contract, in the piling and structure of abutments and center pier, causing insufficiency of foundations, and difficulty in use of the swing bridge. The trial court, however, ultimately withdrew such testimony from consideration by the jury, overruled offers of other testimony in line therewith, and directed return of a verdict for the plaintiff, so that the question of law is presented, whether all such matters tendered in support of the defense set up in the answer were rightly excluded, under the contract and state of facts conclusively established by the evidence.

The contract was in writing, prepared by the American Bridge Company, embracing specifications with a recital that they are "intended to be complete in every respect, but any omission or lack of detail will not excuse the contractor from building and finishing a complete structure, ready for the opening of travel across it and the operation of the swinging parts"; and that "any question or dispute as to the intent or meaning of these specifications, in whole or in part, shall be referred to the town of Packwaukee and county commissioners, or to a disinterested party, and their decision shall be final." It specifies in reference to piling, stonework, and other requirements of the substructure, as described in the answer in averring departure therefrom, and no question arises that such terms were specified therein. It further contains these provisions as to inspection and acceptability of work and materials: That "all facilities for inspection of material and workmanship shall be furnished by the contractor"; that "work hereunder shall be inspected for acceptance" on behalf of the town, on notice "that the work is ready for inspection"; that the town representatives "are to locate position of pier and abutments," and are to receive 10 days' notice "when work on substructure will be commenced"; that the stone used therein "shall meet with the approval of the commissioners"; that the masonry work shall "be done to the entire satisfaction" of the town "or their representative"; that "piles shall be placed as shown on drawings" and be of timber, as specified, or equally good, "acceptable to the commissioners"; that "both material and workmanship" of timber foundation "will be subject to the inspection and acceptance of the engineer." The concluding provision of the contract reads, for payment of \$6,690 "30 days after completion and acceptance."

In neither of the terms is a purpose expressly stated to have an inspector on the work throughout its progress, nor that material or work of the substructure are to be rejected or accepted in the course of construction, nor do the terms necessarily convey an inference for or against such purpose; but the evidence is convincing—and as we believe conclusive—that such was their purpose, in the understanding and conduct of both parties. The chairman of the town, William

Baker, acted as its inspector of work and materials, and supervised operations throughout the construction of the substructure; and this under appointment by the town board to that end, shown both by oral testimony and by record of its proceedings in reference to inspection of mason work, whereby one Schatzka was thus "appointed to assist" the chairman "to see that the stone mason work * * * is carried out according to the specifications of the contract." The plaintiff (as contractor for the entire work) sublet the construction of the substructure to another party, whereof the town board was fully advised—and no question is raised as to his competency—but the representative of the plaintiff, designated in the contract as "contracting manager" thereof, promptly attended to every requirement therein on the part of the town to make materials and work satisfactory. Not only was the entire responsibility of the plaintiff therefor constantly recognized, but the chairman was informed (in writing) that strict compliance with the specifications therein was required, as they "were made very strict in an effort to secure a good piece of work," and that material must "be accepted, before we can allow it to be placed in the work." Nor does it appear from the record, either in testimony received or in tenders of proof, that evasion of any of the contract specifications was sought or attempted by the plaintiff, nor that it was informed at any time prior to the refusal of payment for the bridge of either of the violations of the contract set up in defense in respect of the foundations. It is true that, after the bridge was on the foundations, the chairman wrote plaintiff that "the design for the south pier is not strong enough," and "the pier is broken and sags downstream"; but this complaint was at once taken up before the town board, and the facts were presented and seemingly undisputed as follows: That location of the bridge was changed from the original design, so that an extensive fill was required (made by the town) for the south approach to the bridge; that the mass of earth was thus placed against the abutment, without reinforcing the abutment (on the water side) with riprap (from a nearby quarry) as plaintiff had advised the chairman was needful; that from such cause alone the abutment was broken and pushed forward about one foot; that the town refused to bear the expense of strengthening (with additional piling and anchorage) and restoring the abutment, and such work was performed by the plaintiff, without charge to the town, at considerable expense; and that the town refused and has failed to place riprapping against the abutment, for further protection, as the plaintiff then urged, under a design left with the board therefor.

For every purpose of the present inquiry, however, the alleged departures from the specifications in the foundation work must be assumed to be verities of fact in the case, except in the instances which are otherwise settled by evidence beyond controversy. Thus, in reference to the averments of mislocation of the bridge, no impeachment is tendered of the evidence in writing and of record that the chairman of the town, in conjunction with the government engineer in charge of Fox river improvements, changed and fixed such location and the work was so located; that a question arose, by or before

the town board, whether such action was proper, and the plaintiff's manager attended a meeting of the board, on notice, for settlement of the question; and that, upon hearing, the board adopted and recorded a resolution approving such location. Also, while it is true (as averred) that the swing of the bridge failed to operate freely (some time after the bridge was opened for use), the contractor, upon notice, promptly and readily corrected the adjustment (clearing as well accumulations of sand in the turntable), so that free operation was restored and has continued without further difficulty; but an issue of fact thereupon remains for consideration (through expert testimony offered under the averments), whether settlement of the foundations may not produce future obstruction. The averments of fact, therefore, which we thus assume to be true, are, in effect, that both piling and masonry in the abutments and center pier failed to conform to the specifications, and that the town became entitled to rescind and repudiate the contract, for want of substantial performance, as sought in defense of the suit, unless the evidence is, nevertheless, conclusive of approval and acceptance thereof by the town, in pursuance of the contract, within the rule of law which may then become applicable.

The main controversy, both at the trial and under this writ, arises over the question, whether the rule adopted by the trial court, in directing the verdict, is rightly applicable to the contract in suit; and its solution is needful for ultimate disposition of the case, irrespective of another contention that such issue is not presented by the plaintiff's complaint. Under the contract provisions above recited and the appointment of Chairman Baker thereunder, the evidence upon which acceptance of all materials and work in the substructure is predicated chiefly appears in written correspondence between the contracting plaintiff and Chairman Baker, together with references therein to interviews and facts appearing in undisputed oral testimony. Its bearing is twofold: As proof (1) of mutual understanding and interpretation of the contract provisions thus carried out, and (2) of approvals and acceptance in fact thereunder. Before proceeding to its consideration, however, we take up the single objection urged to this evidence—aside from want of proper pleading—and the single alleged dispute thereof.

On behalf of plaintiff in error it is contended, in substance, that any appointment of the chairman to act for the town board, or action by him thereunder, which extends to approval and acceptance of the work at any stage, would be "an unauthorized delegation of its powers." This proposition we believe to be untenable, neither within the rulings of various authorities cited in its support, nor applicable here, under the power expressly conferred upon the town board by section 1223, Wis. St. 1898, "to appoint some competent person or persons to superintend, under their direction, the construction of" bridges and other highway work. The testimony referred to as disputing the evidence that the chairman was appointed and acted as the representative of the town, is that of such chairman (offered in defense), in substance, that he did not understand, in his acts of approval or letters of acceptance in evidence, that he represented the town, but be-

lieved he "was acting for Mr. Emerson" (the contracting manager) in "a mere friendly way." We deem it sufficient to remark, that his version of these letters and acts cannot be accepted as evidence of their import—especially in the absence of corroboration, circumstantial or otherwise—and that the (so-called) testimony above cited is without force for interpretation of letters or action.

In reference to the letters and testimony relied upon as proving acceptance of materials and work, alleged in the answer to be defective, the leading instances will suffice for mention on the present inquiry. The most serious complaint pressed on behalf of the town, in offers of testimony and argument, relates to the piling which forms the foundation of abutments and center pier—as neither conforming to the contract in the quality of the piles, nor in the method of driving—while the testimony is uncontroverted; that the timber for the piles was selected from standing trees, pointed out by Baker and designated for the purpose—by Baker for the town and Emerson for the contractor, acting conjointly; that Emerson then sublet a contract for their delivery; and that piles thus delivered were inspected and accepted by Baker, and thereafter placed and driven by the subcontractor, under like inspection and approval by Baker throughout performance. When the substructure of masonry (on the piling) was nearly completed, Baker gave a written voucher for payment for the piles, stating (in effect) that they were driven and accepted. Correspondence was frequent between the plaintiff and Baker, throughout the progress of work on the substructure, as to stone, timber, and lumber delivered for use therein, showing requests by the plaintiff for inspection of such material and report whether it is satisfactory, and replies by Baker reporting inspection and results, with rejections of material in some instances, but mainly approvals as satisfactory; and no instance appears of material used in the work which was disapproved by Baker. On report from the subcontractor "that the stonework is about completed and in a satisfactory manner," the plaintiff, in a letter to Baker, after mentioning a request by the stone contractors for payment on their deliveries, recited the above terms of advice as to stonework, and concluded:

"Will you, therefore, give me a statement to this effect, accepting the stone as delivered and placed according to the contract, in order that we may be able to pay the bill promptly."

Baker replied, on November 25th:

"In answer to yours of the 20th, the stone which is laid is satisfactory, but there are about $4\frac{1}{2}$ cords to be delivered to be used at the end of the bridge at the roadway. The bridge is now on the foundation. Mr. Whitson would like pay for 73 piles accepted and driven."

As the plaintiff had no information from any source—either at this stage, or until after completion and public use of the bridge—that any of the work or material in the foundations was not in conformity with the specifications, and as no ground appears for suspicion on its part that the clear specifications therefor would either be evaded by the subcontractor for the work, or overlooked by the chairman as inspector, we believe the bona fides of its course, in requesting

inspection and acceptance during the progress of the work, to be free from doubt. It is not contended that the specifications therefor were open to misunderstanding by Baker, nor that he was either misled, ignorant, or unmindful of their character or importance; nor does it appear, that either of the alleged departures therefrom required special or technical skill for discovery and seasonable objection before material or work were in place and beyond correction. For example, complaint is now urged, with force, that foundation piles were not driven, as the specifications require, "until they did not move more than one inch," under the last blow of the hammer, but that such piling was left in place when it moved at the last blow "12 to 15 inches"—a departure plainly observable under ordinary and unskilled inspection.

These deductions, therefore, we believe to be unmistakable from the facts as established: That the performance of this work was conducted throughout, under mutual understanding of the parties that the contract provisions intended such inspection and approval or disapproval of materials and work, on the part of the town, in the course of construction of the substructure; that this purpose was undertaken on behalf of the town, and was relied upon by the contractor plaintiff in good faith throughout such work; and that the benefits of the entire work have been received by the town in use of the bridge for highway purposes. Moreover, that the provisions of the contract referred to, when read as an entirety, are fairly susceptible of the interpretation thus adopted, and they should be construed accordingly. *District of Columbia v. Gallaher*, 124 U. S. 505, 570, 8 Sup. Ct. 585, 31 L. Ed. 526; *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 74, 12 C. C. A. 37; 27 U. S. App. 364, 372; 9 Cyc. 588.

Under this premise of ultimate fact, we come to the inquiry, whether a rule of law, then, arises to exclude the sole defense set up by the town to rescind the contract for alleged want of complete performance, and thus defeat recovery thereunder. For all purposes of the trial and for reversal of the judgment, the town has rested its defense upon the contentions that the general rules at common law in reference to contract obligations and liabilities were alone applicable to the case. These rules are, in substance, that the contractor undertaking performance of such work may be held strictly to every requirement of the contract, and cannot recover thereunder unless substantial performance (at least) is proven or waived; that the party for whom the work is to be performed as an entirety incurs no duty to inspect and approve or disapprove any portions of material or work entering therein, before tender by the contractor as completed, unless his contract so provides; and that in the exercise of his undoubted right to keep watch over the work during its progress, either personally or through a representative, no general obligation arises therein in favor of the contractor to approve or disapprove portions of the work, but that supervision and responsibility for complete performance rests with the contractor, unaffected by such inspection. In the provisions of the present contract, however (as above defined), whereby the town undertakes not only inspection, but rejection or approval of material and work in the course of construc-

tion, a distinction is obvious from the general line of contract work above mentioned, so that the rule referred to is not justly applicable to performance thereunder, without modification in conformity with such provisions. In reference to like terms in contracts for the erection of buildings, under inspection and supervision by an architect, the doctrine is well settled in Wisconsin, as thus stated in *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 127, 81 N. W. 136, 138:

"Where a building contract provides that the building shall be constructed according to certain plans and specifications to the satisfaction of the supervising architect, who shall inspect all material and work as the building is constructed, with power to reject any material or work not deemed by him to be in compliance with the contract, and to require unsatisfactory construction to be removed and the work done over in a satisfactory manner, the manifest intent is that unsatisfactory material or construction shall be promptly rejected, and that the architect shall not, by silence, allow unsatisfactory construction to proceed to a point where its removal from the building will be attended with serious loss to the builder, and then reject it; that a failure to reject material or work seasonably, and in the manner contemplated by the contract, operates as a waiver of defects in regard thereto, and an irrevocable acceptance of such material or work as satisfactory under the contract, in the absence of some clear, unmistakable provision in such contract to the contrary."

Other Wisconsin cases are of like tenor. *Laycock v. Moon*, 97 Wis. 59, 62, 72 N. W. 372; *Laycock v. Parker*, 103 Wis. 161, 170, 79 N. W. 327; *Siebert v. Roth*, 118 Wis. 250, 253, 95 N. W. 118. Furthermore, in the federal jurisdiction, and as well in other states, the doctrine above stated of exception to the general rule is well recognized and upheld. In a recent case—*City of St. Charles v. Stookey*, 154 Fed. 772, 776, 85 C. C. A. 494—the Circuit Court of Appeals for the Eighth circuit pronounces and applies like doctrine in favor of a contractor for the construction of municipal waterworks, under a contract and specifications providing for inspection and supervision on the part of the city by its engineer. The opinion is elaborate and well considered, citing numerous authorities for the conclusions stated—that performance to the satisfaction of the engineer (acting for the city) amounts to substantial performance in the sense of the contract; that when the city "has derived and retains substantial benefits" therefrom, or has imposed upon the contractor "material losses through the latter's partial performance," the city "cannot rescind the contract on account of the failure of the other party to complete his performance, but the agreement must stand," and the city must perform its part, having recourse only "in damages for the breach," either in separate suit or by counterclaim. See, also, *District of Columbia v. Gallaher*, 124 U. S. 505, 510, 8 Sup. Ct. 585, 31 L. Ed. 526.

The line of precedents above cited are alike in their import, strictly limiting the ground for the rule to approvals and acceptances, express or implied, within the meaning of the contract provisions, in the course of performance, and making it operative only to prevent the party so accepting the work and its benefits from rescinding the entire contract obligation on its part, for alleged want of complete performance. Its application must be further restricted, as recognized by these authorities, both to work and materials which were plainly

open to inspection during the performance, and to cases of undoubted endeavor on the part of the contracting party, in entire good faith throughout, to have the work made and completed in conformity with the contract requirements. Thus limited, we believe their doctrine to be just and well established by modern authorities, as a modification of or exception to the earlier common-law rule in suit upon contracts, and plainly applicable to the present state of facts. True, a distinction of fact appears in the case at bar, from those above cited, in the delegation of supervision on behalf of the town to the chairman of the board, who cannot be assumed to exercise or possess the qualifications of an engineer or professional expert in his supervision; and undoubtedly his action by way of acceptance, as representative of the town, can extend only to materials and work which are plainly contemplated by both contracting parties, as within his competency to be approved or disapproved. But when such limitation is strictly observed, the above-stated doctrine is equally applicable to the delegation and performance thereunder; and, in this case, the initial appointment of Baker to supervise the work was both made and exercised in contemplation of the work then commencing, which was the location of abutments and center pier for the bridge, and delivery and driving of the piles for their foundations; while the formal resolution thereafter adopted by the town board, as recorded, in express terms appoints Schatzka "to assist Wm. Baker, chairman * * * to see that the stone mason work of the" bridge "is carried out according to the specifications of the contract." So, the piling and stone work—mainly, if not entirely, the subject-matter of the defense now set up—were unmistakably placed under the supervision of Baker, and thus brought within the rule. We are of opinion, therefore, that the acceptances proven thereunder, together with completion of the bridge by the contractor as stated and its appropriation for highway purposes, are effectual to bar the town from rescinding the contract for alleged nonperformance; and that, for breaches of contract obligations on the part of the contractor, its remedy is open and must be sought in damages for such breach.

The plaintiff in error contends, however, that such evidence of acceptance is inadmissible under the complaint, for two reasons: First, that it is inconsistent with the averment thereof that the town board refused "to accept the said bridge and work so performed"; and, second, that the complaint fails to allege acts of waiver or acceptance on the part of the town. The proposition of inconsistency is untenable, as we believe, for the reason that the averment referred to obviously relates to the ultimate refusal of the town to accept the bridge as an entirety, as wanting in complete performance, which fact is alike averred in the answer. Whether the complaint may not be defective, under the Wisconsin (code) practice, is a question not met by any authority brought to our attention, and not free from difficulty, in view, especially, of the particular averments of reasons assigned by the town for its refusal to accept the bridge, although the contention that the acceptance must be pleaded as waivers of contract conditions does not impress us to be sound. If rightly termed waivers, in any sense, the fact of acceptances alone (as before stated) does

not waive obligations or conditions imposed by the contract on the contractor. We believe, however, that solution of this question is not needful under the present record. The evidence was introduced and received at the trial, over objections directed alone to its admissibility under the contract, without claim of want of notice thereof through the complaint or of surprise therein, and the controversy throughout was over the competency and effect of such proof to bind the town under the law applicable to the contract provisions. With the issue thus assumed, presented, and tried out between the parties, the alleged defect in the complaint would furnish no just ground for reversal of the judgment, resting alone on such issue, and leaving remedies open to the town, which are not sought in the present suit.

The remaining assignments of error relate to rulings of the trial court in the reception or exclusion of testimony. Their examination discloses no reversible error in either direction, and we are impressed with neither of such assignments as requiring discussion.

The judgment of the Circuit Court is affirmed.

HART v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 19, 1910.)

No. 2,040.

1. INDICTMENT AND INFORMATION (§ 110*)—PROSECUTION FOR VIOLATION OF OLEOMARGARINE ACT—INDICTMENT.

An indictment, charging the defendant generally in the language of the statute with carrying on the business of a manufacturer of oleomargarine without having paid the special tax required by Oleomargarine Act Aug. 2, 1886, c. 840, § 3, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2229), as amended by Act May 9, 1902, c. 784, § 2, 32 Stat. 194 (U. S. Comp. St. Supp. 1909, p. 864), is sufficient, and need not set out a statement of the facts which constitute the defendant a manufacturer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. CRIMINAL LAW (§ 573*)—TIME OF TRIAL—CONSTITUTIONAL RIGHT TO SPEEDY TRIAL.

A delay in placing an indicted defendant on trial, where it was caused by his evading arrest and becoming a fugitive from justice until a short time before his trial, is not a denial of his constitutional right to a speedy trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1292; Dec. Dig. § 573.*]

3. WITNESSES (§ 240*)—TRIAL—EXAMINATION OF WITNESSES—LEADING QUESTIONS.

The court may properly permit the asking of leading questions in a criminal case, in the interest of expedition in carrying on the trial, where it is without prejudice to any rights of the defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

4. CRIMINAL LAW (§ 441*)—TRIAL—RECEPTION OF EVIDENCE.

On the trial of a defendant on the charge of coloring uncolored oleomargarine without having paid the special tax as a manufacturer, and of reselling the colored article without payment of the additional tax.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereon, where an officer of a corporation testified to sales of uncolored oleomargarine to defendant, based on the charge tickets, which he testified were the original entries, and also that drafts were drawn on defendant for each shipment, all of which, as shown by the company's ledger, had been paid, his testimony, with that of an officer of the bank through which the drafts were drawn, was sufficient to establish the fact of such payment, in the absence of any denial; and it was not error to refuse to require the witness to produce the company's ledger.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 441.*]

5. CRIMINAL LAW (§ 400*)—TRIAL—RECEPTION OF DOCUMENTARY EVIDENCE.

Where records are produced in court and subject to examination by a defendant, there is no objection to permitting the introduction in evidence of an abstract made by a witness from such records, giving the pertinent facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 400.*]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan.

John Hart was convicted of criminal offenses, and brings error. Affirmed.

Thomas Mulvihill, for plaintiff in error.

Frank H. Watson, U. S. Atty., and J. Edward Bland, Asst. U. S. Atty.

Before WARRINGTON, Circuit Judge, and COCHRAN and TAYLER, District Judges.

TAYLER, District Judge. At the March term, 1906, of the District Court for the Southern Division of the Eastern District of Michigan, the grand jury returned three indictments for violation of the oleomargarine law against the plaintiff in error, John Hart, and two others. One indictment charged Hart with carrying on the business of a manufacturer of oleomargarine without having paid the special tax required by law. A second indictment charged him in the first count with producing, removing, and furnishing certain colored oleomargarine, and with defrauding the United States by not paying the tax thereon, and in the second count with the same offense as to another lot of colored oleomargarine. The third indictment charged him with violation of the law in neglecting to cancel stamps on empty oleomargarine packages. The three indictments were, by order of the court, consolidated, and the trial proceeded upon all of them. A verdict of guilty was returned against the defendant below on all three indictments, and from the judgment entered error is prosecuted.

Thirty-nine assignments of error are presented on behalf of the plaintiff in error. Many of them are trivial, and none substantial. Classifying them, they relate to the sufficiency of the indictments, the admission of testimony, the refusal to strike out certain testimony, the refusal to charge as requested, and certain instructions given by the trial judge. These assignments will be taken up in the general order just indicated.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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The objections to the first indictment, which charges the defendant with carrying on the business of a manufacturer of oleomargarine without having paid the special tax, are that the indictment does not charge the defendant with manufacturing for sale or removal for consumption by others; that it charges no offense known to the law; that the indictment contains no statement of facts constituting any specific offense; that it does not contain any statement of facts constituting the defendant a manufacturer; that it does not charge the place where the defendant manufactured for sale; and that the defendant was not given a speedy trial, as provided by the sixth amendment to the Constitution of the United States. In none of these objections do we find any serious ground of attacking the sufficiency of the indictment. The indictment charges the defendant in the language of the statute, and is in every substantial respect in the same form as the indictment which was sustained by this court in the case of *Hartman v. United States*, 168 Fed. 30, 94 C. C. A. 124. The last objection made to this indictment, if it means anything, must refer to the fact that the defendant, in anticipation of this prosecution, escaped the vigilance of the marshal and was a fugitive from justice until a short time before he was put upon trial. This can hardly be said to be a denial of the constitutional right to a speedy trial.

The objections to the other two indictments are of a similar nature, although not identical; and it is a sufficient answer to say that they set out the offenses charged substantially in the language of the statute, and, therefore, sufficiently define the crime charged, and informed the defendant of the offense with which he was charged. As none of the objections to the indictments raise any new or difficult question, it would unnecessarily prolong this opinion to devote any further attention to them.

Some of the assignments of error, as we have just indicated, relate to questions as to the admissibility of testimony. These assignments are covered by Nos. 2 to 27, inclusive. It will be well, before considering these specific objections, to generally state the facts as developed by the testimony on behalf of the government. The defendant did not himself testify or offer any testimony.

The plaintiff in error, during the period covered by these indictments, was a legally qualified dealer in white oleomargarine in the city of Detroit. The tax on white oleomargarine is a quarter of a cent a pound; on colored oleomargarine, 10 cents a pound. The general charge against Hart was that he received large quantities of white oleomargarine, and that he caused this white oleomargarine, or a large part of it, to be artificially colored yellow in imitation of butter, and did not pay the tax which the law provides shall be levied on colored oleomargarine. He purchased between April 1, 1905, and February 16, 1906, from Braun, Fitts & Co., of Chicago, manufacturers of oleomargarine, over 125,000 pounds of white oleomargarine. This oleomargarine was shipped in tubs marked "J. H." to Detroit, and was paid for by Hart. In January and early in February, 1906, internal revenue officers, having been led by their pre-

vious investigations to do so, found that the tubs containing this white oleomargarine were being taken from the Michigan Central Station in Detroit to a residence at the corner of Orchard and Trumbull streets, which was not the regular place of business of the defendant. The shipments arrived from Chicago two or three times a week, and many cart loads were conveyed to the premises at Trumbull street. During the same period a large quantity of empty five-pound cartons were delivered to the same place, and many full five-pound cartons were taken away. Some of these empty cartons were taken in defendant's wagon from his store to the premises above referred to, and many of the filled cartons were taken thence to the defendant's store at 378 Gratiot avenue.

While the premises at Trumbull and Orchard were being watched by the revenue inspectors, a machine called a "butter worker" (that is, a machine in which white oleomargarine may be worked over and mixed with coloring matter) was moved therefrom to the adjoining house. An examination made of the butter worker after its removal disclosed the name of the maker, and also the fact that it was the property of John Hart, or that he was interested in it. A few days later the butter worker was removed from the house adjoining the one on the corner of Orchard and Trumbull, and taken to a house at the corner of Riopelle and Winder streets. To this place also empty five-pound cartons were taken, and from it filled cartons were carried to the defendant's place of business. An examination of the premises at Riopelle and Winder, made under the authority of a search warrant on the 16th day of February, disclosed all of the paraphernalia for artificially coloring uncolored oleomargarine. Here, also, were found three empty tubs bearing 10-cent tax stamps which were wholly intact. Upon the lids of each of these tubs were the initials, "J. H., Detroit, Michigan."

It is not necessary to recite any more fully the testimony disclosing the character of the work which was carried on on these premises. The articles found there conclusively establish the fact that colored oleomargarine had been there manufactured in large quantities and that it was packed in five-pound cartons. Indeed 262 cartons filled with colored oleomargarine which had evidently just been mixed were found there by the officers, as well as a can partially filled with coloring matter used to color butter or uncolored oleomargarine. Ten 60-pound tubs of uncolored oleomargarine were standing around a large hard-coal base-burner stove. There was a very hot fire in the stove; the purpose manifestly being to soften the oleomargarine, so that it could be worked up with artificial coloring matter. The windows were covered with paper, bags, and coffee sacks, so as to screen them from outside observation. In the cellar were fragments of thirty tubs which had upon them the initials "J. H., Detroit, Michigan." At defendant's place of business a large number of cartons containing colored oleomargarine were seized. Some of these were concealed under a window. The defendant himself was seen at least twice coming out of the premises at the corner

of Orchard and Trumbull, once a few minutes before a load of filled cartons left it.

We have not undertaken to refer to all of the testimony bearing upon the question of the defendant's guilt; but it is quite apparent from what has been stated that no other rational inference could be drawn from all of it than that the defendant was the responsible person engaged in the business of buying uncolored oleomargarine carrying a small tax and transforming it into colored oleomargarine, upon which a tax of 10 cents a pound was due, and that he was marketing it at his place of business on Gratiot street, and doubtless elsewhere. On the facts thus disclosed the jury could have come to no other conclusion than that the defendant was guilty on all of the charges set up in the indictments.

Even if the court had erred in admitting certain testimony over the exception of the defendant, it did not affect the substantial rights of the defendant. Many of these exceptions relate to leading questions, so called, which the court permitted the district attorney to ask witnesses. Apart from the rule that the propriety of asking leading questions rests in the discretion of the court, and is not to result in a reversal, unless there was a gross abuse of discretion to the prejudice of the defendant, we do not find that the court erred in permitting the district attorney to ask such leading questions as were asked. It would unnecessarily prolong the trial of a case if some leading questions were not permitted, and the instances in which the court allowed the district attorney to ask such questions were all in the interest of expedition in carrying on the trial, and wholly without any prejudice to the rights of the defendant.

One of the witnesses for the government, Francis M. Lowrie, was an officer of Braun, Fitts & Co., and testified to the amount of oleomargarine sold by his company to the defendant. He predicated his testimony on the charge tickets, which he described as the original entries, and testified that he had with him at the time that he testified all the tickets showing sales from April 1, 1905, up to the 5th of February, 1906, aggregating 125,000 pounds or more. He testified that nearly all of the bills were paid through drafts attached to the bills of lading, and that the few shipments which were made on open account were all paid for by draft drawn the same day on the defendant through the First National Bank of Detroit. The witness then added that the ledger account shows that the charges were all paid. Having testified that the ledgers were in Chicago, defendant's counsel insisted that they be produced as the best evidence. We see no force in the exception to the ruling of the court below on this demand that this ledger be produced. It did not contain the original entries nor was it the best proof; and the statement of the officer of the corporation and of the auditor of the Detroit bank that the drafts for all of this oleomargarine had been paid was entirely adequate to establish the proposition, in the absence of any denial of it.

Several assignments of error relate to the testimony of Harry G. Brady, a clerk in the Chicago internal revenue office having charge

of the oleomargarine record. The law requires all sales of oleomargarine made by manufacturers to be reported to the collector of internal revenue. Of this the law requires that a record be kept. Brady, having with him the reports of the sales made by Braun, Fitts & Co. to the defendant during the period in controversy, testified that from these records that were then in his possession he had made an abstract or memorandum. Objection is made that the records themselves, although present, were not introduced, but only an abstract. No proper criticism can be made of this method of proving the condition of the record, because the record was there to be examined by the defendant, if desired. No objection was otherwise made to the competency of the testimony, but only that an abstract could not be used where the witness said the abstract was made from the original papers then in his possession.

The assignments of error from 7 to 27, inclusive, are trivial, and need nothing more than a passing comment. They relate largely to leading questions, so called, to the demand of the defendant that a witness make a chemical analysis in the presence of the jury of samples of oleomargarine with respect to which he was testifying, and other incidents of a similar nature.

The twenty-eighth assignment relates to the denial of the motion that the court direct a verdict for the defendant, which was properly denied.

Assignments 29, 30, 31, and 32 relate to requests to charge which were substantially covered by the charge as given. The requests referred to in Nos. 33 and 34 are irrelevant. The request referred to in assignment of error No. 35 was substantially covered by the charge as given. Assignments 36, 37, 38, and 39 refer to exceptions to the charge of the court. None of them is well founded. The charge in these respects, as well as in all others, was proper and fair.

With some patience we have examined here all of these numerous assignments of error, and have arrived at the conclusion that the defendant had a fair trial, and that he was properly convicted on all three indictments.

The judgment of the District Court is affirmed.

DELAWARE, L. & W. R. CO. v. TROXELL.

(Circuit Court of Appeals, Third Circuit. November 29, 1910.)

No. 1,432.

1. MASTER AND SERVANT (§§ 101, 102*)—CARE REQUIRED OF MASTER—MACHINERY AND APPLIANCES.

A railroad company does not insure the absolute safety of the machinery or appliances it furnishes for the use of its employes, but is bound only to exercise all reasonable care to furnish reasonably suitable and safe machinery and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 180-184; Dec. Dig. §§ 101, 102.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 112*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—RAILROAD SWITCHES.

Plaintiff's husband, while working as a fireman on an engine on defendant's railroad, was killed in a collision between his engine, which was drawing a train, and some freight cars which had escaped from a siding onto the main track. The cars had been placed on the siding the day before, and left with the brakes set and the wheels securely blocked. They had remained stationary for 24 hours, and concededly could not have moved without the releasing of the brakes and the removal of the blocks. By whom this was done was unknown. *Held*, that defendant was not chargeable with negligence because it had not equipped the siding with a derailling switch as an additional safeguard, and under the evidence was not negligent nor liable for the death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 218-223; Dec. Dig. § 112.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action at law by Lizzie M. Troxell against the Delaware, Lackawanna & Western Railroad Company. Judgment (180 Fed. 871) for plaintiff, and defendant brings error. Reversed.

Daniel R. Reese, J. Hayden Oliver, and James F. Campbell, for plaintiff in error.

George Demming, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. This action was instituted by Lizzie M. Troxell, as the widow of Joseph D. Troxell, on behalf of herself and two minor children, under the Pennsylvania statute, to recover damages for the death of her husband, on July 21, 1909, caused, as alleged, by the negligence of the defendant. The deceased at that time was employed by the defendant company in the capacity of a fireman on a locomotive engaged in hauling cars in interstate commerce. The declaration alleges, in substance, that the deceased, while in the performance of his duties, and without any negligence on his part, was killed through the negligence and carelessness of the defendant, in failing to supply and keep in repair proper, necessary, and safe devices, whereby the locomotive on which he was performing his duties came into violent collision with several runaway cars, causing his death.

It appears that the defendant, in the course of its business, had for about eight years maintained a siding known as "Albion Siding No. 2," which extended out from its Pen Argyl branch. The siding was but a few hundred feet long, and connected with the Pen Argyl branch at a distance of from 300 to 400 feet from Pen Argyl Junction, which is the point at which the branch joined the main line of the defendant company. The Pen Argyl branch is itself a blind spur, and extends only from its junction with the main line to Pen Argyl station. The deceased, previous to the accident, had been in the employ of the defendant for about three years, for a considerable part of that time as a brakeman, and later as a fireman. The division upon which he worked was known as the "Bangor & Portland Division," and ran from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Nazareth to Portland, in northeastern Pennsylvania. On July 19, 1909, Troxell, the deceased, at the request of his engineer, took charge of a locomotive and placed six gondola cars loaded with ashes upon Albion siding No. 2. On the following day it was found necessary to place some cars on the siding at the rear of those, and in order to do so it was first necessary to take them out, which was done, and they were afterwards replaced on the siding. The cars, after having been thus taken out and replaced, were, according to the testimony, securely blocked and braked, and remained in that condition on the siding in question for about 24 hours, when, from some unexplained cause, they got away, ran from the siding onto and over the Pen Argyl branch, and from it to the main track, and thereon for a distance of nearly six miles, when they came into collision with a locomotive drawing a train of loaded freight cars, on which locomotive the deceased was then acting as fireman. As a result of the collision Troxell was killed. At the point on the siding where the cars were when they were freed, the grade was descending, as was also that of the Pen Argyl branch, and of the main track over which the runaway cars passed until within about half a mile of the point of collision, when there is evidence that the grade slightly ascended, which somewhat modified the speed of 45 or 50 miles an hour at which the runaway cars were going, according to the evidence, just prior to the collision. The grade of Albion siding No. 2, was, for a short distance from the point of its junction with the Pen Argyl branch, nearly level. After that there was an upgrade of about 1 per cent., and the cars which ran away were, when they were braked and blocked as above stated, standing on that part of the siding having the ascending grade.

The negligence charged against the defendant, and mainly relied upon by the plaintiff below, lay in the admitted fact that it had not provided the siding on which the cars were placed, with a derailing device whereby, had they been tampered with, or otherwise started, they would have been derailed before entering on the Pen Argyl branch. On the part of the defendant, however, it is urged that inasmuch as it had furnished cars equipped with efficient brakes and other appliances, and as it had left them standing on the siding braked and blocked in such manner that they could not possibly move out unless tampered with, it cannot be charged with negligence for not having, in addition thereto, equipped the siding with a derailing device. The evidence in the case shows that the cars were equipped with brakes which were in good order and condition; that the first brake was "doubled"—that is, the strength of two men was used in applying it; that the four rear cars were also strongly braked; that the wheels of the first two cars were blocked; and that the cars remained securely on the siding for nearly 24 hours. Furthermore, all of the witnesses say that there was no way in which the cars could have been started or moved unless some one first loosened the brakes and removed the blocks. Indeed, the evidence in behalf of the defendant, as to the braking and blocking of the cars, was so strong and convincing that the learned judge below, in refusing a motion for a new trial, admitted that it might "be said to be conclusive that they [the cars] could not

have run away, except as the result of some person loosening the brakes and removing the blocks," and as to how or by whom the brakes were loosened and the blocks removed he admitted that there was no evidence.

It appears that the case was allowed to go to the jury principally upon the theory that, in addition to what the defendant actually did, it should have introduced a derailing device in the siding at some point before it joined the Pen Argyl branch. According to the evidence, however, the defendant had already done all that was necessary to make the cars, not only reasonably, but absolutely, secure from running away. It was not obliged to anticipate and provide against the unlawful acts of marauders. Any theory, however, which might be adopted as to the cause of their starting, would be purely conjectural. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter. In *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 277, 45 L. Ed. 361, Mr. Justice Brewer said:

"It is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Again, under the circumstances, the mere absence of a derailing switch furnished no evidence of negligence. It is doubtless a valuable device, but there is no statute that requires its introduction, nor does the law impose upon a railroad company the duty of adopting and using the very latest and best means of avoiding accidents. It is only obliged to exercise all reasonable care to furnish reasonably suitable and safe appliances. The rule is carefully stated by Mr. Justice Lamar in *Washington, etc., R. R. Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 1049, 34 L. Ed. 235, in the following language:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employées. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

The rule in respect to machinery is the same as that in respect to place. *Patton v. Texas & Pacific Railway Co.*, *supra*.

The defendant in this case, according to the uncontradicted testimony, secured the cars on the siding in question with, to say the least, reasonable care and safety, and in so doing did all that under the law it was required to do. It was under no obligation to provide

additional or cumulative devices. It is not required to insure against accident. Some stress, however, was laid upon the fact that the siding in question had a grade which descended toward the Pen Argyl branch. That circumstance, however, has no controlling weight, since, according to the testimony, the cars were securely and safely blocked at the place on the siding where they were left. The testimony, therefore, necessarily took into account the uneven grade of the siding at that place.

In *Norfolk & Western R. R. Co. v. Cromer's Administratrix*, 101 Va. 667, 44 S. E. 898, the court dealt with a situation very like that here presented. It appeared in that case that the deceased, a fireman on an engine drawing a passenger train, which was behind time, and running at a high rate of speed, was killed by a collision between his train and some freight cars which had escaped to the main track from a siding upon which they were stored. But it did not appear how the freight cars, which had their brakes fastened and in a safe condition, escaped. Speaking on that point, the court said that it was a matter wholly of conjecture. After suggesting and commenting upon two possible theories, the court said:

"It is immaterial which theory is adopted. If the brakes which were shown by experience, as well as by direct evidence, to be amply sufficient to hold the cars in position were tampered with, the company would, of course, not be responsible."

It also appeared in the case that, some months prior to the accident, a derailing switch had been installed on the siding, which, however, had been removed before the accident; and it was insisted that its presence would have prevented the accident, and that its removal constituted negligence on the part of the defendant. In dealing with this point the court said:

"In view of the evidence in the case tending to show that the cars on the siding were provided with all the appliances necessary to keep them stationary, and that these appliances and all the rest of the machinery were in good order, it was error to instruct, or to assume in an instruction, that the duty of ordinary care, which the defendant owed to its servant, could only be met by a derailing switch to prevent the moving of cars from the siding to the main track. It is the duty of the master to exercise reasonable care for the safety of his servant; but he is not bound to provide the latest inventions or the most newly discovered appliances. He is not bound to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged."

Other cases touching the point in question are *Grand Trunk, etc., R. Co. v. Melrose*, 166 Ind. 658, 78 N. E. 190; *Edgar v. Rio Grande & Western Ry. Co.*, 32 Utah, 330, 90 Pac. 745, 11 L. R. A. (N. S.) 738, 125 Am. St. Rep. 867; *Fredericks v. Northern Central R. Co.*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306.

After a careful consideration of the evidence in the case, we are unable to find anything which reasonably establishes any negligence upon the part of the defendant. Under these circumstances, therefore, the judge erred in refusing to charge the defendant's twenty-eighth request as follows:

"You are instructed that there is no evidence of negligence on the part of the defendant, and your verdict should be for the defendant."

—the denial of which request was covered by the eleventh assignment of error. In the view that we have taken of the case, it is unnecessary to consider the other points raised.

The judgment below is therefore reversed, with costs, and judgment directed to be entered for the defendant non obstante veredicto, pursuant to a motion of that character made and denied by the trial judge, and its refusal assigned for error herein.

GRAVES v. LAKE MICHIGAN CAR FERRY TRANSP. CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,670.

1. COLLISION (§ 73*)—MOVING AND ANCHORED VESSELS—PRESUMPTION OF FAULT.

In admiralty the rule is settled that a moving vessel must keep away from a vessel properly anchored and lighted, and collision in such cases raises a presumption of fault against the vessel in motion, placing upon her the burden of exonerating herself from blame for the collision; but the general law of the sea becomes applicable to such collisions when the anchored vessel is improperly moored in the fairway or otherwise appears at fault, and evidence of negligence on the part of the anchored vessel, either as sole or contributory cause of the collision, establishes a case within the general rules of admiralty as to the liability for damages.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 103; Dec. Dig. § 73.*]

2. COLLISION (§ 72*)—MOVING AND ANCHORED VESSELS—MUTUAL FAULTS.

A tug with a tow passing down Sturgeon Bay on a stormy night *held* in fault for a collision between her tow and a schooner barge moored to her consort which was anchored near the entrance to Green Bay for continuing at full speed of about eight miles an hour after she saw the lights of the anchored barges and for keeping an insufficient lookout; it appearing that she mistook the anchor lights of the barges for those of a moving steamer until close by. The barge also *held* chargeable with contributory fault for anchoring in the fairway on a much frequented course when there was better anchorage a mile or so farther, and on a line which allowed her to swing through a considerable distance with the variable wind, and also because the stern light of the leading barge was not set lower than the forward light, as required by rule 9 of the navigation rules for the Great Lakes (Act Feb. 8, 1895, c. 64, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2888]).

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 102; Dec. Dig. § 72.*]

With or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Kohlsaat, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in admiralty by Luther P. Graves, as owner of the schooner barge Annabell Wilson, against the steam tug S. M. Fisher and Car Ferry No. 1, the Lake Michigan Car Ferry Transportation Company,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimant, and cross-libel against The Wilson. Decree against The Wilson alone, and libelant appeals. Reversed.

This appeal is from a decree of the District Court in admiralty, condemning the appellant's schooner barge, under libel and cross-libel filed for recovery of damages arising out of a collision, at night, between Car Ferry No. 1, in tow of the steam tug S. M. Fisher, and the schooner barge Annabell Wilson, while the Wilson was lying at anchor in the navigable waters of Sturgeon Bay. The appellant Graves filed the libel, as owner of the Wilson, against the steam tug and her tow, charging fault in their navigation as the cause of collision, and the appellee answered, as claimant of both tug and tow, averring (in effect) their proper navigation, and that the Wilson is alone chargeable with fault for the collision, due to her place and manner of anchorage and insufficient lights, within the channel and course of vessels bound for ports on Green Bay. With like averments the appellee filed its cross-libel—the libel standing as answer thereto—and the issues were submitted and the testimony heard (in open court) before the district judge. The issues were found in favor of the appellee and cross-libelant (without other opinion stated of record), and the decree appealed from awards damages (\$77.21) and costs against the appellant.

The material issues and facts in controversy are stated in the ensuing opinion.

Charles E. Kremer, for appellant.

W. T. Abbott and Robert J. Folonie, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The general locality of the collision in suit was at the entrance between Sturgeon Bay and Green Bay, having about two miles of water, in most part navigable, between the shores; and the appellant's schooner barge Wilson was at anchor off Sherwood Point, on the southerly shore of such entrance, within or near the usual (and charted) course of vessels bound to or from the ports of Green Bay or Peshtigo. Sturgeon Bay is a fine expanse of water, both for navigation and for anchorage grounds, extending from the Sturgeon Bay Canal, westerly and northwesterly to Green Bay, with an expansion northeasterly forming good shelter and anchorage, and another expansion southwesterly, called Sawyer Bay, also used for anchorage. The Wilson had discharged cargo at Sawyer, and on the day before the collision had been towed out of Sawyer Bay by a fishing tug, for anchorage to await the arrival of her towing steamer, Mohican. On rounding Sawyer's Point, in Sturgeon Bay, her consort schooner barge Mingo, owned by the appellant, was found at anchor, and the Wilson passed a line to the Mingo, making fast astern, instead of putting out her anchor. Their distance from the shore and actual location in reference to Sherwood Point are in dispute under the testimony. As stated on behalf of appellee, the bearings of the Wilson were taken immediately after the collision, as one mile from Sherwood Point light S. S. E. by E. $\frac{1}{2}$ E. and "a quarter of a mile right due east" of Sawyer's Point; while the witnesses for the appellant place their anchorage about half a mile northeast of the light, with about half a mile of navigable water between the vessels and the shore. It is undisputed, however, that the wind was blowing fresh and puffy from the northwest, lining the vessels, accordingly, about parallel with the shore line; that the Mingo

had out 30 fathoms of anchor chain and was 200 feet in length; that the line from the Wilson measured 150 feet, and her length was 174 feet; that the "Wilson swung slightly" both ways; and that both white (anchor) lights on the Wilson were placed "about 20 feet above the deck." Witnesses for the appellant testify that vessels passed them on both sides while they were thus anchored.

The night of the collision was dark and squally. It had been raining, but the testimony is conflicting whether the rain continued up to the time the respective lights were discovered. The steamer Fisher, towing Car Ferry No. 1, came up from the canal; her course being westerly and northwesterly and bound for Peshtigo. When the lights of the anchored vessels were sighted, they were taken to be "a steamboat going ahead" of them. And the master of the Fisher testifies that he only made out the colored lights when "his electric light showed on this barge" and that "she was right on our starboard bow"; that he put his "helm hard astarboard" and swung "toward the beach, Sherwood Point"; that the Wilson was swinging shoreward, and caught the towline between the Fisher and Car Ferry, so that the Car Ferry struck the Wilson astern, inflicting and receiving the injuries complained of.

The decree appealed from condemns the Wilson as at fault and alone chargeable for the collision damages. Error is assigned, upon both rulings—that the Wilson was at fault, and that the Fisher was not negligent and not answerable for the damages. So, the first question to be solved is whether fault on the part of the Wilson was rightly found by the district judge under the evidence.

In admiralty the rule is settled: That the moving vessel must keep away from a vessel properly anchored and lighted, and collision in such cases raises a presumption of fault against the vessel in motion, placing upon her the burden of exonerating herself from blame for the collision. *The Virginia Ehrman and The Agnese*, 97 U. S. 309, 315, 24 L. Ed. 890; *The Oregon*, 158 U. S. 186, 192, 15 Sup. Ct. 804, 39 L. Ed. 943, and cases cited. The authorities are numerous, however, that the general law of the sea becomes applicable to such collisions, when the anchored vessel is improperly moored in the fairway, or otherwise appears at fault (*Ross v. Merch. & Miners' Transp. Co.*, 104 Fed. 302, 303, 43 C. C. A. 538; *City of Birmingham*, 138 Fed. 555, 559, 71 C. C. A. 115; *The Scioto*, Fed. Cas. No. 12,508, 2 Ware, 360, and notes); and we believe it to be unquestionable that evidence of negligence on the part of the anchored vessel, either as sole or contributory cause of the collision, establishes a case within the general rules of admiralty as to liability for the damages.

While the evidence is conclusive that the Wilson was moored within the usual course of navigation to and from the upper Green Bay ports—whether in one or the other place, in dispute under the testimony—and that no emergency of weather or other circumstances made such location needful, it is equally well established that there was abundant navigable water for clearance on her port hand. Unless the circumstances in evidence, therefore, were liable to mislead the approaching steamer as to the fact or method of anchorage, it may be conceded

that the Wilson should not be chargeable with fault. Nevertheless, it is obvious that the master and lookout of the steamer Fisher were deceived by the location or the lights (or both) and misunderstood both fact and method of anchorage. The testimony is conflicting whether anchorage off Sherwood Point was or was not customary, or deemed safe or unsafe, within or without the usual course of navigation; but the evidence is convincing, if not undisputed, that the other side of Sturgeon Bay affords both abundant and better anchorage ground for vessels; and the master of the Mingo, who fixed the anchorage place, had not visited Sturgeon Bay for 10 years prior to his present trip. We believe both masters were mindful of a convenient place to be taken in tow, and not of better anchorage ground to leave clearance for navigation, and that the testimony is sufficient to support the finding that the Wilson was at fault, in the following particulars: Their anchorage in the fairway, for days and nights, if not negligence per se, was an obstruction without reasonable cause—and possible menace in darkness or thick weather—to free passage of vessels on a much frequented course. While the testimony is conflicting (as above mentioned) whether it was reasonable and customary for vessels to lie at anchor off Sherwood Point, it is far from satisfactory that it was either reasonable or usual to thus anchor in the course, or that navigators were chargeable with notice that such anchorage was to be expected. Instead of putting out an anchor, the Wilson made fast astern of the Mingo, with 150 feet of line, so that she was constantly swinging under the variable wind; and, if such method was usual (as stated by witnesses) in free anchorage ground, no sanction appears for it under the circumstances. We believe it was a material contributory cause of the collision. The anchor lights of the Mingo, as the master testifies, were placed alike 20 feet above the deck, and not in conformity with rule 9 of the act regulating lake navigation (Act Feb. 8, 1895, c. 64, 28 Stat. 645), which requires the stern light to be "not less than 15 feet lower than the forward light" (3 U. S. Comp. St. 1901, p. 2888); and this departure from the rule tended, as we believe, to confuse the lookout of the approaching steamer—a failure chargeable as well to the consort Wilson.

We are of opinion, however, that fault for the collision is attributable to the speed and navigation of the steam tug Fisher and her tow in approaching the injured vessel. Although the appellee's witnesses state her speed at various rates, from $7\frac{1}{2}$ to 5 miles an hour, it is stated in the answer to the libel at 8 miles an hour, and no actual moderation of speed appears at any stage of the approach. This we believe to be unreasonable under the conceded circumstances. It is conceded that the lights on the anchored barges were observed from the Fisher when about a mile away, although they were taken for the lights of a moving steamer, outward bound. The night was dark, and rain obscured the lights, as testified on the part of the Fisher; and not only was her speed kept up, but the lookout was called by the wheelman to take the wheel, immediately after reporting the lights ahead, and was not serving as lookout thereafter, leaving the master alone to observe the lights and course. Under the testimony, we are satisfied

that a vigilant lookout should have discovered the colored lights and position of the Wilson and Mingo when a quarter of a mile away, to say the least; and the master of the Fisher admits that he "would have had no trouble in keeping away from her" had he "seen these red lights" at that distance. He changed course only when 150 feet away, having then (as he testifies) first discovered the red lights and position of the Wilson on his starboard bow. He immediately ordered his helm "hard astarboard," without giving warning or signal to his tow, and thus cleared the Wilson, although she was then swinging in the same direction according to the testimony. The master of the Car Ferry was left to follow his tug, as best he could; but the swing of the Wilson caught the towline, and the stem of the Car Ferry struck her astern, causing the injuries in suit, both to the Wilson and the Car Ferry.

We believe negligence thus appears in the navigation of the Fisher, and that the decree is erroneous, in exonerating her from liability for such injuries and allowing full recovery against the appellant.

The decree of the District Court, therefore, is reversed, with direction to enter a decree for division of damages as found, and of costs as well, to be borne by the parties respectively, in conformity with the provisions of admiralty for like cases of mutual fault; and it is ordered that the appellant recover the costs of this appeal.

KOHLSAAT, Circuit Judge (dissenting). I am unable to agree with the majority of the court in holding that the Mingo and Wilson were guilty of negligence which contributed to the collision. While there is a conflict of testimony as to the location of the Mingo and Wilson, it is conceded that there was abundant sea room on both sides. It is shown that vessels passing through Sturgeon Bay to points on Green Bay usually take a general course which brings them somewhere in proximity to the place of anchorage of the libelant's barges, though the whole bay is good sailing water. It appears from the evidence that while at anchor the libelant's barges were passed by a number of vessels going up and down Sturgeon Bay—sometimes on the port side and sometimes on the starboard.

So far as the evidence goes, there is no defined course through Sturgeon Bay along which a vessel may proceed at night without keeping a strict lookout. It appears that the object of those in care of the barges, in making the Wilson fast to the Mingo, and in anchoring near the usual course of vessels through the bay was to be in readiness to be picked up by the Mohican. It further appears from the evidence of a number of witnesses for libelant that anchorage near the traveled course was not unusual. On the part of respondents, a number of witnesses testify that it was not a proper or usual thing for vessels to come to anchor in that course. Several of libelant's witnesses swear that they have on various occasions seen vessels so anchored. While, perhaps, it was not the safest place to anchor, yet the libelant was chargeable with only reasonable care, and it cannot be said that it was per se negligence on the part of the barges to anchor where and as they did, no matter in which of the places claimed they were anchored.

For respondent, it is asserted that, owing to the darkness and thickness of the night, it was impossible to see the barges themselves in time to avoid the collision, and that the lights, on which alone the Fisher had to rely, were not properly displayed.

The answer states that the Wilson had a white light, which only showed from her stern; that it had red lights, but whether they were in the forward and mizzen rigging respondent does not know, but calls for strict proof; that the red light could be and was seen about a quarter of a mile away; that the Mingo displayed two white lights, one forward and the other aft, which could be and were seen almost a mile away, except when the squall and rain were too strong.

Respondent claims that it was misled by the position and lights of the barges into believing that the lights were carried by a steamer going out of Sturgeon Bay into Green Bay. Neither the answer nor the cross-libel charge the absence of the lights required by statute in case of vessels at anchor, i. e., one white light at the forward part of the vessel at a height of not less than 20 feet nor more than 40 feet, and one at or near the stern not less than 15 feet below the forward light (article 11, tit. 48, p. 2367, Comp. St. 1901), as in any way responsible for the collision. The failure to see the lights is attributed rather to the thick squally weather. The testimony as to the relative altitude of the several lights of the Mingo is unsatisfactory and indefinite. It nowhere appears just what was their position. It does appear, as above stated, that the Wilson had her regulation lights set, i. e., two red lights, one in the forward rigging and one in her mizzen rigging, and one white towing light showing only from her stern, and that they were seen by the Fisher.

It is contended for respondent that no proper lookout was maintained upon the Wilson. The evidence shows to the contrary; though just how a lookout, however diligent, could have averted the accident, is not stated, except that it is claimed the Wilson might have shown a torch or flare-up, rung a bell, shouted, blown an alarm whistle, or taken some means of attracting the Fisher's attention. If she had her lights set as above stated, she had no reason to assume that the Fisher and tow would run into her, and consequently had no time in which to sound or give an extraordinary alarm, nor could she, under the circumstances, be blamed for not shortening her line.

There are discrepancies between the admissions of the answer and cross-libel and the evidence. For instance, the rate of speed maintained by the Fisher up to the time of the collision is admitted by the answer to have been about 8 miles an hour. Respondent's witnesses fix the speed at about $7\frac{1}{2}$ to 5 miles an hour. The libellant is entitled to whatever advantage there may be, if any, in assuming the speed to have been 8 miles an hour. The case comes fairly within the rule laid down in *Totten v. The Pluto*, Fed. Cas. No. 14,106; *Ward v. The Fashion*, Fed. Cas. No. 17,154; *The Santa Claus*, Fed. Cas. No. 12,327; *Palmer v. Merchants' & Miners' Transp. Co.* (D. C.) 154 Fed. 695.

There seems to be no doubt the whole navigable water of the bay was open to the Fisher. She had sighted some of the barge lights more

than a mile off. She saw that she was gaining upon them and still kept on her stern chase at a speed of eight miles an hour. Even though she may not have been able to see the Wilson's red lights all the time, she did see them a quarter of a mile away. Even though there may have been some uncertainty as to the placing of them, she knew there was some craft just ahead which she was overhauling. Notwithstanding this, she kept up her eight-mile rate of speed. She was not justified in endeavoring to see how closely and how fast she could pass the lights on such a stormy and gusty night as respondent describes, and in such a sea and wind. According to respondent, it was difficult to see the lights at times. That surely was enough to make her wary. Why, when she had the whole bay to sail in, she should, on such a night, follow up directly in the wake of the lights she saw, can be accounted for only by attributing carelessness to those in charge of her. Furthermore, it appears from the evidence that at the time of the collision the Fisher's wheelsman had gone below, and that the lookout had taken his place at the wheel temporarily. The captain claims to have been on the lookout. Even though this be assumed to be true, the tug was shorthanded. With the lights in front of her and the storm about her, this was in itself evidence of lack of diligence, and the burden of proof was on the tug to show that this fact did not cause the accident. The Fisher's negligence was clearly the proximate cause of the collision.

Under the doctrine laid down by the Supreme Court in *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, *The Clara Clarita*, 23 Wall, 1, 23 L. Ed. 146, and *The Virginia Ehrman*, 97 U. S. 317, 24 L. Ed. 890, the burden of proof was upon respondent to show either that the Fisher was without fault or that the collision was occasioned by the fault of the Wilson, or that it was the result of inevitable accident. This the respondent has failed to do.

Under the circumstances, respondent should be held to pay the full amount of the damages sustained by the libellant.

WATKINS v. EATON.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 33.

1. COURTS (§ 505*)—JURISDICTION OF FEDERAL COURTS—MATTERS OF PROBATE.

Funds in possession of an executor or administrator are in the possession of the probate court which appointed him, and a federal court has no power to require him to deliver such funds to an administrator appointed in another state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. § 505.*]

2. EXECUTORS AND ADMINISTRATORS (§ 524*)—CAPACITY TO SUE—ACTION IN ANOTHER STATE.

In the absence of a statute authorizing it, an administrator cannot maintain a suit in his official capacity in a state other than that of his appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2330; Dec. Dig. § 524.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit in equity by Willis L. Watkins, administrator with the will annexed of Elizabeth S. Eaton, deceased, against Hervey E. Eaton, as executor of the last will and testament and of the codicil and memorandum thereto attached of Elizabeth S. Eaton, deceased. Decree (173 Fed. 133) for defendant, and complainant appeals. Affirmed.

Martin & Jones (A. F. & F. M. Freeman, B. M. Thompson, Ralph Phelps, Jr., and Orla B. Taylor, of counsel), for appellant.

E. H. Risley and C. J. Coleman, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Elizabeth S. Eaton, for many years domiciled in Michigan, died at Ann Arbor in that state, May 17, 1906. Her estate consisted of personal property, stocks, bonds, and similar securities aggregating about \$50,000 which for several years prior to her death had been in the possession of her brother-in-law, Hervey Eaton, a resident of Eaton, Madison county, N. Y., who acted as her agent to hold and invest and to collect and remit her income. During a temporary visit to New York, Mrs. Eaton executed a will at Eaton on October 31, 1901, which was left during her life in possession of Hervey Eaton, who was nominated therein as sole executor.

The will provides for certain small legacies each of \$500, or less, to be paid forthwith, and for the payment of certain larger legacies and for a distribution of the residuary "after the deaths of my sister Susan C. Storms and my brother George Albert Storms." It contained the following clauses:

"Sixth. I give and bequeath to my sister Susan C. Storms, during the term of her natural life, from the income of my estate, \$100 per month provided and on condition that she cares for and makes a home for my mute brother George Albert Storms during his lifetime.

"Seventh. Should my sister Susan C. Storms die before my brother George Albert Storms, then in that case I hereby direct and empower my said executor to pay my sister Leah Catherine Kersey, from the income of my estate the sum of fifty dollars per month for caring for and making a home for my said brother George Albert Storms during his lifetime, and in case said George Albert Storms should survive both Susan C. Storms and Leah Catherine Kersey, then my said executor is hereby authorized and directed to make other suitable and sufficient arrangements for such care and home and to pay for the same."

On March 31, 1906, at Ann Arbor, Mich., Mrs. Eaton executed a codicil and memorandum, signing herself "Elizabeth Storms," her maiden name. The codicil contains the following provisions:

"Whereas, my brother George Albert Storms is unable to care for himself through physical defects and infirmities, it is with my wish that my sister Genevieve S. Jacobs and her husband, Nathaniel P. Jacobs, do so care for him and make his home with them during the term of his natural life and that they shall receive the sum of seventy-five dollars (\$75) per month compensation during that time. In the event of his death before that of Genevieve S. Jacobs or Susan S. Higgins, I direct that they shall share alike with the other heirs, in the general and final distribution of my estate.

"Also that any and all property not mentioned in my will is to go to Genevieve S. Jacobs subject to the memorandum annexed to this document."

The memorandum contains this statement:

"George is to make his home with Genevieve and Natty."

The Susan S. Higgins named in the codicil is the Susan C. Storms named in the will; the lady having married in the interim. The codicil and memorandum were attached to the will and with it remained in the custody of Hervey Eaton.

At the time of her death, the testatrix was not indebted to any person in the state of New York, no individual or corporation in the state of New York had made any claim against the deceased or claimed any lien upon any of her estate, no resident or citizen of the state of New York had any interest as heir at law, devisee, or legatee in the estate of the deceased except said Hervey Eaton as legatee of "three family portraits," and a church in Syracuse as legatee of money for a memorial window, which two items have been paid and satisfied. The bill avers that the inheritance tax has been paid to the state of New York. Mrs. Eaton died seised of no real estate, and possessed of some furniture, wearing apparel, ornaments, and household effects in Ann Arbor worth about \$500. Her estate was indebted to sundry persons, residents of the state of Michigan, to the amount of about \$300.

The bill further avers that Eaton petitioned the Surrogate Court of Madison County, N. Y., to probate the will, codicil, and memorandum, filing the same with the court. The same were admitted to probate on November 12, 1906. Eaton was appointed executor, letters testamentary were issued to him, and he thereupon qualified as such executor, and is still claiming to act as such. The Surrogate's Court appointed appraisers, inventory was made of the property of the estate of deceased in the possession of Eaton, which, as we have seen, was practically her entire estate, inventory was filed, and the executor is now holding said property under the authority conferred upon him by the court which appointed him and subject to its direction.

On December 1, 1908, upon whose petition it does not appear, the will of Mrs. Eaton was duly probated in the probate court for the county of Washtenaw, state of Michigan; but the said court rejected the codicil and memorandum, adjudging that they "were not a part of the last will and testament of said deceased and thereupon refused to admit the same to probate." The probate court appointed Willis L. Watkins, the complainant herein, administrator with the will annexed of the estate of Mrs. Eaton. Letters testamentary were duly issued by said probate court to complainant, who "duly qualified as such administrator and is now in the active performance of his duty as such."

The bill further avers that the New York executor, Eaton, is paying the monthly sum of \$75, as provided in the codicil, to Genevieve S. Jacobs for the care and maintenance of George A. Storms, and has refused and refuses to pay to Susan Higgins (formerly Susan Storms) "\$100 per month bequeathed to her by said will; he pretending that said gift and legacy of \$100 per month during her natural life was revoked by said pretended codicil and memorandum." It is further alleged that Hervey Eaton, executor, has brought suit

in the Supreme Court of New York to obtain a construction of certain provisions of the will, codicil and memorandum.

Ann Arbor, the domicile of the deceased, is located within the jurisdiction of Washtenaw county probate court. Counsel for both sides stated on the argument that said court refused probate to the codicil and memorandum because it found that at the time they were executed Mrs. Eaton did not have testamentary capacity and was under undue influence.

Upon all these facts the relief prayed is:

"That the defendants will be ordered to turn over to your orator as administrator with the will annexed of said testatrix, all the property, assets, funds and estate belonging to said Elizabeth S. Eaton at the time of her death and which has at any time come into his possession and control."

It is also asked that Eaton, executor, be stayed from prosecuting his action to obtain a construction.

We entirely concur with the conclusion of Judge Ray that the personal estate of the deceased situated in this state is now in the possession of the Surrogate's Court of Madison County, and that the possession of such property by such court cannot be disturbed by any process issued out of the federal court, and that a decree cannot be pronounced and enforced by the federal court that the executor deliver the property in his hands as an officer of the Surrogate's Court to the administrator with the will annexed appointed by the Michigan court. That is precisely what the complainant asked the Circuit Court to do, the prayer to enjoin the executor from maintaining a suit to have the will construed asked merely for ancillary relief. It is surely unnecessary to cite authorities to show that the federal court has no jurisdiction to administer this extraordinary relief. It is sufficient to point out that in *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, the Supreme Court stated, as "a proposition fully settled by the decisions of (that) court" that:

"An administrator appointed by the state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is in the possession of the court, and it is a possession which cannot be disturbed by any court."

In *Graham v. Lybrand* (Seventh Circuit) 142 Fed. 109, 73 C. C. A. 333, a domiciliary administrator appointed in Ohio brought suit to compel an executor of the same estate appointed in Wisconsin to turn over sufficient of the assets to enable him to pay the debts in Ohio. The court held:

"The fund is in charge of the Wisconsin state court. The federal court in Wisconsin would have the right to adjudicate against these defendants the amount of a claim against the estate; but it rightly declined to order the officers of the Wisconsin state court to turn over a fund under the control of that court to the officer of the Ohio state court for an administration there."

Appellant's brief contains no authority sustaining his right to the relief prayed for here. In the case mainly relied upon (*Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80), the proposition is reiterated that "the prior possession of the state probate court cannot be interfered with by the decree of the

federal court." All that the court holds is that, there being the requisite diversity of citizenship, a creditor may establish a debt against the estate in the federal courts, or a distributee or heir may establish his right to a share in the estate and enforce such adjudication against the executor personally or his sureties, or against any other parties subject to liability or in any other way which does not disturb the possession of the property by the state court—all of which was well-settled law long before *Waterman v. Canal-Louisiana Bank* was decided. But the complainant *Watkins* is not a creditor, nor an heir or distributee, nor has he any personal interest whatsoever in the estate. All that he asks for or can possibly ask for is that the assets be turned over to him in his representative capacity to be by himself administered. Moreover, since the suit is brought solely in his representative capacity, it must fail for another reason.

"In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment (of an administrator of the estate of a deceased person) outside of the territorial jurisdiction of the state within which it was granted. All hold that in the absence of such a statute no suit can be maintained by an administrator in his official capacity, except within the limits of the state from which he derives his authority. If he desires to prosecute a suit in another state, he must first obtain a grant of administration therein in accordance with its laws." *Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757; *Graham v. Lybrand*, *supra*.

There is no statute in this state, to which we have been referred, which enables a foreign administrator to bring suit here in his representative capacity, without first taking out ancillary letters in this state. This, so far as the bill discloses, *Watkins* has not done.

It may be that this objection may be taken by plea; but it is not necessary to discuss that suggestion, since we are clearly of the opinion that the bill does not state facts sufficient to warrant the relief prayed.

The decree of the Circuit Court is affirmed, with costs.

HIGGINS v. EATON.

(Circuit Court of Appeals, Second Circuit. November 14, 1910.)

No. 106.

1. COURTS (§ 311*)—JURISDICTION OF FEDERAL COURTS—MATTERS OF PROBATE.
A federal court has jurisdiction of a suit by a legatee, who is a citizen of another state, against an executor to establish and enforce rights under the will.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 858; Dec. Dig. § 311.*]

Probate jurisdiction, see note to *Bedford Quarries Co. v. Thomlinson*, 36 C. C. A. 276.]

2. WILLS (§ 2*)—TESTAMENTARY CAPACITY—WHAT LAW GOVERNS—FEDERAL COURTS.

Under the settled rule that the status of capacity of a testator to dispose of his personal property is to be determined by the law of his domicile, where the probate court having jurisdiction at the place of domicile

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of a testatrix in Michigan admitted her will to probate but rejected a codicil on the ground of want of testamentary capacity when it was executed, such decision, unappealed from, governs in a suit in a federal court in New York, brought by a legatee against an executor appointed in that state, where most of the property was situated, to establish rights under the will, notwithstanding a contrary decision by the probate court in New York, which admitted the codicil to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2; Dec. Dig. § 2*]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit in equity by Susan C. Higgins against Hervey E. Eaton, as executor of the will of Elizabeth S. Eaton, deceased. Decree (178 Fed. 153) for defendant, and complainant appeals. Reversed.

Martin & Jones (A. F. & F. M. Freeman, B. M. Thompson, Ralph Phelps, and Orla B. Taylor, of counsel), for appellant.

E. H. Risley and C. J. Coleman, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. This controversy arises out of the transactions set forth in our opinion in *Watkins, Administrator, v. Eaton, Executor* (filed herewith) 183 Fed. 384. The complainant is the sister of the deceased, who is named in the sixth clause of the will as Susan C. Storms and in the codicil as Susan S. Higgins. To save repetition the opinion in the *Watkins* suit may be referred to; this bill sets out all the facts which were set out in the *Watkins* bill and some others.

The additional facts are that the probate of the will in the probate court of Washtenaw county, Mich., was upon a petition of this complainant filed July 25, 1906, and that said court denied probate to the codicil and memorandum because it found that at the time it was signed by the testatrix she was not of sound and disposing mind. It also avers that complainant is and at all times has been ready and willing to perform the condition imposed upon her by the sixth clause and to care for and make a home for her brother George Albert Storms, but has been prevented from actually doing so by wrongful and unlawful acts of the defendant, in paying \$75 a month to Genevieve Jacobs for the support of said brother. She avers there is now due and payable to her \$100 a month for each and every month since the death of the testatrix; that she has demanded the same which he refuses to pay; that he is depleting the estate by paying \$75 a month to Mrs. Jacobs; and that she fears such depletion may endanger the payment of her legacy. Also, that *Watkins*, the domiciliary administrator, has not funds in his hands out of which to pay her legacy. She prays payment of the money now due her, a decree requiring defendant to continue the monthly payments to her during her life, and an injunction against his paying out any more money to Mrs. Jacobs.

There is the requisite diversity of citizenship, Mrs. Higgins being a citizen in Michigan. This is a very different suit from that of *Watkins*. It is a suit by the legatee to establish her claim and have a proper execution of the trust as to her; it is exactly the kind of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action which was approved by the Supreme Court in *Waterman v. Canal-Louisiana Bank*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, following many prior decisions of the same court. It will be necessary only to look into the bill to see if upon its face there is sufficient ground for denying complainant the relief prayed for.

It is contended that complainant could not recover, even if there had been no codicil, because of failure to perform the condition prescribed in the sixth clause of the will. A majority of the court are of the opinion that this question should be reserved until the facts are disclosed by proof. It is next contended that complainant, even assuming that she has a valid legacy, is not authorized to come into a federal court here and assert her claim against the personal estate in the hands of the New York executor. Two cases are cited in support of this proposition, neither of which sustain it. In *Doe ex dem. Lewis v. McFarland*, 9 Cranch, 151, 3 L. Ed. 687, the court said:

"It has been decided in this court that letters testamentary give to the executor no authority to sue for the personal estate of the testator, out of the jurisdiction of the power by which those letters are granted. But this decision has never been understood to extend to a suit for lands devised to an executor. In such case the executor sues as devisee."

Mrs. Higgins is not suing in any representative capacity as Watkins is, but personally as a legatee. In *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161, the court said:

"A person claiming under a will proved in one state cannot intermeddle with, or sue for, the effects of the testator in another state."

But Mrs. Eaton's will has been proved in this state, and plaintiff is exactly within the case of *Waterman v. Canal-Louisiana Bank*, supra.

To another objection founded on section 1819, Code Civ. Proc. N. Y., it is sufficient to say that it appears from the bill that more than a year has elapsed, and there has been a demand and refusal.

We have then this situation: No one disputes the validity of the will, which has been probated here. Leaving out for the moment any question as to unfulfilled conditions, no one disputes that under the will this complainant was given a specific legacy which she is entitled to receive. Possibly there may be some way of construing will and codicil so that both will stand, but for the purposes of the argument it may be assumed that is not so and that the codicil, if a valid instrument, revoked the provision for the legacy. This court is properly called upon to determine whether or not complainant is entitled to her legacy, or, in other words, whether the provision of the will was revoked by a subsequent valid codicil. That question has already been before two independent courts each having jurisdiction to pass upon it, and has been adversely decided. The New York court has held that the deceased was of sound and disposing mind when she executed the codicil, which is therefore valid. The Michigan court has held that deceased was not of sound and disposing mind at that time, and that therefore there is no valid codicil. Which of these decisions should the Circuit Court accept as controlling of the present controversy? Because having no probate powers it would not undertake itself to inquire into the testamentary capacity of the deceased.

The Circuit Court held that it must follow the decision of the New York court, when the legatee seeks an interpretation in New York of the obligation of the New York executor. We do not concur in this conclusion. If any proposition is abundantly settled by authority, it is that the status of capacity of a testator to dispose of his personal property by will depends upon the law of his domicile. As Story expresses it in his *Conflict of Laws* (section 465):

"The law of the actual domicile of the party at the time of the making of his will and testament is to govern us as to that capacity or incapacity."

It is unnecessary to multiply authorities, since there is a most exhaustive discussion of them with very many citations in Judge Ray's opinion in the *Watkins Case*. The authorities found on respondent's brief do not indicate any different rule; they merely hold that the will of nonresident testators, having personal property in this state, may be probated in its courts. That is far short of the proposition that a finding by the New York court that a nonresident deceased had testamentary capacity is to be conclusive, when the domiciliary court has decided the other way and the action is prosecuted by a citizen of the domiciliary state in a federal court.

We are of the opinion that the demurrer should be overruled with leave to answer. Some reference was made on the argument to a plea, but it is not in the record before us.

Decree reversed, with costs of this appeal.

SECOND NAT. BANK OF CINCINNATI, OHIO, v. PAN-AMERICAN
BRIDGE CO.

(Circuit Court of Appeals, Sixth Circuit. December 6, 1910.)

No. 2,045.

1. CONTRACTS (§ 292*)—ACTION ON BUILDING CONTRACT—FAILURE TO OBTAIN ARCHITECT'S CERTIFICATE—RIGHT TO SHOW FRAUD.

A contractor for the construction of a building may show in an action at law on the contract that the architect's certificate required by the contract as a condition precedent to action was fraudulently withheld, and is not required to go into a court of equity to avoid the effect of his failure to obtain it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1310, 1343; Dec. Dig. § 292.*]

2. CONTRACTS (§ 284*)—BUILDING CONTRACT—ARCHITECT'S CERTIFICATE AS CONDITION PRECEDENT TO RECOVERY.

Where a building contract required the contractor to obtain the architect's acceptance of the building as a condition precedent to his right to final payment therefor, he cannot maintain an action to recover such payment without such certificate in the absence of fraud on the part of the architect or of mistake so gross as to imply bad faith. It is not sufficient to show that it was withheld unreasonably and unfairly.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1292-1302, 1308-1317, 1326-1338, 1340-1351; Dec. Dig. § 284.*]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action at law by the Pan-American Bridge Company against the Second National Bank of Cincinnati, Ohio. Judgment for plaintiff, and defendant brings error. Reversed.

Chas. M. Leslie, for plaintiff in error.

Orville K. Jones and Joseph W. O'Hara, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. The defendant in error (plaintiff below, and hereafter called the plaintiff) recovered verdict and judgment against plaintiff in error (hereafter called the defendant) for \$2,723.49, being the balance of the contract price for certain structural steel work furnished by plaintiff, under written contract with defendant, for the construction of the latter's bank building, together with the value of certain extras furnished. The questions presented on this review lie within a comparatively narrow compass. The facts material to their understanding are these:

The contract provides that plaintiff shall furnish and erect the work "agreeably to the drawings and plans prepared by" the architects for the owner, and that the work shall be performed "under the direction, and to the satisfaction of" the architects or the authorized representative of the owner; also that payments under the contract should be made "upon a certificate of the architect or other authorized representative of the owner," 15 per cent. being retained from the amount of each certificate and to be paid within 30 days after the final completion of the work "and the acceptance of the same by the architects of the owner, or its duly authorized agent." Payments were made from time to time by the defendant as the work progressed, aggregating full payment of the contract price except the sum of \$2,062.89. Plaintiff furnished extras amounting to \$660.60. It is for the sum of these two items that recovery was permitted. There is no dispute over the extras. The only dispute over the merits of the other item arises upon the claim of defendant that it should be allowed \$2,370.84, as the expense of making certain changes in the work claimed to have been made necessary by plaintiff's failure to comply with the specifications in one respect only, which is this: The specifications provide that "the connection of beams and columns will be standard." They also provide that the contractor shall furnish to the architect, for his approval, triplicate copies of detail drawings, and that the work shall be executed "in strict accordance with such approved drawings," there being the further provision that:

"The architect, in approving these drawings, approves them in a general manner as being in or out of conformance with the general requirements of his drawings and specifications and does not relieve the contractor of responsibility for the correctness of the work shown by them."

The contractor made detail drawings of the connections of beams and columns, plainly showing 8 holes for each connection; that is to say, in splice-plates, angle irons, columns, and beams. These drawings were approved in writing by the architect. Construction in accordance therewith proceeded to at least the sixth story, without ob-

jection by the owner or the architect to the manner of these connections. Objection was then made that good workmanship and standard connection required 10 rivets instead of 8 for each connection. The record indicates that this objection was first made by the public building inspector. There is testimony tending to show that the architect, after construction had progressed to at least the height before stated, insisted that new 10-rivet connections be furnished in place of the 8-rivet connections. Upon plaintiff's refusal or failure to make the changes, they were made by defendant at a cost of \$2,370.84. The architect was satisfied with and accepted the material and workmanship furnished by plaintiff with the single exception of the connections in question. He refused to finally accept plaintiff's work as a performance of the contract and to give a certificate of such performance, basing his refusal upon the failure of plaintiff to make the proper connections or to allow defendant for the cost of the changes made therein. The plaintiff's work has not been accepted by defendant, or by any one on its behalf, as a complete performance of the contract, the defendant, however, being in the occupancy and use of the building. By its plea it offered to confess judgment for \$352.69, as the difference between the plaintiff's claim and the amount paid by defendant for making the new connections.

Upon the trial there was a conflict of testimony as to whether 8-rivet connections were standard or whether 10-rivets were required. The defendant, both by objection to testimony and by motion for a directed verdict at the close of the testimony, insisted that plaintiff was precluded from recovery by the architect's refusal to accept performance of the contract and to give his certificate thereof, and that plaintiff could have relief against such refusal only in a court of equity. The court instructed the jury that if plaintiff's work and material conformed to the contract recovery could be had, notwithstanding the lack of acceptance or certificate by the architect, provided the jury should find that such certificate was withheld "unreasonably and unfairly" or (as expressed at another time) "capriciously or arbitrarily." An instruction requested by defendant at the close of the general charge that "it is not sufficient to show that the architect is unreasonable and unfair," was refused. No exception was taken to the charge of the court as given, exception being, however, reserved to the refusal to give the request just referred to as well as to the refusal to direct verdict for defendant.

In our opinion the exception to the refusal of defendant's request just mentioned sufficiently raises for review the correctness of the charge in the respect mentioned. Indeed, no question of such sufficiency is raised in plaintiff's brief.

We cannot accede to the proposition that resort to equity is necessary in order to avoid the effect of failure to obtain the architect's certificate. The contention most strongly urged seems to be that the plaintiff must, as condition precedent to recovery on the contract, procure the setting aside of the contract provisions requiring such certificate, although the suggestion is also made that the architect's action needs reforming. Neither of those contentions is, in our opinion, maintainable. The plaintiff does not attack the validity of the

contract provision requiring the architect's certificate as a condition precedent to recovery. Nor is there any certificate of the architect standing in the way and requiring reformation. The plaintiff's complaint in this respect is not that the contract is wrong, nor that any certificate of the architect is wrong. Its grievance is that the architect has improperly refused, as alleged, to accept the work and to certify accordingly. None of the cases cited by defendant's counsel are in point, for example: In *Perry v. O'Neil & Co.*, 78 Ohio St. 200, 85 N. E. 41, the holding was that one who had given a voidable release for a cause of action could not maintain his action until the release is set aside. In *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232, it was held that a defense that the bond sued on at law was obtained by fraud was available only "by a direct proceeding to avoid the instrument." In *Beatty v. Wilson* (C. C.) 161 Fed. 453, in accordance with the rule that only legal rights can be enforced at law in the federal courts, it was held that the holder of a state land certificate to whom no patent had been issued could not maintain ejectment against a subsequent purchaser from the state. In *Cook v. Foley*, 152 Fed. 41, 81 C. C. A. 237, one who had accepted and received payment upon a final engineer's estimate of measurements and classification was held not entitled to maintain suit at law for a further sum, based upon a claim that more favorable measurements and classification should have been made, until the estimate was avoided in a court of equity.

The right of a party to a building contract to show in an action at law thereon that the certificate required by the contract as a condition precedent to action was fraudulently withheld has been at least impliedly recognized in numerous cases, several of which are cited in another branch of this opinion, and has never, so far as we have seen, been denied. But in our opinion the trial judge erred in holding that the architect's certificate could be dispensed with if the jury were satisfied that it was "unreasonably and unfairly" withheld. It is true that this instruction finds apparent support in several decisions of state courts cited in plaintiff's brief. But the rule is well settled in the federal courts that under contract provisions such as those existing here the certificate of acceptance is a condition precedent to recovery upon the contract in the absence of fraud or of mistake so gross as to imply bad faith; in other words, that the withholding of the certificate must have been in bad faith.

Thus, in *Kihlberg v. United States*, 97 U. S. 402, 24 L. Ed. 1106, it was said:

"It is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government."

In *Sweeney v. United States*, 109 U. S. 618, 620, 3 Sup. Ct. 344, (27 L. Ed. 1053), it was held that, as there was "neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections," the certificate was a condition precedent to pay-

ment. In *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 551, 553, 5 Sup. Ct. 1035, 1037, 29 L. Ed. 255, a charge was requested that the engineer's final estimate was conclusive unless it appeared that he was guilty of "fraud or intentional misconduct." A modification by adding the words "or gross mistake" was held "well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer." In *Chicago & Santa Fé R. R. Co. v. Price*, 138 U. S. 185, 195, 11 Sup. Ct. 290, 292, 34 L. Ed. 917, it was held that the engineer's certificate was conclusive in the absence of fraud or of such gross error "as to imply bad faith." In *United States v. Gleason*, 175 U. S. 588, 602, 607-608, 20 Sup. Ct. 228, 236, 44 L. Ed. 284, an averment that the refusal of the engineer to extend the time for the completion of the contract "was wrongful and unjust, and a breach of the contract" was held "wholly insufficient on which to base an attempt to upset the judgment of the engineer."

To the same effect are several decisions of this court. In *Mundy v. Louisville & N. R. Co.*, 67 Fed. 633, 637, 14 C. C. A. 583, 587, Judge Taft used this language:

"The authorities leave no doubt that construction contracts, in which the contractor stipulates that the engineer or architect of the owner shall finally and conclusively decide, as between him and the owner, what amount of work has been done, and its character, and the amount to be paid therefor under the contract, are legal, and should be enforced. In such cases, after the work has been done, the contractor can recover nothing in excess of the amount found due by the engineer, unless he can make it appear that the engineer's decision was fraudulently made, or was founded on palpable mistake."

In *Boyce v. United States Fidelity & Guaranty Co.*, 111 Fed. 138, 142, 49 C. C. A. 276, 280, Judge Severens used this language:

"And if the appointee, without fraud or manifest mistake, makes a determination upon any of the matters falling within the scope of the authority committed to him, the parties are bound by the decision."

In *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 398, 403, 93 C. C. A. 162, 167 (where many authorities upon the proposition we are considering are cited), it was said of an agreement in a building contract to submit differences to the arbitration of the architect that:

"An award made by virtue of such contract provision, in the absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding upon both parties thereto, so far as it is confined to disputes actually subsisting and open to arbitration."

See, also, *American Bonding & Trust Co. v. Gibson County*, 127 Fed. 671, 62 C. C. A. 397; s. c. 145 Fed. 871, 873, 76 C. C. A. 155; *Choctaw & M. R. Co. v. Newton*, 140 Fed. 225, 71 C. C. A. 655.

The jury could scarcely be expected to understand that the words "unreasonably and unfairly" meant "in bad faith," for the court charged that:

"If their (the plaintiffs') work and materials did conform to the plans and specifications made by the architect, then the refusal of the architects to ac-

cept such work and materials and to issue a certificate of acceptance is not fair and reasonable, and the plaintiffs may recover in excess of \$352.69."

In other words, the actual conformity of the work and materials to the plans and specifications was made the test of the bad faith which the law requires for setting aside the action of the architect. It is strongly insisted that the bad faith of the architect is clearly shown by his refusal to accept the plaintiff's work on account of defects apparent in the detail drawings approved by the architect. While the record was such as to justify submitting to the jury the question whether the architect acted in bad faith in refusing the certificate, and while it is possible that the defendant and the architect as well, in requiring the substituted connections, were influenced by a fear of criticism upon the sufficiency of the building, we cannot say, as a matter of law, that the admitted facts lead only to a conclusion of bad faith on the architect's part.

The error referred to requires a reversal of the judgment. The plaintiff should be permitted to make any amendment of its pleadings which may be necessary to meet the views we have expressed.

The conclusion we have reached makes it unnecessary to consider the propriety of the instruction that a "capricious and arbitrary" refusal to accept avoided the effect of the failure to obtain the certificate; and perhaps the record should not be construed as sufficiently raising that question. We content ourselves with the suggestion that, if the words referred to are to be used, it should be made clear that they involve either bad faith or a refusal or failure to exercise honest judgment.

Judgment reversed, and new trial ordered.

FULLMER et ux. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. December 5, 1910.)

No. 1,417.

TRIAL (§ 252*)—INSTRUCTIONS—REFERENCE TO MATTER NOT IN EVIDENCE.

Where counsel for both parties on the argument of a case to the jury without objection referred to a matter not shown by the evidence, and assumed it to be a fact, it was not error for the judge to refer to it in his charge, particularly where, as the context shows, he was not referring to the facts, but to the arguments, and the jury could not have been misled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action at law by Henry Fullmer and Susan Fullmer against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Kingsley Montgomery and A. B. Geary, for plaintiffs in error.
John Hampton Barnes, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. Henry Fullmer and his wife, the plaintiffs below, sued the Pennsylvania Railroad Company to recover damages alleged to have been sustained by them on October 12, 1907, by reason of the alleged negligence of the defendant company in suddenly jerking and improperly starting one of its passenger trains into a car of which they were entering as passengers. The husband claimed damages for the loss of his wife's services and companionship, and for the expenses he consequently incurred in caring for her, and the wife for her personal injuries. The defendant pleaded not guilty, and the case was thereupon tried and a verdict returned for the defendant.

Four assignments of error are presented for consideration. One is general, and to the effect that the court erred in entering judgment for the defendant on the verdict. The other three relate to alleged errors in the charge of the court in bringing to the attention of the jury matters which were not in evidence. All of the assignments are based upon the following exception to the charge:

"I desire to except to that part of your honor's charge in which your honor referred to the fact that no claim had been made for nearly two years."

It will be noticed that the exception is general, and it is evident from the opinion of the learned trial judge in denying a motion for a new trial that it did not clearly bring to his attention the precise point here argued, for in denying the motion he said:

"The court in its charge to the jury stated a fact which was not established by the evidence, but which had been asserted in the argument of defendant's counsel. Plaintiff's counsel did not regard the statement of sufficient importance to take an exception to the court's charge in that particular, and call the court's attention to the matter that it might be corrected. Having failed to comply with the rule of court in this regard, the court under the circumstances in this case is not inclined to view favorably the motion for a new trial, and it is therefore overruled."

The portion of the judge's charge complained of was induced in part by the fact that Mrs. Fullmer, notwithstanding opportunity was afforded her, did not complain of her injuries on the night of the accident, but chiefly by what was said by the respective counsel in summing up the case. There was, as stated, direct evidence offered to show that Mrs. Fullmer did not at the time of the accident complain that she had been injured. The defendant's counsel, however, failed in his argument to the jury to confine himself to that fact, but having examined the summons in the case, and finding that it was issued only 17 days before the expiration of the statute of limitations, proceeded to argue that its issuance constituted the first complaint made by her, but of this there was no evidence.

It does not appear, however, that any objection was made by plaintiffs' counsel at the time to what was said by the counsel of the defendant in the respect mentioned; on the contrary, it would seem that it was not only not objected to, but was answered by plaintiffs' coun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sel. This appears from a portion of the judge's charge in which he said, "the plaintiffs say that they were not bound in law to make any claim." This manifestly was but a restatement of what the plaintiffs' counsel had urged in reply to the argument that no claim had been made. Furthermore, it is apparent throughout the portion of the charge objected to, which comprises nearly two printed pages, that the judge was referring, not so much to the evidence, as to the propositions which the respective counsel had argued before the jury. For instance, the court time and again therein used such phrases as "the defendant urges" and "the defendant claims" and "the plaintiffs say," and "it is urged by the plaintiffs." The frequent use of these terms conclusively shows that the court was simply laying before the jury the very points which had been argued and deemed of importance by the respective counsel. Under the circumstances the jury could not have been misled. The context sufficiently explained the judge's meaning. Furthermore, if the defendant's counsel made an argument to the jury which was unsupported by the evidence, the counsel of the plaintiffs should have requested the court to stop him, and if, notwithstanding the objection, he were allowed to proceed, the objectionable matter could have been taken down and an exception thereto then and there noted and sealed. As both counsel in their summing up referred, without objection, to the matter complained of, and assumed it to be a fact, we do not think it was erroneous for the judge to refer to it in the manner he did, particularly as the context shows that he was referring not to the facts of the case, but to the argument of counsel.

As this was the only error relied on, the judgment below will be affirmed, with costs.

DICKSON et al. v. WILDMAN et al.

(Circuit Court of Appeals, Fifth Circuit. November 22, 1910.)

No. 2,066.

1. DEEDS (§ 123*)—CONSTRUCTION—"INTEREST IN LANDS."

The natural and ordinary meaning of the phrase "interest in lands" includes the entire right held in them, and, as used in an instrument conveying the grantor's interest without qualification, it operates to convey all the rights of the grantor.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 123.*

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

2. DEEDS (§ 97*)—CONSTRUCTION—INTEREST CONVEYED—CONFLICTING PROVISIONS.

The settled rule of construction in Alabama, as in many other jurisdictions, is that, in case of repugnancy between the granting clause and other parts of a deed, the former will prevail and determine the interest conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 270; Dec. Dig. § 97.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1307 to date, & Rep'r Indexes

3. COURTS (§ 367*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—CONSTRUCTIONS OF DEEDS.

In construing a deed to real estate, a federal court will follow the settled law of the state in which the property is situated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 959; Dec. Dig. § 367.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, in 11 C. C. A. 71; *Hill v. Hite*, in 29 C. C. A. 553.]

4. DEEDS (§ 124*)—CONSTRUCTION—INTEREST CONVEYED—"LIFE ESTATE AND INTEREST."

A deed recited that the grantor as survivor of his deceased wife had a life estate in certain described real estate which was a part of her statutory separate estate, and that he had agreed to sell the grantee his "life estate and interest" therein. By the granting clause he conveyed to the grantee "and to his heirs and assigns forever, all the right, title, interest, estate, possession, claim and demand whatsoever, as well in law as in equity" which he had in the property, and the habendum was to have and to hold his "life estate and interest * * * and no more, unto said party of the second part his heirs and assigns forever." In fact, the property was part of the equitable separate estate of his wife, and, under the law of the state, a prior conveyance from her to him was effective to convey to him the title in fee simple. *Held*, that, under the rule of decision in Alabama that the granting clause prevails over the recitals or habendum clause of a deed in case of conflict as to the estate conveyed, such deed conveyed the title in fee simple.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-355, 416-428, 434, 435; Dec. Dig. § 124.*]

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Action at law by Annie Dickson and others against Minnie Wildman and others. Judgment (175 Fed. 580) for defendants, and plaintiffs bring error. Affirmed.

John London and Henry Fitts, for plaintiffs in error.

Ormond Somerville, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

SHELBY, Circuit Judge. The plaintiffs are the children and minor heirs of Barton F. Dickson, deceased. They claim the real estate sued for by inheritance from him. In his lifetime he conveyed it to George A. Searcy. The plaintiffs contend that he conveyed only a life estate. The Circuit Court held, however, that the conveyance carried the fee-simple title, and that the plaintiffs, therefore, could not recover. This ruling the plaintiffs assign as error.

1. The main question presented for decision is whether the deed from Barton F. Dickson conveyed a fee-simple title, or only an estate for the life of the grantor. Here is the deed, and we place in *italics* those words to which the parties call special attention as tending to show the true intention of the grantor:

"Whereas, the late Mrs. Katie E. Dickson, now deceased, was seized and possessed in her life time in fee of the real property hereinafter described, the same then being a part of the corpus of her statutory separate estate un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

der the laws of Alabama, and whereas Barton F. Dickson, who was the husband of the said Mrs. Katie E. Dickson, deceased, has survived her; and under and by virtue of the laws of said state, became entitled to the use and occupation of said real property *for and during the term of his natural life*; and (since the death of said Mrs. Katie E. Dickson) he has been in quiet and undisturbed possession and enjoyment of the same; and whereas said Barton F. Dickson has agreed to sell to said George A. Searcy *his life estate and interest in the real property aforesaid*:

"This indenture made and entered into between Barton F. Dickson, party of the first part, and George A. Searcy, party of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of two thousand five hundred dollars lawful money of the United States of America, to him in hand paid by the party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents doth grant, bargain and sell unto the said party of the second part *and to his heirs and assigns forever, all of the right, title, interest, estate, possession, claim and demand whatsoever, as well in law as in equity* (of, in and to the following described real property) of said party of the first part, and of every part and parcel thereof, with the appurtenances, that is to say: (We omit description).

"To have and to hold *all and singular the life estate and interest which said party of the first part hath* in the above mentioned and described premises, together with the appurtenances, *and no more*, unto said party of the second part, *his heirs and assigns forever*.

"In witness whereof, the said party of the first part hereunto sets his hand and seal this 4th day of December, A. D. 1883.

"Barton Flinn Dickson. [Seal.]

"Witness:

"John C. Calhoun.

"W. R. Foster."

The primary rule in the construction of a deed is to learn, if possible, from the language employed the intention of the parties, and then effect should be given to such intention if it can be done without violation of law. The aim is to ascertain the meaning of the words which have been used, looking at them as constituting a complete instrument, and giving effect to every clause and every word if possible, rejecting none unless plainly repugnant to the general intent. When there is no necessary repugnancy in the different parts of the deed, and the intention of the grantor can be ascertained from the words used, read with regard to his situation when the deed was executed, there is no need to resort to other rules. The object of the so-called technical rules of construction is to enable the court to discover and enforce the primary rule—to give effect to the intention.

The plaintiff asks: If the grantor intended to convey in fee simple, why did he not use the few and apt words required, and no more? The defendants ask with equal relevancy: If the grantor intended to convey a life estate only, why did he not use only the few words required to effect that purpose? The questions become more serious, if they do not suggest a mystery, when we consider that the writer of the deed was a lawyer.

After careful consideration, we have reached the conclusion that the record and deed disclose an intention on the part of the grantor to certainly grant a life estate, and to convey also any and all other estate and interest he might have in the property. If it was his intention to do this, and if he was confident of his right to the extent of a life estate, but uncertain as to having other and greater interest,

or uncertain as to the extent and character of such other interest, that fact would account, we think, for the unusual combination of words used in the deed. It has been suggested by a thoughtful judge that, before reading a deed, we should begin to seek the intention by placing ourselves "in the seat" occupied by the grantor at the time the instrument was executed. *Walsh v. Hill*, 38 Cal. 481. The real estate in question came to the grantor, Barton F. Dickson, from his wife. Before he married her, he made an antenuptial agreement whereby he relinquished all of his marital rights to her property. This relinquishment on their marriage made this property her equitable separate estate. Without the relinquishment, the property, under the law of Alabama, as it existed at that time, would have been her separate statutory estate. She could make a valid conveyance to her husband of her equitable separate estate, but she could not at that time have made a conveyance to him effective at law of her statutory separate estate. The deed of Mrs. Dickson to her husband was valid only because of the fact that the husband had previously by the antenuptial agreement relinquished his marital rights. The Alabama law relating to the estates of married women and the distinction between their equitable and statutory separate estates constituted a system not easily understood, and was subject, during its existence, to conflicting decisions even by the court of last resort. It is not improbable that the grantor, or that even his attorney, was at that time uncertain as to the effect of the relinquishment by the husband and the subsequent conveyance by the wife to the husband. That such uncertainty did exist in their minds is indicated by the statement in the introductory recitals of the deed that the property in question was "a part of the corpus of her statutory separate estate under the laws of Alabama." This was an erroneous description of her estate. In fact, her estate was an equitable separate estate, which she could convey as if she were a feme sole. *Whittaker v. Van Hoose*, 157 Ala. 286, 47 South. 741. If the grantor had been right in supposing that her estate was a statutory separate estate, and if the conveyance by his wife to him had been ineffectual, he would then, under the Alabama statute (Code Ala. 1907, § 3765), have had at her death an estate by the curtesy. This life estate he certainly meant to convey, and also any interest that he had by virtue of his wife's deed to him. He was probably not sure of the law that made the wife's estate under the circumstances an equitable and not a statutory separate estate, and therefore he did not know that her deed to him passed the fee to him. The fact that a lawyer wrote the deed does not remove the probability that the deed was executed in ignorance of the extent and quality of the grantor's interest. There is no conclusive presumption that even a lawyer knows all the law when the deed that he writes shows that he did not know part of it. A scrivener may be well informed as to the terms used by a conveyancer, and yet not be informed as to the laws of descents and distribution and the capacity of married women to make contracts relating to their separate estates. While the deed shows that some skill was used in the selection of words, it distinctly shows ignorance or uncertainty as to the character of the grantor's title.

Both in the preliminary recitals and in the habendum there is coupled with the words "life estate" the words "and interest," indicating, we think, not only an intention to convey the life estate, but also any other interest that the grantor had in the property. Being uncertain what title or claim was bestowed on him by the wife's conveyance to him, a word is selected that would embrace it whatever it might be. "The word 'interest' is the broadest term applicable to claims in or upon real estate." *Ormsby v. Ottman*, 85 Fed. 492, 497, 29 C. C. A. 295. The natural and ordinary meaning of the phrase "interest in lands" includes the entire right held in them, and, as used in an instrument including the grantor's interest without qualification, it operates to convey all the rights of the grantor. *Ragsdale v. Mays*, 65 Tex. 255, 257. In the granting clause, we also find the word "interest" coupled with other words—"right, title," etc.—and we also find, as probably showing a doubt as to whether his "interest" acquired by the wife's deed was legal or equitable, that the clause is framed to cover all rights "as well in law as in equity."

It is not questioned that the granting clause of the deed is sufficient to carry the fee or any interest the grantor had. It grants to the vendee "and to his heirs and assigns forever, all of the right, title, interest, estate, possession, claim and demand whatsoever, as well in law as in equity (of, in and to the following described real property) of said party of the first part, and of every part and parcel thereof, with the appurtenances. * * *" This grant is as complete and comprehensive as language can make it, and this plain and unequivocal language should not be made to yield to any uncertain and equivocal expressions in either the introductory recitals or the habendum. The question does not arise as to what should be done in case of irreconcilable conflict between the parts of the deed until it appears that such conflict exists. The introductory recitals show that the grantor erroneously believed that upon the death of his wife he became tenant by the curtesy, notwithstanding she had conveyed the real estate to him, but it states an agreement to sell his "life estate *and interest*" in the property. If effect is given to the entire description of what it was agreed to sell—"life estate and interest" in the property—it is sufficiently comprehensive to prevent conflict with the granting clause. The same is true of the habendum:

"To have and to hold all and singular the life estate and interest which said party of the first part hath in the above mentioned and described premises, together with the appurtenances, and no more, unto said party of the second part, his heirs and assigns forever."

Not only the word "interest" repeated here seems to conflict with the idea that a life estate only was meant to be conveyed, but the use of the words "heirs and assigns forever" tends the same way. If a life estate only had been in the grantor's mind, the word "interest" would probably have been omitted, and, instead of the words "his heirs and assigns forever," the words "for and during the lifetime of the grantor" would have been substituted. The words "no more" create no difficulty if the other parts of the deed show an intention to convey all "interest" of whatever kind the grantor had, but to con-

vey only such interest. The mere recital of the grantor's claim to curtesy is not inconsistent with the additional claim of other interest in the property. Taken altogether, the deed, we think, shows such other claim, though it is not defined, and shows an intention to convey all the title and interest, legal and equitable, that the grantor possessed. As he had the fee, the fee passed by the deed.

2. If it were conceded that there was repugnancy between the granting clause on the one side and the preliminary recitals and the habendum on the other, and that the conflict was such that the true intent of the grantor could not be ascertained, it is manifest that the court must decide which part of the deed shall prevail. The rule in such case is that the granting clause determines the interest conveyed, and when it is clear and unambiguous, as in the deed in question here, it prevails over introductory recitals in conflict with it, and prevails also over the habendum if that is in conflict with it. The reason sometimes given for the rule is that a deed founded upon a valuable consideration is to be construed most strongly against the grantor, and, when the conflict is in the habendum, that the grantor in the latter part of the deed will not be permitted to deny or retract the grant previously made. The rule is very old, and it may be that it is founded on an effort to enforce the cardinal rule to ascertain and give effect to the intention. The granting clause is naturally looked to to see what it was intended to convey, whereas recitals are often merely introductory, and are not a necessary part of the deed. The granting clause is the very essence of the contract. It is required to transfer title, but the habendum clause is not absolutely necessary to make a deed effective. Where a conflict exists, therefore, in the different parts of a deed, the true intent of the grantor as to what was intended to be conveyed is more likely to be found in the granting clause. The settled rule of construction in Alabama and in many other jurisdictions is that in case of repugnancy between the granting clause and other parts of the deed the former will prevail. *Webb v. Webb's Heirs*, 29 Ala. 588; *McMillan v. Craft*, 135 Ala. 148, 33 South. 26; *Dickson v. Van Hoose*, 157 Ala. 459, 47 South. 718, 19 L. R. A. (N. S.) 719; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Miller v. Tunica County*, 67 Miss. 651, 7 South. 429; *Dunbar v. Aldrich*, 79 Miss. 698, 31 South. 341; *Bodine's Adm'rs v. Arthur*, 91 Ky. 53, 14 S. W. 904, 34 Am. St. Rep. 162; *Carl Lee v. Ellsberry*, 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60; *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818; *Wilcoxson v. Sprague*, 51 Cal. 640; *McLennan v. McDonnell*, 78 Cal. 273, 20 Pac. 566; *Tate v. Clement*, 176 Pa. 550, 35 Atl. 214; *Maker v. Lazell*, 83 Me. 562, 22 Atl. 474, 23 Am. St. Rep. 795; *Hobbs v. Payson*, 85 Me. 498, 27 Atl. 519; *G. B. & M. C. Co. v. Hewitt*, 55 Wis. 96, 12 N. W. 382, 42 Am. Rep. 701; *Ingleby v. Swift*, 10 Bingham, 84; 9 Am. & Eng. Ency. of Law, 139; 17 Am. & Eng. Ency. Law, 8.

3. In *Clarke v. Clarke*, 178 U. S. 186, 191, 20 Sup. Ct. 873, 874 (44 L. Ed. 1028), Mr. Justice White, speaking for the court, and citing earlier cases, said:

"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances."

In *Simpson County v. Wisner-Cox Lumber & Mfg. Co.*, 170 Fed. 52, 55, 95 C. C. A. 227, this court held in construing a lease for 99 years:

"It would be intolerable to have one rule prevailing in the state courts and another in the federal courts as to the construction of state statutes and leases of real estate situated in the state. * * * The laws of the state, as expounded by its court of last resort, constitute the law of the land as to the conveyance, lease, and titles of real estate situated within the state."

In 1857 the Supreme Court of Alabama declared the rule to which we have already referred in this opinion. In the case of *Webb v. Webb's Heirs*, 29 Ala. 588, an antenuptial deed contained preliminary recitals describing the interest intended to be conveyed as a one-third interest in fee, but the granting clause granted a life estate. In the opinion Judge Stone says:

"There is a repugnance between the introductory recitals in the deed and the granting clause. * * * The general rule is admitted, that parties are estopped from denying the facts recited in their deeds. Neither will they be permitted, in a court of law, to prove a consideration different from that expressed, so as to change the character of the instrument. In the present case, the deed furnishes its own correction. The granting clause determines the interest intended to be conveyed, and prevails over the introductory statement."

In 1902 the adherence of that court to that rule is announced by the court, holding that, where there is a repugnant conflict between the introductory recitals in a deed and the granting clause, the latter must prevail, since the granting clause determines the interest intended to be conveyed. *McMillan v. Craft*, 135 Ala. 148, 33 South. 26.

Before instituting in the federal court the suit we are now deciding, the same plaintiffs sued for the real estate claimed in this action in the state court, relying on the same title. The case reached the Supreme Court of Alabama, and that court adhered to and applied the rule as to the granting clause that was announced in 1857 in *Webb v. Webb's Heirs*, supra. *Dickson v. Van Hoose*, 157 Ala. 459, 47 South. 718, 19 L. R. A. (N. S.) 719. If we differed from the reasoning and conclusion of the Alabama Supreme Court—and we do not—we would be reluctant to interfere, and are probably bound by the rule announced as one relating to real estate in Alabama.

The judgment of the Circuit Court is affirmed.

PARDEE, Circuit Judge, does not concur.

In re DUGGAN.

COHEN v. CHAMBERS.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1910.)

No. 2,122.

CHATTEL MORTGAGES (§ 194*)—WITHHOLDING CHATTEL MORTGAGE FROM RECORD.

A chattel mortgage given by a bankrupt on his stock of merchandise and withheld from record for several months by the mortgagee under a tacit agreement to do so because of the effect which the record would have on the mortgagor's credit is fraudulent and void both as to prior and subsequent creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 426, 427; Dec. Dig. § 194.*]

Appeal from the District Court of the United States for the Southern District of Georgia.

In the matter of Mrs. S. L. Duggan, bankrupt. Appeal by Louis Cohen from an order of the District Court. Affirmed.

Thomas S. Felder, for appellant.

Jno. R. L. Smith, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

SHELBY, Circuit Judge. Mrs. S. L. Duggan having been adjudicated a bankrupt, Louis Cohen presented his petition to the referee, claiming that she was justly indebted to him in the sum of \$494, with interest, and that the same was secured by a mortgage dated May 17, 1909. The bankrupt at the date of the mortgage was engaged in the mercantile business, and the mortgage was on her stock of goods and store fixtures. The trustee filed objections to the claim, alleging that the mortgage was not a valid and subsisting lien upon the property described; that the same was in violation of the bankruptcy law, in that it was given by the bankrupt and accepted by the mortgagee in fraud of the other creditors; and that, while it purports to have been executed on May 17, 1909, it was given for a past-due indebtedness and withheld from the records till July, 1910, and that the withholding of it from the records was for the purpose of giving the bankrupt credit and commercial standing, and was a fraud upon the other creditors of the bankrupt. The claimant, Louis Cohen, was examined as a witness in his own behalf, and J. W. Duggan, the husband of the bankrupt and her business manager, was also examined. The following excerpts show the substance of the material part of their testimony:

"Louis Cohen: The second time they (the bankrupt and her husband) came to me was for the borrow of \$600 for the purpose of helping them in their store, and they voluntarily offered me a security on their stock of goods, and they also stated to me that they were perfectly solvent, and it was for the purpose of using it to pay off some indebtedness that was pressing them at the time. I gave them the \$600. I sent the paper promptly to Eastman, to the clerk of the superior court there, for record. They lived at Eastman.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Dodge county, and I at Sandersville, Washington county, and I won't be positive how many days it was on record when I received a telephone message from them both, and it was so indistinct that I could just catch enough from the telephone to tell that they were very much agitated and worried over the mortgage having been recorded. So I told them that the best thing they had better do was to come to Sandersville and let me find out what they wanted. It was very indistinct, so they came. They told me that publicity of the mortgage when it was put on the record, that the wholesalers they had been buying of told them that they would not sell them any more as long as this mortgage was on record, and they begged me to take it off. In the meantime they brought me \$150 cash to reduce that mortgage. I knowing the parties for a number of years, knowing them to be honest and straight, I took this mortgage then with the interest, and they asked me not to put this on record. I did not promise them anything, and they also promised to pay me in monthly payments until this paper was liquidated. Before maturity, I think it was when the first payment as per promise came due, I wrote them, and they answered me back that they would make a remittance soon. That passed on, and in the course of my being busy I overlooked this until one day Mr. Duggan came down to see me and asked me for advice, and in that conversation he then told me his condition. I says, 'Well, Mr. Duggan' I says, 'from your statement you are broke.' He says, 'Oh, no, sir; I have got plenty of assets.' I says, 'Yes, sir; you are broke, and I am going to put my mortgage on record right to-day.' I sent it that very same evening over to the record. That was the 4th day of January, 1910. He went into his condition with me at that time, and was advising with me as to what he should do. I told him he was then broke. He told me that I was mistaken; that he had plenty of assets and he was not; that he was perfectly solvent. He was honest in his statement. He showed feeling about it. When I told him and showed him he was broke, he cried. I took this mortgage which I am now setting up in bankruptcy, due October 15th, the 17th day of May, 1909. Mr. Duggan paid me that time \$150, and then I extended—I took a new mortgage for the balance. This is the balance, the amount of this note and mortgage here claimed. He stated to me he was then perfectly solvent. I asked him. I believed what he said. I had every reason to believe everything that both of them said. I made no definite promise as to keeping it off record. I made him no promise. I had loaned him \$600 a short time previous to that, and he came in and paid part of it. And then I extended the indebtedness and took this new mortgage. And this new mortgage I did not put on record until I found out his condition. But I did not have any agreement with him not to put it on record.

"Q. Why was it you took this \$600 mortgage off record, canceled the record of this mortgage? A. They told me that the mortgage I first put on was hurting their credit the minute it was put on—that is the one they telephoned me about.

"Q. Why did you comply with their request about that? A. From their first statement, and then having confidence in their standing and in their solvency, knowing them, I kept it then off record. I thought they would comply with their promise to give me partial payments until when it was due, the second one I had written. It would be liquidated before it was due, while I made the second one the 15th of October, but before they executed it, before it was ever drawn up, they had made me a promise to pay me so much every month that before the 15th the balance of it would have been paid up.

"Q. Your object, then, in canceling the first mortgage and taking a new one, was to extend their credit, give them a better credit than they would have had if it had remained on record? A. From their statement I did, to accommodate them.

"Q. That was your object in doing that? A. Yes, sir.

"Q. You knew, if you didn't do it, their credit would be ruined? A. From their statement and to accommodate them and by their statement is the reason I accommodated them, took it off and took a new one.

"Q. They told you that putting that first mortgage on record was ruining their credit? A. Yes, sir.

"Q. And that no wholesaler would sell them as long as it was on record?
A. Yes, sir."

"J. W. Duggan: I managed the business of my wife. The occasion of that mortgage being canceled from the record, that was given first, the \$600 mortgage was. We needed \$600, and my wife wrote and asked him for \$600. We told him that we would give a mortgage on the stock of goods if he wanted it. The money came right along. We gave him a mortgage on the stock of goods, and in a few days we saw where it was hurting us. I mean we could not buy goods with that mortgage on record; that is, people would know it was on there. We could not buy goods. Of course, pretty nearly everybody knew it. We phoned him, and he could not understand us, so he told us we had better come over there. We went over there and paid him \$150. He took it off, canceled the mortgage. He did that because we asked him to. We asked him to for the simple fact it was hurting our business. I guess we told him that fact. I am not certain. I reckon we told him it was hurting our business. That is what we meant.

"Q. State whether or not there was any request made of Mr. Cohen to keep this second mortgage off the record? A. He didn't make any promise at all there, just to get that mortgage off. To tell you the truth, I don't know positively whether we asked him not to record it or not, but he didn't do it. I know one thing—it didn't make any difference whether we asked him or not. It was not done. Possibly we did ask him not to do it. I think we asked Mr. Cohen not to put it on as long as he could help it; that is the best of my recollection. I think I did do that. I can't tell you what he said. He said he would take this one off. If we paid him \$150, he would take this one off."

The referee decided that the mortgage was valid and entitled to priority of payment in full out of the funds arising from the sale of the stock of goods covered by the mortgage, and directed the trustee to pay it. The trustee thereupon filed a petition to review the decision of the referee, and the question of the validity of the mortgage was certified to the District Court. The District Court reversed the ruling of the referee, and held that the mortgage was fraudulent and void. The first order entered in the District Court was to the effect that the mortgage was void as to all creditors, antecedent and subsequent. After this order was entered, the attorney for the claimant called the attention of the judge to the fact that the order did not follow the ruling of the court, and that the order should have been that the mortgage was void only as to subsequent creditors. Thereupon an order was entered modifying and changing the order complained of, and directing that the intervention of Cohen be again referred to the referee to take an accounting of the creditors who contracted debts subsequent to the making of the mortgage, and that as to the subsequent creditors the mortgage should be void, but, as to all other creditors, it should be valid. The fund arising from the sale of the mortgaged property was sufficient to pay off and discharge all of the subsequent creditors and to leave a balance sufficient to pay the mortgage. The trustee applied to the District Court for a rehearing, which was granted. On rehearing, after argument by counsel on both sides, it was finally held by the District Court that the mortgage was void as to all the creditors of the bankrupt, those who contracted their debts prior to the making of the mortgage as well as those who contracted their debts subsequent to the making of the mortgage, and the petition of the claimant to have his mortgage declared a prior claim was dismissed and refused. Cohen, the claimant, seeking to establish the priority of his mortgage, appealed from this order.

In *Clayton v. Exchange Bank*, 121 Fed. 630, 57 C. C. A. 656, we held, on the facts of that case, that certain mortgages were fraudulent and void. It was so held on the objection of subsequent creditors, chiefly on the ground that the mortgage had been withheld from record upon a tacit understanding between the mortgagor and the mortgagee for the purpose of bolstering the credit of the former. There was no reference in the case to creditors whose claims accrued prior to the mortgage. In the statement of the case it was said:

"These objections (to the mortgages) were made in behalf of the unsecured creditors, who became creditors, it is admitted here, after the execution of the mortgages, and while they were unrecorded."

And in the opinion it was said:

"The creditors who seek to avoid the priority of the mortgages are those who sold goods to the mortgagor after the execution of the mortgages, and while they were withheld from record."

The court clearly had in view an attack for fraud on mortgages by subsequent creditors only. No prior creditor appeared in that case, certainly none to claim that, although the mortgages might be void as to subsequent creditors, they should be treated as valid as to prior creditors.

The evidence in the instant case fully sustains the conclusion of the trial judge that the mortgage was withheld from the record for the purpose of giving the mortgagor a fictitious credit. This fact, with the other circumstances disclosed by the record, is quite sufficient to bring the case within the authority of the *Clayton Case* as to subsequent creditors.

But it is assigned that the court erred in holding that the mortgage was made "invalid as to all creditors of whatever class." It is contended that the withholding of the mortgage from the record, although it bolstered the credit of the mortgagor and enabled him to contract other debts, did not affect the prior debts of the mortgagor, and that, if held invalid as to the subsequent debts, the mortgage should remain a superior claim to the prior debts.

Usually the prior or existing creditor is in a better position than the subsequent creditor from which to attack a conveyance for fraud. For example, a voluntary conveyance may be successfully attacked by an existing creditor by merely proving the existence of the debt at the date of the conveyance, that the conveyance was without consideration, and that the debtor has no other property than that conveyed sufficient to satisfy complainant's claim. A subsequent creditor would have to allege and prove additional facts to show that he was injured by the fraudulent conveyance although his debt did not exist when it was made. The difference, therefore, between existing and subsequent debts in reference to voluntary conveyances is this: As to the former, fraud is an inference of law, and, as to the latter, there must be fraud in fact. The rights of the two classes of creditors to relief, and the proof required to obtain a decree annulling the conveyance attacked, are necessarily different; the differences depending on the facts of each particular case. But this is not relevant here except to show that it is the subsequent, and not the existing, creditor, who

has usually the greater burden to establish his right to relief. In this case we are concerned only with the kind of decree for distribution that should be entered when the attack made by a trustee representing both classes of creditors has been successful.

In the first place, it should be noted that the Georgia statute condemning conveyances and contracts "made with intention to delay or defraud creditors" makes no distinction between prior and subsequent creditors. The act of making such deed or contract is made void against "creditors and others." Civ. Code Ga. 1895, § 2695.

The letter of the statute indicates that when a successful attack is made, and the contract is annulled and declared void, it is void as to all "creditors and others." Commenting on a similar statute, the Supreme Court said:

"If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future." *Parish v. Murphree*, 13 How. 92, 98, 14 L. Ed. 65.

In *Kehr v. Smith*, 20 Wall. 31, 36, 22 L. Ed. 313, the court said:

"It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund pro rata."

This principle was applied in a case like the one at bar. A trustee in bankruptcy attacked a mortgage as fraudulent. The master to whom the case was referred reported the names of the creditors whose claims accrued while the mortgage was fraudulently withheld from record, and recommended that the mortgage be held invalid for the benefit of those creditors; but the court held that it was void as to all creditors, antecedent and subsequent. *Mitchell v. Mitchell* (D. C.) 147 Fed. 280, 286.

It is suggested that only the subsequent creditors—those who gave credit while the mortgage was withheld from record—were injured by the fraud, and that, therefore, the prior creditors—those who extended credit before the mortgage was executed—should not share in the distribution. But this contention is not well founded. The existing creditors were probably lulled into inaction by the withholding of the mortgage from the record. If it had been promptly recorded, they might have proceeded at once to enforce their claims. In that way they may have been hindered or "delayed."

The general rule is that the proceeds of the property adjudged to be fraudulently conveyed should be distributed ratably among all the creditors, preserving, however, the rights of those, if any, who have liens on the property. *Day et al. v. Washburn et al.*, 24 How. 352, 356, 16 L. Ed. 712.

There is nothing in the bankruptcy law to require a departure from this general rule. On the contrary, it provides that dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured. Bankr. Act July 1, 1898, c. 541, § 65a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3448). If the mortgage were declared void as to one set of unsecured creditors and valid as to another set of unsecured creditors, it would result in an unequal distribution among creditors of the same class.

The trustee was vested by operation of law with all property trans-

ferred by the bankrupt in fraud of his creditors. *Id.*, § 70a. When the mortgage is declared void, the trustee holds the mortgaged property unincumbered by the mortgage, and it is subject to pro rata distribution just as any other property of the bankrupt.

The learned judge of the District Court, in the decree appealed from, decided correctly, and the decree is affirmed.

SLOCUM et al. v. SOLIDAY.

(Circuit Court of Appeals, First Circuit. December 1, 1910.)

No. 885.

BANKRUPTCY (§ 318*)—PROVABLE DEBTS—COVENANT FOR INDEMNITY AGAINST LOSS OF RENT—"FIXED LIABILITY."

A provision in a lease that, in case the lessee shall be petitioned into bankruptcy or declared a bankrupt, the lessor may re-enter and terminate the lease, and that in such case the lessee shall pay to the lessor "as damages a sum which at the time of such termination * * * represents the difference between the rental value of the premises and the rent * * * herein named for the residue of the term," does not create a liability which can be proved as a claim against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

Appeal from the District Court of the United States for the District of Massachusetts.

In the matter of the French Carriage Company, bankrupt. From a decree of the District Court, William H. Slocum and others, trustees, appeal. Affirmed.

Harold Williams, Jr. (Wilmot R. Evans, Jr., on the brief), for appellants.

Henry T. Richardson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is an appeal from a decree in bankruptcy cutting down a proof of claim offered by the appellants. The appellants are testamentary trustees, owning lands and buildings which were leased to the French Carriage Company, of which Soliday, the appellee, is trustee in bankruptcy. The petition in bankruptcy was involuntary, and was filed on November 19, 1909, with an adjudication on December 6, 1909. The letting of the premises was by an indenture under seal, which was to expire on December 31, 1910. The proof covered all rent in arrears, and also the equivalent of the rent for the unexpired time to the end of the lease. A credit was given for payment by the receiver in bankruptcy during his occupancy, leaving the balance of the claim as proved, \$14,265.29. On the rehearing of the proof, the referee reduced it to \$3,102, which ruling of the referee was sustained by the District Court. Thereupon appeal was taken to us. The \$3,102 was the admitted amount of the rent to the time of the filing of the petition in bankruptcy.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The lease contained no special provisions, except the following:

"This lease is made on condition, also, that if the lessee shall neglect or fail to perform or observe any of the covenants herein contained on the lessee's part to be performed or observed, or if the estate hereby created shall be taken on execution or other process of law, or if the lessee shall petition to be or be declared bankrupt or insolvent according to law, or if a receiver, guardian, conservator, or other similar officer shall be appointed to take charge of any part of the property of, or to wind up the affairs of, the lessee, or if any assignment shall be made of the lessee's property for the benefit of creditors, then, and in either of the said cases, the lessor lawfully may, immediately or any time thereafter, and without demand or notice, enter into and upon the demised premises, or any part thereof, in the name of the whole, and repossess the same as of his former estate, and expel the lessee and those claiming through or under him, and remove the effects of both or either (forcibly, if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies for arrears of rent or preceding breach of covenant, and upon entry as aforesaid the lessee's estate shall end. And the lessee covenants that in case of such termination, or of termination under the provisions of statute by reason of default on the part of the lessee, the lessee will, at the election of the lessor (which election may be made or changed at any time), either (a) pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same installments, or, if the premises shall have been relet, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate installments, as liquidated damages for so much of the unexpired term as is represented by such installments; or (b) pay to the lessor, as damages, a sum which at the time of such termination, or at the time to which installments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term; or (c) indemnify the lessor against loss of rent and other payments herein named from the time of such termination, or from the time to which installments of liquidated damages shall have been paid, during the residue of the term."

It does not clearly appear from the record whether the lessors rest their claim for any rentals subsequent to the filing of the petition in bankruptcy, or the equivalent thereof, on the demand arising out of the ordinary relations of landlord and tenant holding under an unexpired lease, as readjusted by statutes in bankruptcy, or whether they rely on the special provisions of the lease which we have cited. If the former, the rule that rent, as such, arises out of the occupation of the leased premises, or, as in support thereof, the rule that there is no certain liability, because non constat the tenant may not continue to occupy the premises, are too well established to require any discussion by us so far as this case is concerned.

If the lessors rely on the peculiar provisions of the lease, it seems to us emphatically demonstrable that no claim arises therefrom provable here. In order that a claim may be proved, it must have existed at or before the filing of the petition in bankruptcy which the adjudication follows. It is true that there are some confused provisions of the present statutes in bankruptcy which have relation to the time of the adjudication; but we are governed by the rule stated, as found in the form of proving unsecured debts fixed by the General Rules in Bankruptcy ordained by the Supreme Court. *Hutchinson v. Dee* (decided by us December 6, 1901) 112 Fed. 315, 50 C. C. A. 264; *In re Roth & Appel*, 181 Fed. 667-674. This proposition does not seem to be contested; but the lessors maintain that the status of the parties, out of which their present claim un-

der the peculiar provisions of this lease arises, was fixed simultaneously with the filing of the petition in bankruptcy, if not prior thereto. The provision in the lease contemplates several alternatives. The one relied on by the lessors is "(b)." This alternative has relation to the time of "such termination." Indeed, the whole of this special provision of the lease has no operation, except from the time when the lessors enter into or upon the premises as provided therein. This entry clearly could not be made in a case in bankruptcy, except on the condition that the lessee had already been petitioned into bankruptcy, or declared bankrupt. To the common apprehension, the entry could not occur, either in fact or in theory of law, until after the petition in bankruptcy had been filed; and the order of things in the law is the same. Therefore no claim based on the particular provision referred to could have had existence, except in the possible undisclosed or disclosed intention of the lessors, prior to the filing of the petition in bankruptcy, or at the time of such filing. Any mere such intention, whether disclosed or undisclosed, would not be of effect to create a claim which the law would regard as provable. Whatever the intention may have been, there was no existing claim which could be proved in bankruptcy, until the lessors had exercised their option to enter, and had actually entered in accordance therewith. Until that time there was simply a contingency that there might be a claim; but neither under the present statutes in bankruptcy nor under any prior statutes was there anything in such a contingency which was capable of being proved against a bankrupt's estate.

The lessors rely on our decision of December 6, 1901, in *Hutchinson v. Dee*, 112 Fed. 315, 50 C. C. A. 264. The effect of that decision was that the filing of a petition in bankruptcy sometimes operates to render unnecessary a demand, or tender, which might otherwise be necessary under an existing executory contract; so that the mere filing of the petition operates as a breach of the contract. It was there pointed out that, inasmuch as the filing of the petition is the effective act which accomplishes the breach, the filing and the breach are simultaneous. In the case at bar the District Court found as a matter of fact that the entry was subsequent to the commencement of the proceedings in bankruptcy; but this finding was necessarily true as a matter of law. In the theory of the law, the beginning of proceedings in bankruptcy necessarily preceded the entry, because by the terms of the lease entry could not be made until after the proceedings were commenced. Therefore, although the entry may have immediately followed the beginning of the proceedings, and may not have been separated by an interval capable of definite measurement, the two matters were distinct and separate, and one succeeded the other.

An earlier publication of *In re Roth & Appel*, 181 Fed. 667, in which the Circuit Court of Appeals for the Second Circuit reached the same conclusion which we have reached here, might have saved us the labor of drawing the opinion.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal, to be paid out of the estate in bankruptcy.

THE VOLUND.

(Circuit Court of Appeals, Second Circuit. October 12, 1910.)

Nos. 279-282.

COLLISION (§ 154*)—SUITS FOR DAMAGES—COSTS.

Where a libellant in a suit for collision against a vessel recovered, and the charterer, brought in by the ship, was also dismissed as not liable, both libellant and charterer are entitled to costs and disbursements against the ship.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 308; Dec. Dig. § 154.*]

Appeals from the District Court of the United States for the Southern District of New York.

Suits in admiralty by Charles W. Dumont against the steamship Volund and the Higginson Manufacturing Company, and by Etta Gracie, as administratrix of Stewart Gracie, deceased, by Eliza S. Dodge, as administratrix of Gladys Dodge, deceased, and by Joseph M. Hanigan against O. Irgens and A. Irgens and the Higginson Manufacturing Company. On settlement of costs.

See, also, 181 Fed. 643.

Wallace, Butler & Brown (Frederick M. Brown, of counsel), for The Volund.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. When opinion in these causes was handed down (July 26, 1910), and when the mandate was subsequently signed, nothing was said about the costs in the District Court, although the cause was remanded to that court for "appropriate action"—that is, for final disposition in accordance with the views expressed in our opinion. It was supposed that the District Court would dispose of any question as to costs which might arise upon such final disposition. It now appears that the District Court is of the opinion that, by reason of our failure to award costs of that court to the libellants or to the Higginson Company, it is without power itself to make such award, but must enter a decree strictly in conformity to the mandate. The District Judge, however, intimates that there are in his judgment sufficient grounds for the claims made for such costs to warrant the parties making them to apply to this court for a settlement of the question.

The libellants proceeded against the ship and have prevailed in both courts. There is no reason apparent why the costs (and disbursements) necessary to the prosecution of their several claims in both courts should not be included in their final decrees against the ship.

The Higginson Company, charterer, was brought into the cause upon petition of the ship. It has now been held that such petition should have been denied and the charterer released. The company has insisted throughout that it was not liable, and that it ought not to have been brought in, and there is no reason why it should not be entitled to costs and disbursements in the District Court upon its final dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

missal from the case, and the only person liable therefor is the ship which brought it in.

If the District Court thinks it necessary that this court should amend the mandate, so as to provide specifically for the costs in that court, the same may be returned for such disposition. But it is thought that this expression of opinion, coupled with the direction in the mandate to take "appropriate action," will be sufficient authority without any amendment.

ESSEN et ux. v. CITY OF PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 1,409 (33).

MASTER AND SERVANT (§ 106*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE.

An employé in the engineering department of the city of Philadelphia, while standing on the elevated track of a railroad sketching a semaphore, saw a train approaching, and instead of going upon a platform, which was beside the track, stepped from the track alongside a picket fence between the two tracks, and was struck and killed by the train. There was a platform on each side of the tracks, beside one of which the semaphore stood. It did not appear that the sketch could not have been made from either platform. *Held*, that there was no evidence to charge the city with negligence which would render it liable for his death.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 106.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action at law by William G. Essen and Wife against the City of Philadelphia. Judgment (175 Fed. 522) for defendant, and plaintiffs bring error. Affirmed.

Charles H. Edmunds, for plaintiffs in error.

J. Howard Gendell, City Sol., and Joseph W. Catharine, Asst. City Sol., for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. A judgment of nonsuit, entered by the court below, is here the subject of review. William L. Essen, son of the plaintiffs, and a draftsman in the employ of the defendant, the city of Philadelphia, was on May 8, 1907, sketching a safety device of the Philadelphia & Reading Railroad Company for the city of Philadelphia. It was work that he had been directed to do for his employer. While doing it, he stood on one of the tracks of the railroad company, was struck by an express train, and was killed.

The safety device, a semaphore about 24 feet high, stood on the side of the platform near Ninth and Spring Garden streets. There were but two tracks at the place of the accident, and there was a platform on each side of the railroad. There is no evidence to show that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the sketch could not have been made on either platform, or that the deceased's duty required him, in the performance of his work, to take a position upon the railroad tracks, or that any representative of the city had reason to believe he would take such a position. Consequently there is no evidence of negligence on the part of the city in failing to warn him of the approaching train. Indeed, he heard the warning whistle of the train, saw the train coming, and, instead of going to the platform, stepped from the track alongside the picket fence between the two tracks, in which place he stood when he received the injury that resulted in his death an hour or two later. The burden was on the plaintiffs to show negligence on the part of the defendant. It seems that the unfortunate man was himself negligent in unnecessarily assuming a dangerous place for doing his work, and in taking his place by the side of the picket fence when the train was approaching him. However that may be, it is clear that no inference of negligence on the part of the defendant can be properly drawn from the facts presented.

The judgment is therefore affirmed, with costs.

GENERAL ELECTRIC CO. v. DUNCAN ELECTRIC MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,666.

PATENTS (§ 328*)—INVENTION—BINDING-POST FOR ELECTRIC METERS.

The King patent, No. 789,433, for a binding-post or circuit terminal, particularly adapted for use in electric meters, is void for lack of patentable invention in view of the prior art, supplemented by the disclaimer filed by the patentee.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit in equity by the General Electric Company against the Duncan Electric Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

The appellant, General Electric Company, as owner of letters patent No. 789,433, sues the appellee for alleged infringement thereof, and this appeal is from a decree dismissing its bill for want of equity. The patent was granted to King (assignor) May 9, 1905, on application filed October 10, 1902, for "improvements in binding-posts," and the specification states, as the object of the invention, "the production of a simple and efficient binding-post which is insulated from its support, and is especially adapted for use in connection with electric meters." It contains six claims as allowed, and claims 1 and 6 are alleged to be infringed, reading as follows:

"1. In combination, a casing provided with an opening, an insulating-bushing fitted to the opening, the interior of said bushing being threaded, a metal binding-post in the interior of said casing threaded into said bushing, a washer of insulating material surrounding the inner end of said bushing, and a nut threaded on said binding-post for securing said washer and said bushing to said casing."

"6. In combination, a meter-casing having an aperture formed in it, an insulating-bushing passing through said opening and provided with a flange

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

engaging the outer surface of the casing at the edge of said aperture, a binding-post inside the meter-casing, means located within the casing for securing the binding-post and bushing to each other and to the casing, a conductor passing through the bushing, and means located within the casing for securing the conductor to the binding-post."

On May 9, 1905, the appellant (as assignee) filed in the Patent Office its disclaimer as follows:

"To that part of the claim in said specification which is in the following words, to wit:

"5. The combination, of a casing, a binding-post having a longitudinal bore, a bushing mounted in an opening in said casing and receiving said binding-post, and a clamping device located within the casing for securing to the binding-post a conductor passing into the bore of said post from without the casing."

The drawing of the patent and descriptive matter contained in the specification are as follows:

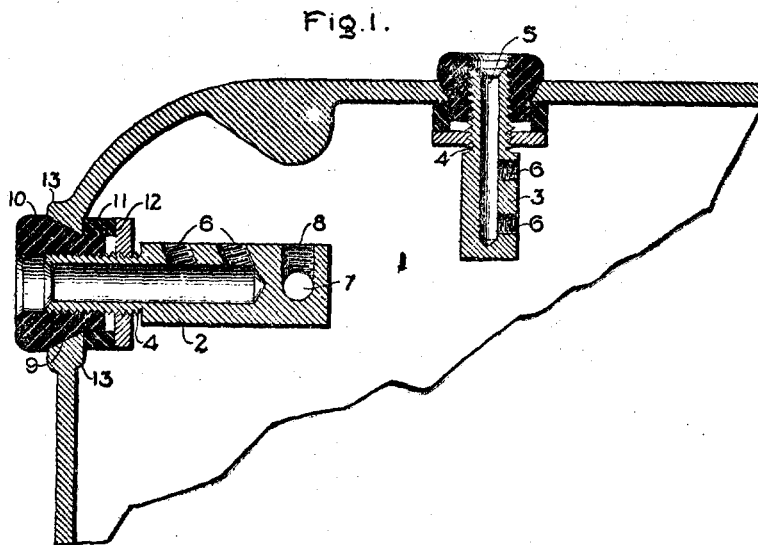
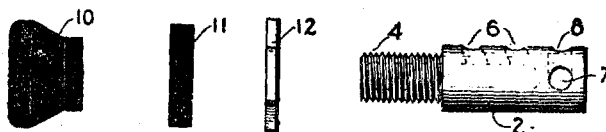


Fig. 2 Fig. 3 Fig. 4. Fig. 5.



"Each binding-post consists of a substantially cylindrical body, having one end, 4, reduced in diameter and threaded. An axial opening or recess, 5, is formed in this end of the binding-post. Threaded transverse openings, 6, are formed in the body portion of the binding-post leading into the recess, 5, into which set screws may be inserted in order to secure an external conductor in the binding-post. A transverse opening, 7, is formed in the unthreaded end of the binding-post, 2, which receives the conductor leading to the cur-

rent coils of the meter mechanism. At right angles to this opening, 7, a threaded opening, 8, is formed, into which a set screw holding the meter terminal in position is threaded. * * *

"The major portions of the binding-post are located on the interior of the meter-casing. The threaded end may, however, project through the tapered opening, 9, in the wall of the casing. A tapered tubular insulating-plug, 10, into which the binding-post is secured, is fitted into this opening, 9, and insulates the binding-post proper from the casing. The insulating-bushing, 10, may be circular in cross section, or may be given any other desired configuration, and is interiorly threaded to receive the threaded end of the binding-post. The taper of the opening and the bushing is such as to prevent more than a partial entrance of the bushing. A washer, 11, also made out of insulating material, surrounds the inner end of the insulating-bushing, 10. A nut, 12, which may be made of metal, is threaded on the binding-post and abuts against the end of the washer, 11, which extends into the casing farther than does the bushing, 10. * * *

"By the construction shown the binding-post is secured in a position in which there is almost no opportunity for dust to pass from the outside of the casing into the interior, and in which the connections between the meter mechanism and the circuit cannot be readily altered."

Other facts deemed material are stated in the opinion.

P. C. Dyrenforth, Richard N. Dyer, and John Robert Taylor, for appellant.

Robert H. Parkinson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The patent in suit, No. 789,433, is for an improvement in so-called "binding-posts" or circuit terminals, particularly adapted for use in electric meters. The post consists of several parts which are assembled for use in the meter, fitted into an opening in the meter-casing, and screwed together for receiving and connecting wires in an electric circuit, and novelty is neither disclosed nor claimed in means or function, unless a new and patentable combination appears of the several elements, each well known in the art, constituting the binding-post. Its function as described, for a circuit terminal, was fundamental in the structure of electric meters and analogous provisions for electrical connection, and exemplifications in the art are needless. In the light of the prior art, supplemented by the appellant's disclaimer (filed October 20, 1906), we believe both claims in suit to be without patentable novelty in the combination set forth.

The history of the application for this patent—shown by the "File Wrapper and Contents" in evidence—is instructive. It was filed October 10, 1902, with three original claims, which were rejected December 9, 1902, on reference to prior patents, Nos. 498,407, 371,161 and 668,300. Amendments were made and two more claims inserted December 8, 1903, and all claims rejected February 9, 1904, on reference to prior patents, Nos. 498,407 and 503,427. Claim 6 was then added, and on reconsideration all claims were allowed and patent issued. Neither of the patents hereinafter mentioned is included in these references, and counsel for the applicant contended for this distinction in means and purpose over the prior art as cited:

"The construction shown by applicant is intended for use in electric meters, the object of the invention being to provide a suitable binding-post arranged

so that a conductor passing through an aperture formed in the meter-casing may be secured to the binding-post by means accessible only from the interior of the casing, the object being, of course, to prevent tampering with the meter connections by unauthorized persons. In order to obtain the results desired the applicant designed the construction shown in the drawings. This construction is simple and reliable, and has been used on many thousand meters."

It may justly be inferred, therefore, that the ultimate allowance was predicated on the view thus stated and the further contention, that "clear and distinct patentable differences over the prior art" arise in the patentee's device.

Whether means and function so referred to are included in the above-mentioned disclaimer, as appellee contends, needs no determination in our view of the effect of other prior devices of the art, in evidence, namely, Scheeffer's patent, No. 622,639, for "electric meter," April 4, 1899, and Badeau's patent, No. 651,063, for "insulated contact or terminal for electric circuits," June 5, 1900. The Scheeffer patent (owned by the appellee) shows an "insulated leading-in plug" (so-called) "situated in the meter-casing to receive the line conductors," which is substantially identical with the King binding-post, in structure, location and functions, differing only in the means of attachment for (a) the bushing to the casing aperture and (b) the hollow post to the bushing—each by "a tight fit," instead of the nut and screw attachment of the King patent—while screws are alike inserted within the casing to hold bushing and post together. This device, as described in the patent, makes "a closure for the meter that is practically hermetic," and all means for securing the conductor to the post are located within the casing—alike with the King device inaccessible from without. In the Badeau patent a binding-post is exhibited, "particularly designed for service in connection with switchboards—an analogous use—with its post in the combination, not only substantially identical with King's post, but having like screw attachments for insulating bushing, nut, insulating-washer, and hollow post. Thus the combination of King is plainly anticipated by Badeau for like purpose, and we believe no invention was involved in the King adaptation, even if it be assumed that his combination were otherwise patentable in the light of Scheeffer's disclosure.

We are of opinion, therefore, that the appellant's bill was rightly dismissed for want of equity, and the decree appealed from is affirmed.

GENERAL ELECTRIC CO. v. WINONA INTERURBAN RY. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,688.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC CURRENT TRANSFORMERS.

The Kurda patent, No. 600,228, for a polyphase-current transformer, embodies means for economic improvement over polyphase transformers of the prior art, such as to disclose patentable invention, and which,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

while not a great advance in the art, are of undoubted utility and entitle the patent to protection, within its narrow scope; also *held* infringed.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit in equity by the General Electric Company against the Winona Interurban Railway Company and the Allis-Chalmers Company. Decree for defendants, and complainant appeals. Reversed.

The General Electric Company appeals from a decree dismissing for want of equity its bill charging the appellees with infringement of letters patent No. 600,228, owned by the appellant-complainant. The patent was issued March 8, 1898, to Schuckert & Co., as assignee of the alleged inventor, Carl Kurda, for a "polyphase-current transformer," and the specifications state:

"Up to the present transformers for polyphase currents with common magnetic circuits have been built in which several electromagnets are arranged side by side between the base-plate and an iron cover. It is obvious that this arrangement can only be used with transformers of the core type. It is, however, well known that up to a certain size for single-phase currents transformers of the ironclad type are to be preferred. For polyphase currents the latter type has not yet been used.

"The object if the present invention is to produce ironclad transformers for polyphase systems."

Six drawings accompany the specifications, with Figure 1 mentioned as "a plan of a transformer of the new type destined for two-phase currents," Figure 3 as showing "a similar apparatus for three phases," and Figure 6 as illustrating "the magnetic conditions of the different circuits for a special case." Figures 1 and 3 are as follows:

Fig. 1.

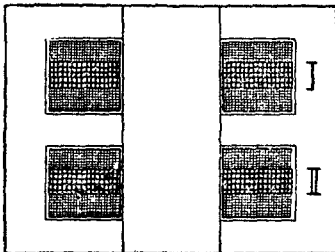
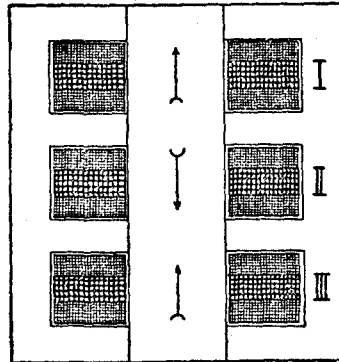


Fig. 3.



The claims of the patent, both alleged to be infringed, are:

"1. A transformer for polyphase alternating currents consisting of two or more sets of inducing-coils of different phase placed one upon another, in combination with laminated sheet-inductive material surrounding said sets of inducing-coils and separating them from each other, substantially as described.

"2. A transformer for three-phase alternating currents consisting of three sets of inducing-coils of different phase placed one upon another, in combination with laminated sheet iron surrounding said inducing-coils and separating them the one from the other, the electrical connection for the inner set being made in an opposite sense to that of the outer sets, substantially as described."

The fact appears and is undisputed that the transformer made by the appellee Allis-Chalmers Company and used by the other appellee is within both of these claims, and their validity, in view of the prior art, is the only issue

upon this appeal. While the Allis-Chalmers Company filed a plea to the jurisdiction of the court and issue was taken thereupon, no testimony was offered, so that the case proceeded to final hearing with such issue undetermined, leaving the Winona Interurban Railway Company nominally the sole defendant. But the Allis-Chalmers Company entered an admission of record that it was the manufacturer of the apparatus "charged to be an infringement" and "controls and directs the defense of this suit and is paying the expenses thereof." Other material facts are stated in the opinion.

Edward Rector and L. F. H. Betts, for appellant.

Thomas F. Sheridan and Clifton V. Edwards, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The Kurda patent, No. 600,228, for a "polyphase-current transformer," was granted March 8, 1898, and purchased by the appellant, General Electric Company, January 4, 1902; and these further facts are uncontroverted: Utility of the device as a unitary transformer of more than one alternating current in an electric system; extensive manufacture by the appellant of the patent transformers, with a profitable branch of business in their use by the trade; and invasion of the prima facie right of monopoly under the patent, by the defendants as charged in its bill. The sole defense tendered by the testimony, as frankly stated in the argument on behalf of the appellee, "is that the patent in suit is invalid in view of the prior art"—in substance for want of patentable invention—and the technical difficulties involved in the special subject-matter of "polyphase currents" tend to increase the usual difficulty arising under that issue. While the patent specifications refer to prior transformers for polyphase currents as of another type, using a group of single-phase transformers of the "core type" placed side by side, and that none were of the "ironclad type" adopted for the patent device, the evidence shows prior patents for transformers approximating so closely the means and function of this improvement that the margin is narrow for distinction therein between invention and exercise of the skill of an electrical engineer.

The patent transformer deals with the complicated problem of utilizing two or more alternating electric currents, as distinguished from a direct current, to transform the changing values of such currents into the desired electric energy. It is of the ironclad or shell type, as distinguished from the core type, and economizes material and space through its unitary structure. The specifications describe the invention as consisting "in arranging the electromagnets one above the other instead of placing them side by side, as heretofore, thus giving the electric magnets a common vertical axis." In the prior Dobrowolsky patent, No. 422,746, granted March 4, 1890, for a transformer for polyphase currents, the structure is alike unitary, with the three cores (A, B, and C) shown in the patent drawings as placed radially, although other embodiments are in evidence arranging them directly "side by side"; and the appellant contends, in substance, for distinction therefrom: That "the transformer of the Kurda patent in suit is a specific improvement in unitary polyphase transformers embodying the Dobrowolsky principle, characterized by having 'common mag-

netic circuits"; that the Kurda electromagnets (primary and secondary coils) placed "one above the other," and "mounted upon a common core or axis, are surrounded and separated by iron pieces" thus obtaining the common magnetic circuit; that such combination is novel and "the gist of Kurda's invention, as covered by claim 1"; and that further invention appears in reversing the middle set of coils, covered by claim 2, whereby "marked economies are obtained," as conceded by the appellee's expert.

The above-mentioned Dobrowolsky patent was considered and upheld by this court, in an infringement suit brought by the present appellant, as owner thereof (*Kuhlman Electric Co. v. General Electric Co.*, 147 Fed. 709, 78 C. C. A. 97), and the opinion in that case furnishes sufficient description and definition of the patent; and in reference to the appellees' contention here, not only of complete anticipation of Kurda by Dobrowolsky, but that, such prior patent having expired in the hands of this appellant, it "now seeks to again obtain monopoly of polyphase transformers by means of the Kurda patent," we remark that, monopoly in production and use being the legitimate purpose of the grant, the sole test of right thereto is the validity and scope of the patent. It plainly appears that Kurda succeeded in his quest for economy in material and form over prior devices, for a commercial transformer, and, if his product discloses invention to that end, the purchaser is entitled to the protection sought in exclusive use.

In the argument to defeat the patent various propositions are urged, with reference to the prior art, which may be summarized as follows: (a) that Kurda's transformer differs from Dobrowolsky's only "in form of mechanical construction," with "no different function and operation and secures no new or different result," and "no advantages over the use of three single-phase transformers not previously obtained by Dobrowolsky"; (b) that after Dobrowolsky "the particular form of other polyphase transformers became merely a matter of design and not of invention"; (c) that Kurda's transformer "is merely a natural union of single-phase shell-type transformers in view of polyphase transformers such as Dobrowolsky"; (d) that claim 1 of the patent "is anticipated in every respect by the earlier Hutin & Leblanc patent," and as well by other patents; and (e) that "claim 2 involves no invention over the prior art." We believe, however, that solution of the issue rests upon the inquiry above stated of patentable invention, as a commercial improvement over Dobrowolsky, in the light of the prior art; and that such inquiry does not involve reconsideration of the issue settled in *Kuhlman Electric Co. v. General Electric Co.*, *supra*, that the "union of single-phase shell-type transformers" in a unitary transformer for polyphase currents was invention in Dobrowolsky's transformer, and not therefore an obvious expedient. Until means were devised to obtain common magnetic circuits in a unitary structure, such union of single-phase transformers was necessarily inoperative. The question, therefore, is this: Are Kurda's means to that end, for economic improvement, as stated in either or both claims, differentiated from Dobrowolsky's transformer, plus the prior art, so that invention is disclosed therein?

Claim 1 of the patent is for a unitary transformer "consisting of two or more sets of induction coils of different phase placed one upon another, in combination with laminated sheet-inductive material surrounding said sets of induction coils and separating them from each other"; and claim 2 is alike, with this additional element: "The electrical connection for the inner set being made in an opposite sense to that of the outer sets"—in other words, reversal of the middle coil. Thus the Kurda combination of claim 1 obtained the needful common magnetic circuit, by vertical arrangement of the several sets of coils on a single core, together with provision of the "E-shaped flat iron pieces" to surround and separate the coils—distinctively a unitary single core, embraced in iron, or "ironclad"—while that of Dobrowolsky has several cores, with provision for the common circuit, by joining the several cores at their inner ends by a (so-called) pooling basin, with connection of their outer ends "by means of the bars E." The advantages over Dobrowolsky appear in compactness, saving of material, and (we believe as well) in convenience of handling and installation. It is contended, however, that these departures of Kurda were plainly within the teachings of the prior art, and the only other reference tending to support that view which impresses us to require mention is the German patent (No. 78,825) issued to Hutin & Leblanc, January 12, 1895. Two of the drawings of this patent are cited as showing "three shell-type single-phase transformers united end to end and utilized as a polyphase transformer," alleged to be identical with Kurda's claim 1, although not showing the reversing of the middle coil provided in claim 2. On the face of these drawings the analogy is close, but we believe neither specifications nor drawings to be directed to the Kurda purpose of a unitary apparatus "to transform an alternating current of one potential into an alternating current of another potential," and that disclosure to that end is not an inevitable presumption therefrom. The sole purpose referred to was changing "an alternating current into a direct current," for which, as specified, "the apparatus must have three separate transformers whose primary circuits must each be fed from one of the three-phase currents"; and, although they "are mounted on the same framework," it is conceded that they are not "placed one upon another" on a common core. No suggestion appears of the common magnetic circuit, on which Kurda's operation depends; and it is questionable under the testimony, to say the least, whether the butt joints shown between these separate transformers of Hutin-Leblanc would permit arrangement for such common circuit. The cogent fact, however, is undisputed that manufacturers of these supplies were constantly seeking, through skilled engineers, economies in material and form of unitary transformers which were thus obtained by Kurda's combination, and we believe it to be fairly attributable to invention, rather than an obvious expedient of the engineer; that without great advance in the art his new combination is entitled to protection within its narrow scope, and claim 1 may justly be upheld accordingly.

Claim 2 provides the additional element of reversing the middle coil, with undisputed advantages not shown in prior polyphase trans-

formers; and it plainly appears that this economy is due to reversal of both primary and secondary coils of the middle set. As such provision is not disclosed by either of the patents cited as anticipations—Steinmetz Nos. 533,248 and 561,735; Dobrowolsky No. 455,683—the sole test of validity is whether invention was involved in thus reversing both for the benefit sought. We believe no clear suggestion thereof appears in the evidence of prior art, and that the device of this claim is well within the doctrine of invention.

We are of opinion, therefore, that the charge of infringement is established by the evidence, and that the decree of the Circuit Court, dismissing the bill for want of equity, is erroneous. The decree is reversed, accordingly, and the cause remanded, with direction to enter a decree in conformity with the foregoing opinion.

GENERAL ELECTRIC CO. v. DUNCAN ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,617.

PATENTS (§ 328*)—ANTICIPATION—ELECTRIC METER.

The Hood patent, No. 561,711, for an electric meter, is void for anticipation in the prior art.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit in equity by the General Electric Company against the Duncan Electric Manufacturing Company, M. F. Holmes, and Thomas Duncan. Decree for defendants, and complainant appeals. Affirmed.

The appeal is from a final decree in the court below, dismissing appellant's bill for the infringement of letters patent No. 561,711, issued June 9th, 1896, to Ralph O. Hood, for an Electric Meter, and assigned to appellant September, 11, 1897.

The bill was based on the fourth claim of the patent, as follows:

"4. An electric meter having different circuits comprising in its construction an electric motor and its armature and an adjustable artificial resistance inserted into that part of the meter-circuits in which a current is to be obtained, which by its dynamic action on the armature of the electric motor may give sufficient energy to almost start and counterbalance the friction of said motor."

Electric meters are so well known that there is no occasion to reproduce them diagrammatically in this opinion, and the alleged invention at issue has no relation to electric meters except to the extent that it is intended to eliminate or compensate for errors due to variations of friction of the moving part of the meter, caused by conditions of service and length of use. Other letters patent cited are the following:

- No. 316,092. E. Weston, April 21, 1885.
- No. 414,595. O. B. Shallenberger, Nov. 5, 1889.
- No. 435,958. M. J. Wightman, Sept. 9, 1890.
- No. 440,627. S. Z. De Ferranti, Nov. 18, 1890.
- No. 448,894. E. Thomson, March 24, 1891.
- No. 491,560. G. Hummel, Feb. 14, 1893.
- No. 521,684. E. Thomson, June 19, 1894.
- No. 521,685. E. Thomson, June 19, 1894.

- No. 604,465. T. Duncan, May 24, 1898.
 No. 752,048. T. Duncan, Feb. 16, 1904.
 No. 225. Sydney Pitt, 1887.
 No. 701. Sebastian Ziani De Ferranti, 1887.
 No. 4,225. George Hookham, 1887.
 No. 1,480. Alberton and Philpott, 1889.
 No. 3,096. Sebastian Ziani De Ferranti.
 No. 9,061. De Ferranti and Wright, 1890.
 No. 21,766. Schuckert and Wacker, 1891.

Edward Rector, Drury W. Cooper, and Charles Martindale, for appellant.

Robert H. Parkinson, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). The appellant's patent puts into a cross-electrical circuit, material that constitutes resistance; and attaches to this material, which is in circular form, a finger, movable around the same, whereby the distance between the ends of one wire and the beginning of another may be either shortened or lengthened, thereby increasing or diminishing the quantum of resistance material, which, in turn, diminishes or increases the electric flow. The purpose of this, is to put the meter, as an entirety, in such a state of delicate balance or suspense that the friction, incident to a change from standstill to motion, is overcome, in order that the current, flowing through the main wire and feeding the light or other consumer's purpose, will not be diminished or otherwise affected by the initial overcoming of the friction. The operation, in this respect, is sufficiently illustrated by Figure 2 of the patent (an error therein being eliminated), which is as follows:

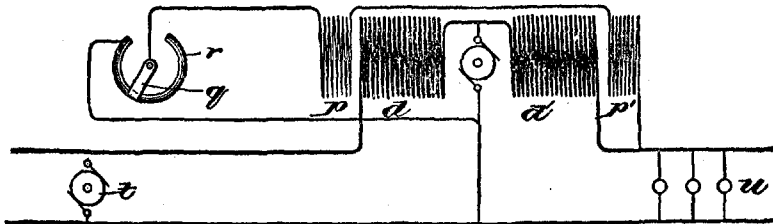


Fig. 2.

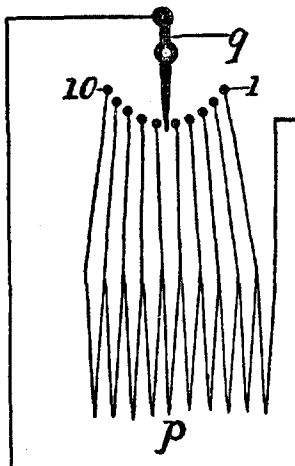
the arm "q" being capable of resting, at different distances, upon the circular post "r," from the end which is connected with the binding post, thereby adjusting the distance and, as a result, the amount of interposed resistance.

The device of appellees accomplishes the same purpose; but instead of using the exact adjustable resistance mechanism indicated, there is interposed in the meter wire a series of "turns," thrown in or cut out (either individually or in such number as is desired), by means of a movable finger, whereby, by an increase or diminution of the "turns"

in the circuit, the flow of electricity is resultingly diminished or increased. The appellees' device is illustrated in the following diagram:

This is said by appellant to be the electrical equivalent of its method.

Assuming that it is, the question then arises whether appellant's patent is not thereby anticipated by the prior art; for, if a finger, throwing in or out of circuit a given number of "turns," is electrically the equivalent of a finger increasing or diminishing the amount of resistance material, as in appellant's patent, the presence in the prior art of such "turns," and fingers to adjust them, would be an anticipation of appellant's conception. Two patents, in this connection, are important, viz; the De Ferranti patent, issued in 1890, following a previous patent to the same patentee in 1887, and the Shallenberger patent, issued in 1889. The Italian patent employs



"turns," just as appellees employ them, to increase or diminish the flow of electricity, the result being, as stated in the patent, that De Ferranti was thus "better able to adjust the meter to at all times indicate correctly whether much or little current is passing." True, as urged by appellant, this language is somewhat obscure; but it is cleared up in that respect by interpretations put upon it by electrical engineers in this country prior to appellant's patent. "The Electrician" (London), in 1891, speaking of the De Ferranti meter, said:

"To overcome the initial friction an auxiliary shunt coil is provided, as is shown in the figure over the letter N. A resistance placed at the bottom of the case is in series with this. If the shunt current were strong enough, the meter would, of course, slowly revolve, but it is arranged so as to be just too weak to do this. A very small current through the main coils will therefore start the meter, whose readings are then proportioned to the current."

And in the Transactions of the American Institute of Electrical Engineers, Vol. X, 1893, is a paper by Caryl D. Haskins on "Electrical Recording Meters" in which (referring evidently to the De Ferranti meter) is the following statement:

"Friction is balanced in this meter quite successfully by the introduction of a fine coil of high resistance around the field. This coil is 'in shunt across the line,' like a lamp, and serves to intensify the field on the lower reading, while on the higher ones it bears too small a proportion to the total field to exert any appreciable influence. This coil can be nicely adjusted to balance friction, but varying an outside resistance."

Indeed, these papers, in themselves, constitute prior publication, not only of a consciousness among electrical engineers, prior to appellant's patent, of the need of something to overcome the initial friction, but also of the method therefor by means of an adjustable coil. The need was already discovered; the problem already presented; and the problem, to the extent already named, was solved. The only thing between this way of solving the problem and appellant's way, was by

means of adjustment by a finger instead of adjustment at the shunt.

Now, this adjustment by finger is just what Shallenberger points out in his patent No. 414,595, November 5, 1889. True, it relates to the variation of electrical currents generally, not necessarily for a meter; but with this disclosed, the mere application of this method of adjustment to the meter wire is something that falls, we think, not within the field of electrical invention, but within the field, rather, of electrical engineering; for it will not do to say that the transfer of such a well-known device from a general field to a special use is, in itself, invention; and there is nothing in this record that gives to this transfer the character of invention other than what is disclosed in the mere fact of the transfer itself. The patent, in our judgment, is void.

The decree appealed from is affirmed.

DOHERTY et al. v. HARRY

(Circuit Court, W. D. Missouri. December 12, 1910.)

No. 3,154.

PATENTS (§ 328*)—INVENTION—CORRUGATED SHEET METAL CULVERT.

The Watson patent, No. 559,642, for a corrugated sheet metal culvert, is not so clearly void on its face for lack of invention as to warrant its being so declared on demurrer to a bill for its infringement.

In Equity. Suit by Fred H. Doherty and William B. Griffith against H. W. Harry. On demurrer to bill. Overruled.

Dennis Madden, Keplinger & Trickett, Parkinson & Lane, and E. H. McVey, for plaintiffs.

W. H. H. Piatt, H. F. Lea, and F. H. Wood, for defendant.

SMITH McPHERSON, District Judge. This case is by a bill in equity reciting letters patent 559,642 with reference to corrugated culverts, under which the rights to the state of Missouri by due course of conveyances were assigned to complainants, setting forth that the respondent is infringing complainant's rights, and for general equitable relief. To this complaint defendant has filed a demurrer, to the effect that the patent on its face is a nullity.

My views are that the question is doubtful, my first impression having been that the patent was not valid; but upon reflection I cannot say but that the matter is involved in doubt. And the rule is in cases of doubt that the complainant must be given an opportunity by proof to support and justify the action of the Patent Office in issuing the patent. It cannot now be said from the face of the complaint that in no event can the patent be sustained. The case is not free from doubt. And this court cannot say, from judicial notice as to these matters, that it is the common knowledge of all that it is not a new invention, and that it is not novel, or that it is not of utility.

Therefore the demurrer will be overruled, and the respondent required to answer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES v. READING CO. et al.

(Circuit Court, E. D. Pennsylvania. December 8, 1910.)

No. 27.

*(Per Gray, Circuit Judge.)***1. EVIDENCE (§§ 577½, 579, 580*)—COMPETENCY—TESTIMONY GIVEN IN PRIOR PROCEEDING BEFORE ADMINISTRATIVE BODY.**

A copy of testimony shown by a report of the Interstate Commerce Commission to have been given by a witness in an investigation before that body, not otherwise authenticated, is not competent evidence in a subsequent suit in a federal court between different parties and in which different issues are involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2410, 2412, 2413; Dec. Dig. §§ 577½, 579, 580.*]

2. MONOPOLIES (§ 17*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE —CONTRACTS BETWEEN COAL PRODUCERS.

For many years small producers of coal in the anthracite regions of Pennsylvania had sold their product to contiguous large operators, who took it at the breakers and shipped and marketed the same through their own agencies, paying to the sellers therefor a certain percentage of tide-water prices, differing under different contracts. During a general strike of all anthracite miners, at a conference between the producers, in order to induce the selling operators to assent to a settlement by which all miners were to receive increased pay, the purchasing companies agreed to contract with the selling producers under an agreed form of contract by which the purchaser bought the entire product of the seller's mines, to be mined and delivered as the buyer directed, which it agreed should be the seller's just proportion of all the anthracite coal which the requirements of the market might from time to time demand. The purchasers were also to pay an increased percentage based on the general average price at tide-water during the month, to be determined by an expert accountant. The making of such a contract was optional with each seller; but several were made, and the accountant made reports which were furnished to all parties interested, and also published in trade journals. *Held*, that such agreement did not constitute nor evidence a combination or conspiracy on the part of the purchasing companies to restrain or monopolize the sale or control the price of coal in interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), but was the legitimate outgrowth of peculiar business conditions, and was to the advantage of the smaller producers by utilizing for the handling of their product the facilities and agencies of the larger companies. *Buffington*, Circuit Judge, dissenting.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 13; Dec. Dig. § 17.*]

3. MONOPOLIES (§ 12*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE —COMBINATIONS PROHIBITED.

To constitute a violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), there must be a contract, combination, or conspiracy which in purpose or effect tends to restrain trade or commerce among the states or to monopolize some portion thereof. There must be a meeting of the minds of two or more to accomplish some common purpose directly violative of the act, or a purpose which will, whether intentionally or not, in effect constitute a restraint of trade and commerce among the several states.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

4. MONOPOLIES (§ 12*)—WHAT CONSTITUTES—CONSTRUCTION OF ANTI-TRUST ACT.

The mere extent of acquisition of business or property achieved by fair and lawful means cannot be the criterion of monopoly within the meaning of Anti-Trust Act July 2, 1890, c. 647, § 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); but in addition to acquisition and acquirement there must be an intent by unlawful means to exclude others from the same traffic or business, or from acquiring by the same means property and material things.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

5. MONOPOLIES (§ 24*)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—SUIT FOR INJUNCTION—SUFFICIENCY OF EVIDENCE.

Evidence considered in a suit by the United States against various railroad and coal companies engaged in the production and transportation of anthracite coal in Pennsylvania, charging defendants with having entered into a general combination and conspiracy to restrain and monopolize the production and transportation in interstate commerce of anthracite coal, and to control its price in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and held insufficient to establish such charge.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

(Per Buffington, Circuit Judge.)

6. MONOPOLIES (§ 12*)—RESTRAINT OF INTERSTATE COMMERCE—CONTRACT OR COMBINATION RESTRICTING COMPETITION—"RESTRAINT OF TRADE."

One of the purposes of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), in making illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states, is to maintain interstate commerce on the basis of free competition, and any contract, combination, or conspiracy, the purpose or direct effect of which is to restrict such free competition by way of transportation or otherwise, is in restraint of interstate commerce and unlawful.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

7. EQUITY (§ 330*)—PLEADING—MULTIFARIOUSNESS OF BILL—WAIVER.

The failure of defendants to object to a bill on the ground of multifariousness until final hearing, or until after complainant has taken his proofs, is a waiver of objection, and, while the court on such hearing may of its own motion dismiss the bill, it will not do so if that objection does not embarrass or prevent the decreeing of relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 663; Dec. Dig. § 330.*]

8. MONOPOLIES (§ 16*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—COMBINATION TO PREVENT BUILDING OF COMPETING RAILROAD.

A combination between railroad companies for the avowed purpose and with the effect of preventing the threatened building of a competitive road for the transportation of coal in interstate commerce, by purchasing, through a corporation, the stock of which they purchased, large coal properties, the prior owners of which had pledged their tonnage to the projected road, thus retaining to certain of the combined roads such tonnage and the tonnage of other coal operators tributary thereto who had no other means of transporting their product, was a combination in restraint of trade and commerce among the several states, and unlawful under Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

St. 1901, p. 3200), against which the United States is entitled to injunctive relief under section 4 of the act. Lanning, Circuit Judge, dissenting on the pleadings and evidence.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

9. MONOPOLIES (§ 12*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—LEGALITY OF SEPARATE ACTS.

The fact that the several acts by which the purpose of a combination in restraint of trade and commerce among the several states is effected are, taken in isolation, lawful or intrastate in character, and not within the purview of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), does not relieve the combination from illegality; but such acts must be viewed as elements of a whole and in the light of their purpose and effect in combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

(Per Lanning, Circuit Judge.)

10. MONOPOLIES (§ 16*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—CONSOLIDATION OF RAILROADS.

The purchase by one railroad company of the stock of another by issuing and exchanging its own stock therefor, both roads being at the time carriers of anthracite coal from Pennsylvania to New York Harbor, but chiefly from different localities, *held* not to constitute a combination in restraint of interstate commerce in such coal, unlawful under Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); it appearing that the main object of the consolidation was the betterment of the terminal facilities of both roads at New York City and Harbor, which were largely improved thereby to the benefit of the public, and that their competition in the coal carrying business was slight, and the effect, if any, on such competition merely incidental.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

11. MONOPOLIES (§ 16*)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CONSOLIDATION OF RAILROADS.

The purchase by one railroad company of a controlling interest in the stock of another, which was a competitor in the carrying of anthracite coal between the mines and New York Harbor, did not constitute a combination in restraint of interstate commerce in such coal, or to monopolize such commerce, unlawful under Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), where the predominating motive in the purchase was to preserve traffic arrangements which were very important to the purchasing company, by preventing the purchase of such stock by another company, although its necessary incidental effect was to eliminate competition between the two roads in the coal carrying business.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

In Equity. Suit by the United States against the Reading Company and others. Decree granting the relief prayed for in part, and for defendants in part.

J. C. McReynolds and G. Carroll Todd, Special Assistants to the Attorney General, for the United States.

Robert W. De Forest, Samuel Dickson, and Jackson E. Reynolds, for Central R. R. of New Jersey and Lehigh & Wilkes-Barre Coal Co. Alexander & Green, for Mercantile Trust Co.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles Heebner, J. D. Campbell, and John G. Johnson, for Philadelphia & R. Ry. Co., Philadelphia & R. Coal & Iron Co., and Reading Co.

Willard, Warren & Knapp, for Temple Iron Co.

J. Claude Bedford, for St. Clair Coal Co.

James H. Torrey and William S. Opdyke, for Delaware & Hudson Co.

Welles & Torrey, for Enterprise Coal Co., North End Coal Co., and Green Ridge Coal Co.

R. H. Patterson, for People's Coal Co.

Thomas F. Wells, for Pine Hill Coal Co. and Nay Aug Coal Co.

W. W. Watson, for Austin Coal Co.

Henry W. Palmer, for Parrish Coal Co.

Frank H. Platt, J. F. Schaperkötter, and George W. Field, for Lehigh Valley R. Co. and Lehigh Valley Coal Co.

Adelbert Moot, George F. Brownell, and Herbert A. Taylor, for Erie R. Co., New York, S. & W. R. Co., New York, S. & W. Coal Co., Pennsylvania Coal Co., Hillside Coal & Iron Co., and Clarence Coal Co.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The proceedings in this case were begun by a petition in the nature of a bill in equity, filed June 12, 1907, on behalf of the United States, under section 4 of the act of Congress of July 2, 1890, commonly known as the "anti-trust act," against the defendants named above. Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201). The petition invokes the jurisdiction of this court to prevent and restrain the alleged violation by the defendants of sections 1 and 2 of said act of Congress. The defendants are all alleged to be corporations duly created under the laws of the states of Pennsylvania, New York and New Jersey, respectively.

In its first paragraph, the petition alleges that the defendants, the Philadelphia & Reading Railway Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company (called the defendant carriers when referred to collectively), are common carriers engaged in interstate transportation, particularly in the transportation of anthracite coal from the mines of Pennsylvania to the markets of that and other states. It alleges that the defendants, the Philadelphia & Reading Coal & Iron Company, the Lehigh Valley Coal Company, the Lehigh & Wilkes-Barre Coal Company, the Pennsylvania Coal Company, the Hillside Coal & Iron Company, and the New York, Susquehanna & Western Coal Company (called the defendant coal companies), own and operate anthracite coal mines in the state of Pennsylvania, and "buy, sell and otherwise deal in anthracite coal in the markets of the several states"; that the defendant, the Temple Iron Company, also owns and operates anthracite mines in the state of Pennsylvania; that the defendant, the Reading Company, is the holding corporation of the Reading System,

and holds the entire capital stock of the Philadelphia & Reading Railway Company and of the Philadelphia & Reading Coal & Iron Company, and a majority in interest of the capital stock of the Central Railroad Company of New Jersey.

In its second paragraph, it is alleged that, save the Pennsylvania Railroad Company and the New York, Ontario & Western Railroad Company, and the line of the Delaware & Hudson Company, the defendant carriers operate the only lines of railroad that penetrate the anthracite coal regions, and, with the exception stated, furnish and control the only means of transporting anthracite coal from the mines in Pennsylvania to the markets and distributing points in that and other states, particularly the great markets and distributing points at tide water in the vicinity of New York.

The third paragraph of the petition alleges that the Reading Company, the holding corporation of the Reading System, which holds the entire capital stock of the Philadelphia & Reading Railway Company, also holds the entire capital stock of the Philadelphia & Reading Coal & Iron Company; the Lehigh Valley Railroad Company owns all the capital stock of the Lehigh Valley Coal Company; the Central Railroad Company of New Jersey owns nine-tenths of the capital stock of the Lehigh & Wilkes-Barre Coal Company; the Erie Railroad Company owns all the capital stock of the Pennsylvania Coal Company and a large majority of the capital stock of the Hillside Coal & Iron Company; and the New York, Susquehanna & Western Railroad Company owns nearly all of the capital stock of the New York, Susquehanna & Western Coal Company; and that these so-called "subsidiary" coal mining companies (the defendant coal companies herein) are controlled by or in the interest of the defendant carriers, or some of them, through the ownership of controlling stock interests.

The fourth paragraph of the petition, after stating that anthracite coal is an article of prime necessity and universally used for domestic purposes throughout New England and the Middle Atlantic States, and that the source of the entire supply, save a few small deposits of inferior quality, is located in the state of Pennsylvania, in an area of about 484 square miles, divided for trade purposes into three regions, viz., the northern or Wyoming (sometimes called the Lackawanna) region, the middle or Lehigh region, and the southern or Schuylkill region, alleges that the defendant carriers and the Reading Company, either directly or through the said defendant coal companies, own or control 90 per cent., approximately, of the entire unmined area of anthracite, distributed substantially in the following proportions, to wit:

	Per Cent.
Reading Company.....	44.00
Lehigh Valley Railroad Company.....	16.87
Delaware, Lackawanna & Western Railroad Co.....	6.55
Central Railroad Company of New Jersey.....	19.00
Erie Railroad Company.....	2.59
New York, Susquehanna & Western Railroad Co.....	.54

89.55

—and that they produce, either directly or through the agency of these coal companies, from 70 to 75 per cent., approximately, of the annual supply of anthracite. There are, however, it is alleged, a large number of independent individual firms and corporations who mine anthracite, either from their own properties or from properties leased by them, and who would be free from the control of the defendant carriers, were it not for the unlawful contracts hereinafter referred to; that these independent operators produce, approximately, from 20 to 25 per cent. of the annual supply of anthracite (the residue being produced by the anthracite carriers not parties hereto), which would come in competition in the great distributing centers with the anthracite produced by the defendant carriers, or their so-called agencies, the defendant coal companies, were it not for the unlawful contracts, combinations and conspiracies hereinafter charged and set forth, which stifle competition between the several defendant carriers, or their so-called agencies, in the sale of anthracite coal throughout the several states, and between such defendant carriers, or their so-called agencies, and the aforesaid independent operators.

Paragraph 5 alleges that that part of the anthracite output not consumed in the state of Pennsylvania, is carried chiefly to tide water at New York Harbor, and is thence distributed by water and by railroad to points in the New England and Middle Atlantic States; that New York Harbor is the principal distributing point for anthracite coal, and that the price in that market fixes or regulates its price in the markets of the several states which get their supply through New York Harbor points.

Paragraph 6 sets forth the attempted lease, in January, 1892, by the Lehigh Valley Railroad Company and by the Central Railroad Company of New Jersey, as lessors, of their respective railroads and coal properties, to the Philadelphia & Reading Railroad Company, predecessor of the present defendant, as lessee, for the period of 999 years; and that by the decree of the chancellor of the state of New Jersey, said lease of the properties of the Central Railroad Company was adjudged to be null and void, and that, in consequence thereof, the lease between the Philadelphia & Reading Railroad Company and the Lehigh Valley Railroad Company was rescinded.

The gist of the petition and its charging part are set forth in the seventh paragraph thereof. Its general charge of combination and conspiracy is thus set forth:

"The average price of anthracite coal at tide water, taking for illustration the stove size, which rose from \$3.71 and \$3.85 a ton in 1890 and 1891, respectively, prior to the leases just described, to \$4.15 and \$4.19 a ton in 1892 and 1893 respectively, the years during which the said leases were in force, again declined, under the influence of competition, in the years immediately following the cancellation of the leases, falling to \$3.60 a ton in 1894 and \$3.12 a ton in 1895. Whereupon, in violation of the provisions of sections 1 and 2, respectively, of an act of Congress, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209), the defendant the Reading Company, and the defendant carriers and the defendant coal companies, owning or controlling 90 per cent. more or less, of all the anthracite deposits, and producing 75 per cent., more or less, of the annual anthracite supply, and controlling all the means of transportation between the anthracite mines and tide water, save the rail-

roads operated by the Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, which, as aforesaid, reach only a limited number of collieries, entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states and its price and sale throughout the several states, with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed, and the price thereof to consumers greatly enhanced. As steps in the development of this illegal combination, and in furtherance of its illegal purposes, the defendants herein named, or some of them, engaged in and became parties to the following additional acts, schemes and contracts, among others, in violation of the aforesaid act of July 2, 1890," etc.

These "additional acts, schemes and contracts," alleged to be steps in the development of this illegal combination, in violation of the act, are then set forth in said paragraph. They are four in number, and are referred to as (a) the 65 per cent. contracts, (b) the absorption by the Erie Railroad Company of the New York, Susquehanna & Western Railroad Company, (c) the acquisition by the Reading Company of the majority of the shares of the Central Railroad Company of New Jersey, (d) the Temple Iron Company transaction, and (e) the acquisition by the Erie Railroad Company, while controlling the Hillside Coal & Iron Company, of all the shares of the Delaware Valley & Kingston Railroad Company, a projected competing carrier, and all the shares of the Pennsylvania Coal Company, a competing producer.

All the above named defendants, both carrier and coal companies, have filed their answers to the petition, and the Hillside Coal & Iron Company demurred generally for want of equity, and specially for multifariousness. These answers are several and separate, and each of them denies any participation in any combination or conspiracy, as charged against all the defendants in the seventh paragraph of the petition, and all knowledge or information in regard to the same. The separate acts charged against various groups of the defendants, as steps towards the alleged general conspiracy, and as independently unlawful, are also denied by those defendants, respectively, against whom the charge is made.

After the filing of the answers, the petitioner, by leave of the court, amended its original petition, by adding as defendants therein a large number of independent coal producers, operators and mine owners, as being parties to the so-called 65 per cent. contracts with all or some of the original defendants.

Issue having been joined by replication duly filed by the petitioners, evidence was taken at great length on behalf of both the government and the defendants, and the case is now before us on final hearing.

The provisions of the act of Congress, of July 2, 1890, with which we are here concerned, are contained in sections 1, 2, and 4 of said act, and are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof,

shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

"Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The theory of the government's case, as stated by the learned and able counsel who represented it, is that all the original defendants have long been parties to a general combination and conspiracy which stifles competition and obstructs trade and commerce among the states in anthracite coal, to which the separate acts charged against various groups of the same defendants are referable as steps towards the common goal; and further, that these separate acts of the various groups are independently in violation of the act of Congress, and, contributing as they do to the same end, that all the defendants, parties to some of them, would properly be embraced in one petition, though there were no general combination or conspiracy to which each might be referred.

Counsel for the petitioner have dwelt at great length upon the somewhat peculiar conditions now and for a long time past obtaining in the production and transportation of coal in the anthracite region of Pennsylvania, and counsel for the defendants have referred to the history, as shown by the evidence, of the development of coal production and transportation in that region, and the necessary and fostering care exercised by the state in promoting that development. This development has necessarily been influenced by the peculiar natural features, topographical and geographical, which characterize the anthracite region, and it is doubtless true that the present situation of trade and traffic in anthracite coal is largely the outgrowth of these antecedent conditions.

The knowledge of the availability of anthracite coal as a fuel for domestic and industrial purposes, antedating as it did the railroad era, was not utilized for want of transportation facilities, and after the beginning of that era, for the want of capital for the building of railroads and the mining and preparation of the coal for use. The requirement of such capital was enhanced by the fact that the production of anthracite coal differed from that of bituminous coal, in that the former, after it was mined, required to be broken up before it was marketed into assorted sizes, by means of expensive machinery called "breakers."

The transportation of anthracite coal to the more distant markets of Pennsylvania and adjoining states, was at first accomplished by the construction of canals by those owning the coal properties. The public policy of the state of Pennsylvania, for obvious reasons, favored such construction. This public policy also extended to the construction of railroads from convenient shipping points to different parts of the anthracite region. This policy is exemplified by the acts of Assembly of the state of Pennsylvania, between the years 1823 and 1871, which expressly conferred upon the Delaware & Hudson Company the same authority which was conferred upon it in its act of incorporation in the state of New York, April 23, 1823 (Laws 1823, c. 238), "to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson river in New York, to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." This authority was afterwards extended to the construction and acquisition of railroads for the same general purpose of transporting coal from the coal lands owned by said company. The same is in general true of the other defendant carriers. Under and in deference to the same general policy, the roads of the other defendant carriers were constructed, either by the present corporations or their predecessors in title, as also were established the defendant coal companies which grew up under the auspices or ownership of the defendant carriers, respectively, each coal company producing or marketing the coal over the railroad to which the mines from which it was produced were contiguous or naturally tributary. These coal companies were organized from time to time under acts of Assembly of the state of Pennsylvania, with authority to mine and sell coal and to acquire coal lands for that purpose. Moreover, by an act of Assembly of the state of Pennsylvania, approved April 15, 1869 (P. L. 31), entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber and other material interests of this commonwealth," such railroad and canal companies were authorized to aid corporations engaged in developing coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock and bonds, or either of them.

The anthracite coal deposits of Pennsylvania are found in three quite distinct and separate fields or regions—the upper, or Wyoming, region extending in a northeast and southwest direction, and of comparatively narrow width, for a distance of 50 or 60 miles, partly on both sides of the Susquehanna river as it runs from the northeast to the southwest, containing 176 square miles in Lackawanna and Luzerne counties; the middle or Lehigh region containing 127 square miles in Luzerne, Schuylkill, Columbia and Northumberland counties; and the southern or Schuylkill region, in Schuylkill, Dauphin and Carbon counties, containing 181 square miles. Scranton and Wilkes-Barre are the principal towns of the Wyoming region, Hazleton of the Lehigh region, and Pottsville of the Schuylkill region. In each of these regions, there are many collieries and plants for preparing coal, including those owned and operated by the defendant coal companies or carriers, as well as by so-called independent coal companies

and operators. Into each of them run one or more of the defendant carrier companies, which, with some other companies not defendants, collect and carry the coal adjacent to their lines, respectively, by means of the spurs and branches constructed from such lines to the various mines and collieries. Naturally, each railroad line carries the coal from that part of the coal region adjacent to it or conveniently reached by its spurs and branches.

From one of the tables filed as a government exhibit, we take the following statement of the shipments of anthracite coal carried by the defendant railway companies, and two others, as initial transportation lines during 1907, and the proportionate percentage of the whole carried by each:

Railroad.	Gross Tons	Per Cent.
Phila. & Reading Ry.....	14,018,795	20.89
Lehigh Valley Railroad.....	11,532,255	17.18
Central R. R. of New Jersey.....	8,714,113	12.99
Del. Lackawanna & West. R. R.....	10,237,419	15.25
Delaware & Hudson Company.....	6,562,768	9.78
Pennsylvania Railroad.....	6,203,271	9.24
Erie Railroad.....	7,151,683	10.66
New York, Ontario & West. Ry.....	2,689,089	4.01
	<hr/> 67,109,393	<hr/> 100.00

It appears from the exhibits and testimony produced by the petitioner, that approximately 12 per cent. of the total production of coal in the anthracite region is not shipped away, but is consumed at local points and in the operation of the mines, and that, taking the year 1905 as a normal year, it would appear that, of the coal that was shipped away from the mines, about 25 per cent. was carried to tide water points in New York Harbor, and of the balance, about 20 per cent. was consumed within the state of Pennsylvania and 55 per cent. shipped to points outside the state, other than those at tide water in New York Harbor.

As averred in the petition, and as appears in the agreed statement of facts, the distribution of coal lands among the principal holders at the time of filing the petition was as follows:

Names of Holders	Area Possessed Acres.
The Del., Lackawanna & West. R. R. Co.....	17,353
The Delaware & Hudson Co. and subsidiaries.....	25,180
Hillside Coal & Iron Company.....	13,466
The Pennsylvania Coal Company.....	13,900
The New York, Susquehanna & West. Coal Co.....	963
Seranton Coal Company.....	2,695
Elk Hill Coal & Iron Company.....	3,049
Lehigh & Wilkes-Barre Coal Company.....	15,650
The Temple Iron Company and subsidiaries.....	4,465
Susquehanna Coal Co. and affiliated companies.....	16,867
Lehigh Valley Coal Company.....	37,047
Coxe Bros. & Company, Inc.....	5,311
Philadelphia & Reading Coal and Iron Co.....	98,077
Lehigh Coal & Navigation Company.....	13,783
Total	<hr/> 267,806
Total Coal Area (484 square miles).....	<hr/> 309,760

Of these, the Delaware & Hudson Company and its subsidiaries, the Scranton Coal Company, the Elk Hill Coal & Iron Company, the Susquehanna Coal Company and affiliated companies, and the Lehigh Coal & Navigation Company, whose ownership aggregates 61,574 acres, are not defendants in this proceeding, as participants in the general combination or conspiracy charged by the petition against the original defendants therein named. This would leave about two-thirds in area of the coal lands of the anthracite region in the ownership or possession by lease, or otherwise, of the defendant companies. As appears from the undisputed testimony of the defendants, these present holdings of coal lands have resulted from acquisitions made through a long period of years by the companies named respectively, or their predecessors in title, beginning, in the case of some of the largest holders and in respect to the larger part of the acquisition, long prior to 1874. The gradual growth of these acquisitions and the consequent development of the present situation, it is contended by the defendants, have been induced by natural causes, such as the geographical and topographical features of the anthracite coal region, which have presented serious obstacles to the construction of railroads with which it was sought to penetrate the different coal fields of the anthracite region, and which have enhanced enormously the cost of their construction; that in the earlier periods of the development of this region, when the mines and the production of coal were more largely in the hands of individuals and small corporations, the business of mining and marketing coal was wasteful and often resulted largely in the failure or bankruptcy of those concerned therein. The individual exploiter skimmed the cream, so to speak, of his coal lands, and, unable to meet the expense of practicing the economies necessary to their full development, the mines were not infrequently abandoned, and of this abandonment, deterioration or ruin was the natural result. That, latterly, the recurrence of strikes and labor troubles have contributed to the difficulties of the situation. That these strikes and labor troubles extended to all the coal mining and coal shipping operations of the whole region, affecting all producers, great and small alike, and that the solidarity of the labor unions compelled a joint agreement, embracing all engaged in mining operations as to the terms of settlement. That since the last settlement in 1902-03, there has resulted a condition of comparative industrial peace in the anthracite region. That this condition, together with the increased demand for and the consequent increased price of coal have regulated, without destroying, the natural competition of the great carrying and producing companies. That many economies in the production and sale of coal have been made possible, wasteful production largely done away with, and, more than all, a wise and scientific conservation of the future supply of this necessity of modern life has been brought about, to the infinite advantage of the public and of those connected with the production of coal, whether as capitalists or laborers.

It is further urged by the defendants, that the destruction of present conditions and methods attending the production and sale of coal,

will produce a deplorable anarchy in the trade, and involve in confusion and financial loss all those engaged therein, a confusion and loss by which the consumer is bound to suffer.

This may all be admitted. Counsel for the petitioner, indeed, do not undertake to deny, as it is unnecessary that they should, any of these statements. They are only pertinent as challenging by their importance the careful consideration by the court of the issues involved in the case before us.

The general situation being as thus briefly indicated, the defendant railway carriers and defendant coal companies are charged by the petition, as above stated, with having, in violation of the provisions of sections 1 and 2 of the act of Congress, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" at a time not definitely stated, but presumably shortly after the year 1895, "entered into an agreement, scheme, combination or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain and monopolize, and have controlled, regulated, restrained and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states, and its price and sale throughout the several states; with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed and the price thereof to consumers greatly enhanced." For specific details of time, place and circumstance of this somewhat vague and indefinite charge, we must of course look to the evidence adduced by the petitioner. In saying that the time fixed for the entering into the combination and conspiracy charged, is presumably shortly after 1895, reference is made to the statements of the petition introductory to the charge above quoted. These statements having set forth the attempted lease, in 1892, by which the Philadelphia & Reading Railroad Company, as lessee, was to take over the railroad and coal properties of the Lehigh Valley Railroad Company and of the Central Railroad Company of New Jersey, the lessors, for a period of 999 years, and that the same was set aside by a decree of the chancellor of the state of New Jersey, in 1893, at the suit of its Attorney General, adjudging the same to be null and void, the petition avers that the price of stove size of anthracite coal at tide water, which rose from \$3.71 and \$3.85 a ton in 1890 and 1891 respectively, prior to the leases just described, to \$4.15 and \$4.19 a ton in 1892 and 1893, respectively, and again declined in the years immediately following the cancellation of the leases to \$3.60 a ton in 1894 and \$3.12 a ton in 1895. "*Whereupon,*" the petition charges that the defendants entered into the combination and conspiracy as above recited. The conclusion is thus sought to be drawn by the petitioner, that the motive of the combination and conspiracy about to be charged was the fall in the price of stove coal that occurred in 1895, and that the time at which it was entered into was shortly thereafter.

Accordingly, as being direct evidence of the general conspiracy charged, we are referred to the testimony touching what is alleged to be an express agreement or arrangement entered into between the

presidents of the defendant carriers, on January 23, 1896, and spoken of as "the presidents' percentages."

Joseph A. Harris, one of the first witnesses produced on behalf of the petitioner, was president of the Philadelphia & Reading Railroad Company from 1893 to 1895, when he became one of the receivers appointed by this court of the said railroad, and of the coal and iron company, and after the reorganization in 1897, president again of the Reading Railroad Company, the Reading Company, and the Reading Coal & Iron Company, until 1901, when he retired. He was called to testify, and was questioned at great length as to certain alleged agreements between the defendant carriers and coal companies in 1876, 1884, 1885 and 1886, by which the coal tonnage of the different roads was to be apportioned among the several roads and restricted to certain percentages of the whole. To repeated questions, he answered that he had no recollection at all in regard to such agreements ever having existed. He was then questioned as to certain testimony given by him in a suit by the state of Pennsylvania against certain of these companies in 1886, as to all of which he replied that he had no recollection of having given the testimony referred to, and when read to him, that it did not refresh his memory. The same course was pursued in regard to the proceeding before the Interstate Commerce Commission, in which he is said to have testified with the same result. This course of questioning was pursued, and to reiterated leading questions, he repeatedly declared that he had no recollection and did not believe that any such agreements between the defendant companies as he was being interrogated about had ever existed. The examination then continues as follows:

"Q. Coming now to the year 1896, while you were president of the Philadelphia & Reading Railroad Company, give us the substance of the agreement between the presidents of the anthracite coal roads entered into at that time, establishing what were thereafter commonly called 'presidents' percentages.'

"A. I do not know anything about it.

"Q. Have you never heard of the 'presidents' percentages'?

"A. I have never heard of the 'presidents' percentages.' I never heard the term.

"Q. What was the agreement entered into by the presidents of the railroads in 1896, in reference to allotting to each interest a certain percentage of the total output of coal?

"A. I do not know. I do not remember that there was any agreement at all. Have you anything there to refresh my memory?

"Q. In 1896, was there not a meeting of the presidents of the coal carrying roads, in which the question of the allotment of tonnage was discussed?

"A. That I do not remember at all.

"Q. Do you remember no discussion in reference to that matter between the presidents of the various coal carrying roads?

"A. No; if you will give me the papers, I will look over them and tell you.

"Q. This is your testimony which was taken in the investigation before the Interstate Commerce Commission (referring to testimony).

"A. I no doubt gave my testimony correctly then.

"Q. You were asked: 'You do recollect, do you not, that there was a time when that matter (referring to the distribution of tonnage among the coal carrying roads) came up for discussion among the presidents of the coal carrying roads?' and you replied, 'What question came up? Q. The question of the division of the business of carrying coal—the question of the division

of the anthracite coal into certain percentages?" you saying, 'Understanding as to what share of the business each road was legally entitled to? Q. Yes, if that makes it clearer,' and then you answered that, 'Yes.'

"Judge Campbell:

"I think the witness's attention should be called to the whole of his examination and cross-examination, because he may have, and probably did on further recollection or refreshment of his memory, made a very material change in the substance of his testimony.

"By Mr. McReynolds:

"Q. Have you any recollection of those meetings at all?

"A. I have no recollection of them at all; no. If I were to see these minutes or to read them, I might remember them. I have no doubt that what I testified to there was true. That is all I can say.

"Q. From 1896 down to the time when you left the Reading Railroad Company, was there not a general understanding between you and the various presidents of the coal carrying roads, as to what percentage each one should be entitled to?

"A. There was not a general understanding, because it was the subject of a great deal of contest. I do not believe, so far as my recollection goes, that there was ever any agreement made at all.

"Q. Please read this testimony that you gave before the Interstate Commerce Commission in 1903, commencing on page 1570, for three or four pages, and see if it refreshes your recollection on that subject.

"A. (After reading testimony) I notice I said then, as I say now, that it was too far away for me to recollect any of the details of that meeting. It has been long years since, and my memory has not been refreshed. I think this testimony of mine, from page 1572 to page 1575, is all correct.

"Q. Having read that, do you not remember that there was a meeting in the year 1896?

"A. I only remember it by these papers.

"Q. Having refreshed your recollection about that, do you not remember that there was a meeting in the year 1896 of the presidents of the anthracite coal carrying roads, at which they came to a general understanding about the amount of the proportion of the total output which should be allotted to each?

"A. Yes.

"Q. What was the percentage at that time allotted to the Philadelphia and Reading interest?

"A. Twenty and a half, it appears from this testimony.

"Q. And each of the other roads had some percentage of a similar character allotted to them?

"A. Yes; I say here in this testimony, 'there was never any binding agreement'—I thought there was not—as can best be shown by the statistics at that time. There never was a year when that understanding was kept or nearly kept, and as a general statement of what would be fair and reasonable, there was never a single year when there was an approach to it.' There is a general statement, and that is correct.

"Q. There was, however, a general understanding among the parties, that they should each endeavor to produce a given percentage which was allotted?

"A. Yes, sir."

(See Record, vol. 2, pp. 25, 26.)

Mr. Harris is a gentleman highly respected in the community in which he lives, but the activities of his useful life have long since ceased. He is pressed again and again with questions, the answers to which only disclose a want of recollection as to the matters suggested therein. His testimony, as quoted above, in regard to the so-called "presidents' percentages," falls short of supporting the general conspiracy charged in the petition, not only on account of the manifest infirmity of the witness's memory, but also on account of the substance of the testimony itself.

A copy of the testimony of one Alfred Walter, who at one time was president of the Lehigh Valley Railroad Company, given in a proceeding against some of these same defendants before the Interstate Commerce Commission, begun in 1902 on the petition of William R. Hearst, and certified before the secretary of said Commission, has been introduced into this case by the petitioner. Mr. Walter's deposition is an exceedingly long one. That part of it to which we are especially referred by counsel for the petitioner, is as follows (see Government Exhibit No. 159, vol. 3, Record, p. 377):

"Mr. Shearn: Have you not stated and is it not a fact, Mr. Walter, that the Lehigh Valley Coal Company during your administration did not produce and sell to tide water as much coal as it was capable of producing and marketing?

"Mr. Walter: I do not think I said anything like that.

"Mr. Shearn: Well, you used to receive Ruley's report, did you not?

"Mr. Walter: Yes.

"Mr. Shearn: And you used to see on those reports the heading, 'tonnage based on the presidents' percentages,' did you not?

"Mr. Walter: Yes.

"Mr. Shearn: What did that mean to you?

"Mr. Walter: That meant the question of the shipping of coal and not the sale of coal. You have the two mixed.

"Mr. Shearn: Changing the form of the question, then, was there during this period an understood arrangement between the presidents of the different companies as to the proportion of anthracite tonnage to be shipped over each of the railroads?

"Mr. Walter: Yes.

"Mr. Shearn: And when was that understanding arrived at; when was it reached?

"Mr. Walter: Oh, I do not remember.

"Mr. Shearn: Was that not in January, 1896?

"Mr. Walter: I think it was; yes. I think so."

Afterwards, on cross-examination, however, he testified as follows:

"Mr. Gowen: You have just spoken of these figures that were called the 'presidents' figures,' having to do with the relative tonnage over various roads, and you spoke of the matter as having originated in 1896. At that time, you had no connection with the Lehigh Valley road?

"Mr. Walter: No.

"Mr. Gowen: You do not know anything about how the figures started?

"Mr. Walter: I was not president of the Lehigh Valley at that time.

"Mr. Gowen: You had nothing to do with the coal business at that time?

"Mr. Walter: No.

"Mr. Gowen: During the time you were president of the Lehigh Valley Railroad Company, you were under no agreement or understanding which was binding on you, by which you undertook to regulate the percentage of shipments over the Lehigh Valley road? You could have decreased your percentage or run it up without violating any agreement?

"Mr. Walter: Yes, sir."

The natural inference to be drawn from Mr. Walter's testimony, as well as that to be drawn from Mr. Harris's testimony, would seem to be that, for some time prior to January, 1896, as well as for some time thereafter, there had come to be what was generally thought a normal coal tonnage over the railroads respectively transporting anthracite coal, representing the capacity of the collieries in the regions tributary to those roads respectively, as derived from the reports of the Bureau of Statistics furnished to the railroad and coal companies

and the public generally. It would also seem from Mr. Ruley's testimony, as above quoted, that these supposititious percentages, which the so-called "presidents' percentages" of 1896 had by that time come to be, were not reported until January, 1901, in the monthly reports of the Bureau of Statistics, and were discontinued in May, 1903. Nor is it to be inferred, as it seems to be by the counsel for the petitioner, on page 57 of their brief, that immediately after the meeting of 1896, and not before, all the coal interests "reported to a common source their production and sale of coal"—that is, to the Ruley Bureau of Statistics. On the contrary, Mr. Ruley's testimony shows that from 1890, when he took charge of the Bureau, these reports had been regularly made of the tonnage carried by the roads respectively, as well as of the sales of coal and prices obtained by the various shippers.

The objection to the admission of the copy of Mr. Walter's testimony, as taken before the Interstate Commerce Commission, must be sustained. It is testimony taken before a body not judicial but administrative, in a proceeding between different parties, and with reference to nonidentical issues. It is not authenticated or proven by any witness present at the time the testimony was taken. It is therefore not within the rules permitting the testimony of a witness taken in one proceeding to be used in another. The inclusion of this testimony in the record is to be regretted, as it is embarrassing to the court in considering the weight and effect of all the testimony on either side. It may be said that the testimony, as far as its substance goes, is in the same line with the other testimony on the part of the petitioner; but the barriers between what is competent and incompetent as testimony, cannot be broken down without creating confusion and exposing litigants to dangers from which they have a right to be protected.

The testimony of Mr. Ruley, of the Statistical Bureau, in respect to the so-called "presidents' percentages," is also referred to in support of the general conspiracy charge. This Bureau was started by one Jones, in 1876, as a private enterprise in industrial statistics, and he sold his compilations, among others, to the defendant carriers, individually. In 1892, he sold out his business to Ruley, who has since carried it on, and whose work has been, and is now, recognized as authoritative by those interested in industrial statistics. It is no doubt true that his patronage or employment has come largely from the defendant carriers and defendant coal companies, who are more than any others interested in these statistics, and indeed, since 1902 and perhaps before, they seem to have been compiled in great part from the monthly returns made to the Bureau by the defendant coal companies and the defendant carriers, severally, of the sales and shipments over the respective roads, and the price obtained for the different sizes of coal at tide water in New York Harbor. Mr. Ruley testifies that these compilations have been furnished each month to the press—that is, to the coal trade journals—and thus find their way to the office of every considerable wholesale or retail dealer in anthracite coal. He testifies that they are also furnished to the departments of the general and state governments. After the award made by the Anthracite Coal Strike Commission, in April, 1903, by which all the

defendant companies and other coal operators in the anthracite region, by agreement previously made among themselves, were jointly and severally bound, it became necessary, in order to carry out the award of the Commission, as to the sliding scale of wages fixed thereunder, to resort to the monthly compilations of this Statistical Bureau, in regard to average prices for certain grades of coal at tide water in New York Harbor.

From Mr. Ruley's testimony, it appears that the appellation "presidents' percentages" originated in one of the trade journals to which Mr. Ruley had contributed monthly tonnage reports. In his cross-examination, page 99, volume 2 of the record, we find the following:

"Q. You said the other day that you got the 'presidents' percentages' from the press, if I understood you correctly, or trade papers?

"A. I said they were published there, *and that is the only source of information I had in mind.*"

(The italics are ours.)

"Q. Did you ever talk with any president about the thing, one way or the other?

"A. No, sir."

He then refers to a Coal Trade Journal which had been published for 35 years by Mr. Saward, and in connection with this Trade Journal was a Coal Trade Annual, published by the same person. He said he had them with him as far back as 1890. Referring to the Annual of 1890, he is asked:

"Q. I find below, on page 11, 'Reducing the business done by each of the initial anthracite coal carriers to the basis of percentages, one may find that there are some interesting features attached thereto. Taking the years 1886-1888 (the latter being the latest official figures available) one finds that the Reading Company did an average of 20.55 per cent., the Lehigh Valley 17.78 per cent., the Central Railroad of New Jersey 14.91 per cent., the Delaware, Lackawanna & Western 17.36 per cent., the Delaware & Hudson 11.29 per cent., the Pennsylvania Railroad 11.22 per cent., the Pennsylvania Coal Company 4.55 per cent., and the Erie 2.27 per cent.; this fairly represents the 'ability to produce' of the several interests on collieries tributary thereto, whether the total output be 40,000,000 of tons annually or less.' Are you able to find anything earlier than that in any publication on the percentage basis?

"A. I judge I could.

"Q. That is the earliest you did find?

"A. The earliest I could find in the files.

"Q. In other words, for a long time the statisticians had been dealing with tonnages on the percentage basis?

"A. Yes.

"Q. What is the next one you have?

"A. 1891. In 1896 there is quite an extensive report.

"Q. Is this report of 1896 one of the reports you had in mind the other day when you spoke of these presidents' percentages being published?

"A. Yes, sir. * * *

"Q. Without giving the monthly production and the shipments by the anthracite companies, and the production in each district, with its percentages, and the actual percentages of the whole shipments for the years 1890 to 1895, each year separately for the P. and R., the L. V., the C. R. R. of N. J., the D. L. & W., the D. & H., the P. E. R., the P. C. Co., the Erie, the O. & W., and the D. S. & S., on page 21—are these figures which you furnished originally to these publications yourself?

"A. Yes.

"Q. You recognize these figures?

"A. I do not say I furnished the per cents. I furnished the tonnages on which the percentages are based.

"Q. I find this statement, 'There was held on the 23d of January, 1896, a meeting of the representatives of the several anthracite producing and carrying companies in order to come to some agreement in regard to trade conditions and its improvement. According to the figures presented at the meeting the tonnage of the different companies in 1895, as compared with 1894, is as follows: Then follows the statements of the companies and the production for 1895, and the per cent. for 1894, and the changes of increase or decrease in percentages, the largest being a change of 1.45 per cent. This was referred to a committee to adjust, which a week later brought in a report recommending that for the period commencing February 1, 1896, and ending March 31, 1897, the following percentages should be adopted: Philadelphia & Reading 20.50, Lehigh Valley 15.65, Delaware, Lackawanna & Western 13.35, Central Railroad of New Jersey 11.70, Pennsylvania Railroad 11.40, Delaware & Hudson Canal Company 9.60, Erie Railroad 4, Pennsylvania Coal Company 4, Delaware, Susquehanna & Western 3.20, New York, Ontario & Western 3.10.' Now are these percentages and these statements the percentages and statements you had in mind about seeing them in print in the trade journals?

"A. Yes.

"Q. Do you know of any earlier publication of the presidents' percentages, except in the journal of which this is a compilation?

"A. No, sir; I do not.

"Q. And was it from these sources, or the original journal of which this is a compilation, from which you got the compilation from which you made your percentage reports and figures?

"A. Yes."

He afterwards testifies that ever since he had been connected with the Bureau, since 1890, these journals have been giving the details of the anthracite coal statistics, the details for the month and the details for each company, together with circular prices of the different companies for each grade of coal. So that it appears that the only knowledge that Mr. Ruley had of a meeting on the 23d of January, or of any meeting was the publication in the trade journal above quoted. As to the statement made in this publication, it is to be observed that the so-called agreement as to percentages of coal traffic to be distributed among the carrier companies, was to obtain for the period commencing February 1, 1896, and ending March 31, 1897, and that these percentages correspond very nearly with those reported in the same trade journal for the years 1886-1888. Counsel for the government rely upon Mr. Harris's testimony, that the understanding, such as it was, continued in force as long as he remained president of the Philadelphia & Reading. We do not think Mr. Harris's testimony, taken as a whole, will bear out this statement. Counsel also rely upon the fact that the reports of the Bureau of Anthracite Coal Statistics from January, 1901, to May, 1903, show a calculation of tonnages as they would be if based on the so-called presidents' percentages. Referring to government Exhibit No. 7, produced by Mr. Ruley as showing the form of these reports, we do not find that these percentages are spoken of as presidents' percentages at all, though they undoubtedly correspond with what were reported as having been adopted in the meeting of January 23, 1896, in the trade journal above referred to. Mr. Ruley's explanation of how they came to be included in his report, for what purpose, why he abandoned them

after May, 1903, and that he had no direction from any defendant to so include them, we think deprives their inclusion during the period mentioned of any evidential value, as claimed by the petitioner. In considering the question, whether the matter of the so-called presidents' percentages furnishes any foundation for the general charge of combination and conspiracy in restraint of trade, as set forth in the petition, we must consider also the testimony of the defendants.

Mr. E. B. Thomas, president of the Lehigh Valley Railroad Company, testifies, first as to the general charge of the petition above referred to, as follows. The general charge having been read to him from the petition, he is asked:

"Q. Is that charge true or false?

"A. It is not true.

"Q. Did you ever have any knowledge of any such scheme as that which is charged?

"A. I never did.

"Q. Has there ever been any such agreement or scheme, or combination, or conspiracy between the defendants?

"A. Never has. I have never known the time when every party in the trade was not at liberty to produce and transport all the coal he desired to, or that he could sell. If he could not sell it, he could throw it in the North River, if he wanted to.

"Q. Did that agreement, or any such agreement as that, or any agreement of that character, exist at the time charged in the complaint, or at the time of the commencement of this proceeding, June 12, 1907?

"A. I never knew of any."

Coming to the question that the general conspiracy, as charged, was begun about the time of or at its origin in the arrangement of the so-called "presidents' percentages," on January 23, 1896, Mr. Thomas's testimony is as follows:

"Q. Some testimony has been offered by the complainant about a meeting, or some meetings, which were held in or about 1896, of the presidents of the anthracite railroads, at which there was an understanding, or an attempt at an understanding, between them as to percentages of product of anthracite coal to be carried by different railroads during that year. Were you present at any such meeting at that time?

"A. Yes, I was present at a meeting where there was an attempt made to reach a tentative understanding as to the quantity of coal, proportion of coal, that each road would transport. It related entirely to transportation.

"Q. For how long a period was that under discussion? I mean, what was to be the period—

"A. The period was to be a year. There was not enough percentage in a hundred to go around, to begin with.

"Q. What do you mean by that?

"A. I mean to divide it into per cents., we had to put one hundred and one per cents. as near as we could come.

"Q. In other words, there was some party or parties that were there that would not consent to the percentage that was talked about; is that right?

"A. That is right.

"Q. And never did consent?

"A. Never did consent to it. As far as I have any knowledge, I do not think anybody ever regarded it. It came about by reason of crowded terminals, the question of distribution of cars among shippers.

"Q. I wish you would explain that more fully.

"A. The individual operators claimed that, in times of scarcity of cars, we were favoring our own companies, or those controlled by the railroads, and that they were short of cars. There was an attempt to distribute the tonnage to be handled on colliery production. The individual shippers would

load up the cars and send them to tide water or to any other destination and allow them to accumulate and have no market for them. They crowded our terminals and then, when times came up that our own companies had not done the same, they claimed their same proportion of cars right along; and it was an endeavor to conduct the distribution of cars and movement of tonnage in a more orderly manner and in a more businesslike manner than it had previously been.

"Q. And to meet these complaints?

"A. To meet these complaints.

"Q. And to enable the railroad companies to meet these complaints?

"A. Precisely.

"Q. Was any demand made at that time, or was any suggestion of any demand made, to curtail the output of coal?

"A. None whatever. I recollect George B. Roberts, who represented the Pennsylvania at that meeting, stating distinctly that he would not discuss any question of that kind or have anything to do with it; with which I heartily accorded. * * *

"Q. The percentages which were considered at that time were the percentages which have sometimes been referred to in this testimony as the 'presidents' percentages'?

"A. I assume that they were.

"Q. Did that understanding or talk ever go into effect as an agreement?

"A. Never.

"Q. Was it ever put into operation?

"A. I think some people tried to live up to it a little while, until they found the other fellow was not.

"Q. Was there ever any talk about continuing it after the first year?

"A. Never.

"Q. By anybody?

"A. There never was any meeting held after the first one, and I do not think there were any practical results out of that.

"Q. Has there at any time since, except as to this early attempt by some of them, been any observation by the companies of these percentages which were adopted at that time?

"A. Not to my knowledge.

"Q. Has the Lehigh Valley Company ever observed them?

"A. It has not."

Elsewhere, in speaking of these so-called "percentages," he says: "I do not think that tentative understanding entered into ever had any practical result." He speaks of it repeatedly as an abortive attempt on the part of the carriers to prevent congestion of cars at the water terminals and docks, and to regulate the distribution of cars at the collieries. He says, during the course of his testimony above quoted, that it was directed against a usage of the independent operators to load up long trains of cars, and to use the same to store up coal mined in advance of demand, but that whatever the purpose of the same was, it was not lived up to even for the year during which it was to be tried.

William Truesdale, another witness called by the defendants, at the time of testifying had been president of the Delaware, Lackawanna & Western Railroad Company since March 1, 1889. In the course of his examination, he testifies as follows:

"Q. What is meant by presidents' percentages?

"A. I do not believe I am familiar enough with that matter to give any explanation of it. It is something that was arranged long prior to my connection with the Lackawanna Road, which had nothing to do with our affairs since then, if it ever had.

"Q. Did you ever enter into any agreement with any other person whereby the tonnage of the different coal carrying railroads was distributed according to certain arbitrary percentages?

"A. There was never such an agreement that I recollect of since my connection with the Lackawanna Railroad.

"Q. Has there been any distribution of tonnage according to any percentage?

"A. There has not.

"Q. Do you know what the alleged presidents' percentages are?

"A. I know what is referred to by that.

"Q. The Delaware, Lackawanna & Western's percentage, I believe, is said to be—

"A. Thirteen and thirty-five one-hundredths per cent. under those old percentages.

"Q. State whether or not the Delaware, Lackawanna & Western tonnage, since your connection with the railroad, has been maintained at about thirteen and thirty-five one-hundredths per cent?

"A. No, sir. I think nearly every year we exceed that very much.

"Q. State whether or not, since your connection with the Delaware, Lackawanna & Western Railroad, you have produced all the coal that you could profitably sell?

"A. We certainly have, and most of the time we operate our collieries to the limit of their capacity. * * *

"Q. And you have sold that coal at the best price you could obtain for it?

"A. We have."

W. A. Lathrop, a witness produced by the petitioner, had been in charge of the mines of the Lehigh Valley Coal Company between 1889 and 1901, and president of the Lehigh Coal & Navigation Company since March, 1907. In the course of his examination, he testifies as follows:

"Q. Are the collieries of your company operated to their capacity throughout the year, and have they been since your connection with it?

"A. Practically so. There are times during the summer when that is not done, because we cannot find the people to buy our coal. Except that, they are worked practically full time.

"Q. What proportion of the entire production of anthracite does your company put out?

"A. I think the total production last year was about 67,000,000, as near as I remember, and our production was not quite 3,000,000. That would be about 5 per cent., a little less than 5 per cent.

"Q. Do you endeavor to so operate your mines as to produce about that per cent. from month to month of the entire output?

"A. No, sir; we do not pay any attention to that.

"Q. You pay no attention to the output of the other companies?

"A. We get out all the coal we can find customers for. We would be glad to get out more if we could find them."

Mr. George F. Baer, who testifies that he has long been familiar with the affairs of the predecessors of the present defendants, the Reading Company, the Reading Railway Company, and the Reading Coal & Iron Company, as counsel for and director in the same, in 1901 became president of the defendant companies above named. After stating that the Philadelphia & Reading Railway Company is not a competitor for the carriage of coal, which originates in the northern or Wyoming region and the Lehigh or middle region, and that the operations and holdings of the Philadelphia & Reading Coal & Iron Company are confined entirely to what is known as the lower and Schuylkill region, testifies as follows:

"Q. Was there ever at any time, or is there now, anything in the nature of a division agreed upon or participated in by these defendants, of the tonnage carried by them?

"A. None whatever. There is absolutely no division of coal tonnage and has not been to my knowledge during the period since my active connection with the systems. During my administration, of which I can speak absolutely, there never was any division or attempted division of coal tonnage. We mine and market all the coal we can, without regard to what other companies are doing. It is as free and open a market, so far as that goes, as exists in any commodity in the world."

Taken in connection with the defendants' testimony, above quoted, it is not without significance too, that tables, filed as exhibits by the government, of the tonnages of the different defendant carriers after 1896, are utterly inconsistent with the existence of any pooling agreement. We take the following analysis of certain of these tables from the brief of the Lehigh Valley Railroad & Coal Companies. Taking the government's specimen report (Exhibit 7, vol. 3, p. 34) for the five months of 1903, it appears that over 1,500,000 tons, on which the freight at an average of \$1.24 per ton, amounted to about \$1,860,000, was carried by some railroads in excess of their allotments, provided the pooling agreement existed at that time. The want of conformity by the defendant carriers and others to the so-called "presidents' percentages," from 1896 to 1908, is more comprehensively shown in the table furnished by the Erie Exhibit No. 16, vol. 6, p. 455, exhibiting the yearly percentages of shipments of anthracite coal by the several transporting companies, from 1892 to 1908, inclusive.

Taking from this table only the figures for the years 1896 to 1908, they show that some railroads carried tonnage greatly in excess and others as much short of the tonnages allowable under the supposed pooling agreement, to wit:

	Tons Over.	Tons Under.
Reading		2,490,892
Lehigh Valley.....		1,705,015
Jersey Central.....	3,241,078	
D., L. & W.....	10,730,454	
D. & H.....		934,132
Penna.		12,185,542
Erie		1,570,357
O. & W.....	7,069,496	
D. S. & S.....		2,150,094
	<hr/>	
	22,041,028	

That is to say, the three railroads, Jersey Central, Lackawanna, and Ontario & Western, violated the agreement, if it existed, by carrying over 22,000,000 tons more than they had right by the agreement to do. The earnings on this tonnage, at an average rate of \$1.24 per ton (see vol. 2, p. 690) would have been \$27,280,000, which represents approximately the amount that these three railroads obtained in earnings in excess of their right under the agreement, if it existed, and there is no evidence that any complaint was ever made by any of the companies on this account.

We are compelled to conclude that thus far the direct evidence relied upon by the government to show that all the before mentioned defendants have long been parties to a general combination and con-

spiracy, commencing presumably in 1896 and continuing down to the filing of the petition, which stifles competition and obstructs trade and commerce among the states in anthracite coal, fails to establish that charge, and we turn now to a consideration of what may be called the indirect testimony adduced, from which it is contended the existence of such general conspiracy must be inferred. In this respect, we are called upon chiefly to consider the acts charged in the seventh paragraph of the petition to have been committed by certain groups of the defendants in development of this illegal combination, and in furtherance of its illegal purpose, of which we have already given a summary.

The first of these has relation to the so-called 65 per cent. contracts. Much testimony has been taken on both sides in explanation of these contracts, which must be examined, in order to determine their character. It appears that, long prior to 1890, it had become a custom more or less prevalent in the anthracite region, for the smaller operators of collieries to sell the product of their mines to the large coal companies producing and shipping coal in their neighborhood, f. o. b. on the railroad to which their mines and territory were contiguous and naturally tributary. The terms on which these sales were made gradually came to be common to all parties so engaged; that is to say, instead of a fixed money price per ton, it was agreed that the small producer or independent operator who delivered his coal f. o. b. on the cars, should receive a certain per cent. of the average price at which that grade of coal was sold during the month in the tide-water market of New York Harbor. Out of the balance over such percentage must come the freight of the carrying company, and whatever profit there might be for the purchasing coal company. The advantages of such sales to the independent and smaller operators were stated by many witnesses of that class. To have marketed their own coal would have required sales agents and the maintenance of officers at the various market points, and would have entailed the cost of insurance and the risk of collections, and not infrequently the cost of storage, upon the seller. All this was avoided by the contracts in question, and the seller, upon delivery of the coal upon the cars, was done with it and received each month from a responsible buyer the price of his coal, as determined by the contract. There is no doubt from the evidence that this method of dealing between the large companies and the smaller operators grew in favor with both parties to the contracts. The large purchasing companies being compelled to maintain sales agents and offices at the market points and provide for insurance or storage, if needed, were put to little additional expense in caring for and disposing of the coal thus purchased. There is no evidence to show that this custom had its origin and subsequent growth in any agreement or concerted scheme on the part of the defendant carriers or coal companies, or others in the business.

The testimony of the operators called by the government, and occupying a large space in the record, shows that this custom had commenced back as far as 1860, one of them saying that they were educated to it from the first, by reason of the difficulty of getting cars

and transportation just when they wanted it, to meet sales, but they all say that the principal reasons were those above enumerated—the expense of maintaining selling agencies and offices, risk of handling, and expense of storage, as contrasted with the regularity and certainty of payment secured by the method of selling f. o. b. to the large companies.

The rate of these percentage contracts was at first as low as 40 or 45 per cent. This percentage rose gradually to 55 per cent. About 1890, and for some time prior thereto, there had been some dissatisfaction expressed by the selling operators with the returns coming to them under these contracts. This dissatisfaction culminated in 1892, in an arrangement by which certain of the coal companies in the Wyoming region offered to take the product of the mines of the independent operators contiguous and tributary to certain of the railroads, on a 60 per cent. basis. This seems to have been the result largely of negotiations had with Simpson & Watkins, large colliery owners of that region. (See testimony of Clarence D. Simpson, Record, vol. 2, p. 440 et seq.) Simpson had insisted on 65 per cent., but 60 per cent. was finally agreed upon. This percentage seems to have been adopted by all the other coal companies and coal roads; whether by any concert or agreement among them, does not appear. This rate generally obtained until about 1899, when demands were made by some of the independent operators, whose contracts had expired or were about to do so, for an increase in the percentage prices to 65 per cent. Negotiations between the representatives of the independent operators and the coal companies and railroads were carried on for some time, without result, when early in the fall of 1900, a general strike of the coal miners and laborers of the whole anthracite region took place, resulting in an entire cessation of the production of anthracite coal.

There is some conflict in the testimony and in the contentions of counsel, as to the influences which brought about, on the part of the large coal companies and coal carrying roads, an acquiescence in this demand for 65 per cent. contracts. We think, however, it is established by the clear preponderance of the testimony that, during the autumn of 1900, those controlling the large coal companies and railroads affected by the strike, were induced to concede to the striking miners a 10 per cent. increase in their wages; that though this was agreed to on the part of the representatives of these companies, the smaller and independent operators were unwilling to accede to this increase, on the ground that it would necessitate the production of coal by them at a loss. As the strike extended over the whole anthracite region, and affected all producers of coal alike, the representatives of the striking miners refused to accept the settlement on the basis of this increase, unless agreed to by practically all the producers and operators throughout the region.

The proposed settlement having been thus brought to a standstill, conferences took place between representatives of the large coal producing companies and these dissentient operators—notably with those who had been parties to the expired 60 per cent. contracts, with the result that it was agreed that new contracts should be framed and

entered into, by which 65 per cent. of tide water prices should be given by the purchasing companies, instead of the 60 per cent. of the price obtained at tide water under the former contracts, in consideration of the entire output of the mines of the contracting operators, without limitation as to time, "shipments to be made from time to time as called for by the buyer." On these terms, such operators were to join in the settlement of the strike on the basis of a 10 per cent. increase in wages. Pursuant to this agreement, a form of contract, embodying its terms, was drawn up, which was presumably acceptable to all parties. At all events, contracts substantially in this form were thereafter, from time to time, executed severally between the theretofore purchasing coal companies and many of such so-called independent miners as produced their coal in territory contiguous and tributary to the roads over which the purchasing companies shipped their coal. These contracts provided that:

"The general average f. o. b. prices herein referred to shall be determined by a disinterested expert accountant, satisfactory to both parties, to whom the buyer shall furnish, not later than the 8th of each month, a statement of the quantity of each size sold during the preceding month, and the amount realized therefor by the buyer at tide on all sales of each size of coal from the region, and the accountant each month shall make a true average price for each size sold at tide of all the coal sold from the same region, and the average prices thus obtained shall be furnished by the accountant to the buyer and seller."

The expert accountant selected to make these returns was, naturally, Mr. Ruley, of the Statistical Bureau, who had since 1890 been furnishing these same statistics to the coal producing companies and all others interested.

Counsel for the government argue from the fact that these accounts were so rendered to the parties interested, that there must have been some concert or agreement in violation of the act of Congress among the defendants and others, with reference thereto. We cannot so regard it. It is, of course, possible that the information obtained from these monthly reports of the Statistical Agency or Bureau maintained by Mr. Ruley and his predecessor, might have been of some use to such a combination as is charged in the bill, to maintain rates of freight or prices of coal in the anthracite region, but, in the absence of any direct proof of such a combination, it is a very violent presumption, indeed, that, because of the existence of such statistics and monthly reports, published in all the trade journals of the country and in the hands of every retailer of coal, as well as in those of every producer of coal, there must have been such an illegal combination; and this too, in face of the fact that many obviously legitimate and useful purposes were to be subserved by such publications, to which all intelligent persons interested in the conduct of the business of producing, selling, carrying and consuming coal would, for their own information and advantage, refer. There does not seem to be the slightest direct proof, apart from the presumption we are asked to indulge in, of any illegal combination or contract promoted by the use of these statistics. The reports were public, and there is not the slightest intimation of any secret correspondence between the Statistical Bureau and the defendants. This information,

open to every one, was doubtless useful in many legitimate ways to those who subscribed for and supported it. We might as well be asked to draw unfavorable inferences, in the absence of other proof, from the use by the defendants of the statistics published by the state or federal governments, concerning mining operations and the coal supply of the country.

The genesis of these contracts being found in the long-established custom above described, the general raising of the percentage of price at tide water to be given to the individual seller, incident to the settlement of the strike, and the insistence by the so-called independent operators, whose previous contracts had expired, is not to be considered as necessarily predicated on any concert or agreement denounced by the act. Moreover, these contracts were clearly intrastate and not interstate in their character. They were complete when the coal was delivered at the mines f. o. b. to the buyer. They did not control or affect, except indirectly and incidentally, interstate commerce; much less did they suppress or restrain such commerce. No stipulation of the contract directly or indirectly touched the movement or disposition of the coal by the buyer after its delivery under the contract to purchase. Such buyer might have withheld all the coal thus purchased from the stream of interstate commerce, disposed of it in the state where it was bought, or in any other way exercised to the fullest extent every right appertaining to complete ownership of personal property. The law of July 2, 1890, cannot be so construed, or such a purpose be imputed to those who enacted it, as to strike with nullity the legal intrastate contracts which do not in purpose or effect directly relate to or touch "commerce with foreign nations or among the several states." No judgment of the Supreme Court sanctions such an interpretation. On the contrary, that court has always adhered to the doctrine that the manufacture and sale of commodities within a state are not within federal control under the commerce law, merely because such commodities may, as well as may not, after their manufacture or sale, become the subject of interstate commerce. These contracts were not for the sale of coal to be delivered in another state. They did not reach beyond the delivery of coal f. o. b. the cars at the breakers. If such coal afterwards entered the stream of interstate commerce, it was because the buyer chose that it should do so, and it was then within federal jurisdiction under the commerce clause of the Constitution. But the contracts by which the title to such coal was acquired, not relating to or affecting, except incidentally and indirectly, interstate commerce, are not amenable to federal control.

It is said, however, that these contracts were made pursuant to concert or agreement entered into among the purchasing coal companies. It might be a question whether such contracts, even if the result of concert and combination, were in restraint of trade. But the evidence does not satisfactorily establish the existence of such combination or concert. The contracts were made, not by all with all, or by all with one, but by the coal companies severally with individual operators. In all essential features, these contracts took the place of the expiring contracts, whose history and genesis we have summarized. They were the result of the natural development of the business and the peculiar

conditions pertaining thereto in the coal region during a long series of years, and so far from being in restraint of commerce, contributed largely to its orderly and healthy growth. That the price given was determined by the price obtained for similar coal at tide water in New York Harbor, did not impress an interstate character upon the contracts in question. It was merely the fixing of the standard by which the prices should be measured, and in no wise differed from the fixing of the price of such coal by the price obtained in San Francisco or Boston. In fact, the evidence is, that a large part of the coal so purchased was not taken to tide water at all, but was, to a considerable extent, disposed of in the state of Pennsylvania.

Nor does the mere fact that, during the long period when these contracts were in vogue, there was equality in the percentage offered and paid by the buyers to the sellers, or practical equality in the prices obtained by different defendants as sellers at tide water, argue any concert or combination denounced by the act of Congress. Equality in prices for staple articles given and received, is the general result of free competition among buyers and sellers. Of this, the grain markets and cotton markets of the world furnish signal examples. Nor can we attribute to the so-called 65 per cent. contracts an inherent illegality under the law, in the fact that they provide for the purchase by the coal companies of the whole product of the mine, whereas the percentage contracts prior to 1900 or 1902 were to continue only for a term of years. To buy the whole product of a mine is just as legitimate a transaction as to buy a portion of it. To buy the whole produce is just as legitimate as to buy the mine itself. And it is difficult to see how the 65 per cent. contracts directly affect interstate commerce, if, as seems clear to us, those to which they succeeded did not. A form of contract used for purchase and sale under these contracts has been shown. Uniformity in the framework of these contracts would seem to be the natural result of the situation, each seller demanding the terms that obtained among other sellers, and is no more evidence of concert or agreement, illegal or otherwise, than the uniform character of negotiable notes and bills of lading, as used in the business world. There is no evidence to show that the coal bought by the coal companies under these 65 per cent. contracts was not sold by them in competition with each other, just as it is proved all other coal owned or produced by them was sold, whether at tide water in New York City, or elsewhere.

Being clearly of the opinion that these so-called 65 per cent. contracts are not within the mischief denounced by the act of July 2, 1890, and have no proved connection with any general combination or conspiracy, as charged in the seventh paragraph of the bill, I think as to them the bill should be dismissed.

Nor can we agree that the abortive or abandoned attempts by the defendants, or some of them, to come to agreements or arrangements in 1876, 1884, and 1886, even if admitted to be of a character now denounced by the act of July 2, 1890, have any evidential bearing, remote or otherwise, upon the charge now being considered by the court. In the first place, the several acts referred to were legal when made. They certainly violated no act of Congress then in force; and in the

second place, were abandoned long before the passage of the act now under consideration.

If no general agreement or conspiracy in violation of the act has thus far been disclosed by the testimony, direct or indirect, it is hardly worth while to consider in this connection at any length, the separate acts of individual defendants or groups of defendants, so far as they are alleged to have been committed as steps in the development of the general illegal combination charged in the petition, and in furtherance of its illegal purposes. Nor do these separate acts constitute circumstances from which the existence of such general unlawful combination and agreement can be inferred. The alleged absorption by the Erie Railroad Company, in January, 1898, of the New York, Susquehanna & Western Railroad Company, even if it were held violative of the provisions of the act of July 2, 1890, on the part of the two companies concerned, has no relation whatever, necessary or otherwise, to any general conspiracy, such as is charged against all the defendants. The same observation is true, also, of the transaction in which the Reading Company acquired a majority of the shares of the capital stock of the Central Railroad Company of New Jersey, thereby, as alleged, uniting and bringing together under a common head and source of control, that company and the Philadelphia & Reading Railway Company. In fact, if all be true, as is alleged of these two transactions, they enabled these two groups of defendants to compete more efficiently with some of the other defendants. They certainly do not tend to prove the conspiracy which must be assumed, if they are to be considered as steps in the development or furtherance thereof.

A careful consideration of the very able argument and brief of the counsel for the government, does not convince us that the evidence discloses any such general contract, combination or conspiracy among the defendants in restraint of trade or commerce among the several states, or to monopolize any part of the trade or commerce among the same, as charged in the petition. Certainly there is no direct evidence of such a combination or conspiracy, and we think it is equally obvious, from what we have just said, that there is no indirect or convincing circumstantial evidence of the existence of such a conspiracy. The things herein charged are violations of law, and constitute the crimes denounced by the act. We refrain from saying that, on that account, the degree of proof of their commission should be that required upon the trial of indictments therefor. It suffices to say that the evidence should be such as to convince the mind of the tribunal to which it is addressed, that the acts denounced by the law have been committed. The consequences attending the finding of the defendants guilty of the acts charged in the petition in this proceeding, are certainly very serious, not only to the defendants, but to a large portion of the public and to many innocent persons involved in these transactions. As we have before said, this consideration can only be pertinent to invoke a more careful consideration of the testimony adduced in support of the charges made in the petition.

We are not unmindful that the conspiracies and combinations forbidden by the act may be proved otherwise than by direct and positive testimony of definitively formed agreements, and that it is a part of the

law of conspiracy, that "if there is a meeting of minds brought about in any way to accomplish the common purpose, the essentials of a guilty combination are all satisfied." We fail, however, to find in any of the acts and transactions disclosed by the testimony, evidence of any general combination or purpose to combine in violation of the provisions of the act continuing after the date of its enactment. Except as hereinafter stated, we cannot find, from any fair intendment of the act in question, a purpose to denounce general conditions and relations such as now exist among the parties engaged in the mining, selling and transportation of anthracite coal, whether intrastate or interstate in its character, disclosed by the evidence, as now existing since July 2, 1890, and we can impute no intention to the framers of the act to disturb such conditions.

To violate the act, there must be a contract combination or conspiracy, which in purpose or effect tends to restrain trade or commerce among the states, or to monopolize some portion thereof. Whether in purpose or effect violative of the act, such contract, combination or conspiracy must have the ordinary meaning attached to those words. There must be the meeting of the minds of two or more, to accomplish some common purpose directly violative of the act, or a purpose which will, whether intentional or not, in effect constitute a restraint of trade and commerce among the several states. In most of the cases under this act which have come before the Supreme Court, the existence of the contract, combination or conspiracy, has been either admitted or clearly and definitely proved, and the question of difficulty presented to the court was, whether the contract, admitted or proved, came within the purview of the act. In this case, however, we are met at the threshold with the denial of the existence of any such contract, combination or conspiracy, generally charged against all the defendants, and with what we think is a deficiency in the evidence adduced to support the same.

In the *Addystone Pipe Case*, 175 U. S. at page 235, 20 Sup. Ct., at page 105 (44 L. Ed. 136), the court say:

"We are thus brought to the question, whether the contract or combination *proved* in this case, is one which is either a direct restraint or a regulation of commerce among the several states or with foreign nations, contrary to the act of Congress." (The italics are ours.)

Immediately thereafter, the court adopt the statement of special facts made by the learned circuit judge, in part, as follows:

"The defendants, being manufacturers and vendors of cast iron pipe, entered into a combination to raise the prices for pipe for all states west and south of New York, Pennsylvania and Virginia, constituting considerably more than three-quarters of the territory of the United States and significantly called by the associates 'pay' territory."

In the *Northern Securities Case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, of course the existence of the contract or combination, the result of which was the incorporation of the Northern Securities Company, for holding the stock of and controlling and managing two competing railroads, was not denied. Its terms and conditions and purpose were before the court, and were not the subjects of dispute or

controversy. The question argued before the court, and upon which the court divided, was whether this combination, admittedly existing, was within the purview of the act of Congress.

In *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the case came up upon demurrer by the defendants to the petition, and the Supreme Court decided in effect, that the allegation as to the existence of a contract, combination or conspiracy, was sufficient.

In *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, the combination to "boycott" the interstate trade of a certain hat manufacturer in Connecticut, was admitted or clearly proved.

So far, we have considered the denunciation of agreements or combinations in restraint of trade as set forth in the first section, and combinations to monopolize any part of interstate trade, together, because both involve the agreement and combination of two or more persons to accomplish a common purpose, as above discussed.

Section 2, however, makes it an offense for any person to monopolize, or attempt to monopolize, any part of interstate trade or commerce. The monopoly feature of the act is covered by the charge of combination and conspiracy to monopolize, and the individual offense can only exist as to individual defendants. There must, however, be a clear, legal concept of the words "monopolize" and "monopoly," in order to properly consider the charge in this respect, as set forth in the petition. The word is hard to define, and no attempt at exhaustive definition need be made. It will suffice to say that the mere extent of acquisition of business or property achieved by fair or lawful means cannot be the criterion of monopoly. In addition to acquisition and acquirement, there must be an intent by unlawful means to exclude others from the same traffic or business, or from acquiring by the same means property and material things. As said by Judge Sanborn in *U. S. v. Standard Oil Co.*, 173 Fed. 177:

"It (the anti-trust act) was enacted, not to stifle, but to foster competition, and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoined under it, monopolies of part of interstate and international commerce, by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts."

But, even if the proper interpretation of the word "monopoly" were as broad as contended for, as we have already said, we find no evidence to support the charge of an agreement, combination or conspiracy on the part of the defendants in that regard.

The Supreme Court has said that it was not the intention of the court to obstruct, trammel or interfere with the freedom of business, or with the necessary or lawful relations of those engaged in it. The situation in the anthracite region is a somewhat unique one. The territory in which the anthracite coal deposits are found is comparatively a restricted one, and the development of the business of producing, preparing for the market and transporting it, though necessarily affected by the peculiar conditions surrounding it, has had, on the whole, a natural, wholesome and beneficial growth. It cannot be that every phase in this development, which tends to the better regulation of a business engaged in by many operators, corporate and individual,

which incidentally but not directly affects the selling and transportation of coal in and to other states, in the absence of the unlawful purpose denounced in the act, can be visited with the serious consequences sought in this case to be visited upon the defendants. We have already commented on the fact that the development of this business has tended to eliminate from it the confusion, loss, and wasteful conditions which characterized the earlier period of its growth, in accordance with the natural laws which govern competition and reward intelligence and enterprise.

It has been said in many cases, and the brief of the United States admits, that mere acquisition of the material sources of wealth, and the enlargement of business and traffic, accomplished without the illegal combination or conspiracy denounced by the act is not unlawful. In the present case, it has resulted in a large percentage of the coal lands of the region being held by wealthy and powerful corporations who have the ability, and whose interest it is, to conserve those natural resources so valuable to the people of the whole country. The evidence of this case tends to show that these large holding and carrying companies do carry on their business in competition with each other; and there is nothing to show that there has been any general agreement or combination between them, verbal or in writing, in restraint of trade and commerce among the states, by a suppression of competition or otherwise, as is charged in the first clause of the seventh paragraph of the petition.

Counsel for the government insist that the cases in which the Supreme Court has discriminated between those acts of the state Legislatures which unlawfully invade the exclusive domain of federal regulation of interstate commerce, and those which do not, are applicable to the consideration of the present case. I think this is so only in a qualified sense. But, pursuing the argument on this line, we find that the Supreme Court has said repeatedly, that state legislation enacted without intent to regulate interstate commerce, is only unlawful if it directly and substantially interferes therewith, but not so if it affects interstate commerce only incidentally and not substantially. I find nothing in this case, either in the evidence in support of the general charge of conspiracy, or of the individual acts of the Reading Company, with reference to the stock of the Central Railroad Company of New Jersey, or of the Erie Company, with reference to the stock of the New York, Susquehanna & Western Railroad Company, by which there has been made manifest any purpose to restrain interstate commerce, or anything to show that the effect of these transactions has been to directly interfere therewith.

As to the Temple Iron Company transaction, in which seven of the defendants are involved, to wit, the Reading Company, the Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, it is charged, and the charge is supported by the proof, that the defendants named entered into a combination or conspiracy to defeat and prevent the building of a railroad and the construction of

an interstate route for the carrying of coal from the Wyoming region to tide water. The details of this transaction are fully set out in the opinions written by the other members of the court, and need not be here repeated. I agree with the conclusion reached in one of these opinions, that this so-called Temple Iron Company transaction involved a combination or conspiracy by the defendants above named, in violation of the act of July 2, 1890, as being in restraint of commerce among the states. It seems to me clear that an agreement was come to by the defendants named, which resulted in concerted action for the avowed purpose of bringing about an abandonment of the project of a route from the Wyoming coal field in the state of Pennsylvania, for the carriage of coal, to tide water in the state of New York. This avowed and conceded purpose rendered all that was done in pursuance thereof violative of the act of Congress in question, however innocent and legitimate it might have otherwise been. It is true, that the Simpson & Watkins collieries might have been innocently purchased by the defendants, separately or in combination, but as they were purchased in order to carry into effect the purpose of an unlawful combination, it seems to me the transaction was clearly within the denunciation of the law. The Temple Iron Company was the palpable instrument or means by which the unlawful purpose of the combination was accomplished, and its acquirement of the said collieries, in pursuance of that combination, must be held as illegal. I cannot think that the fact that the Pennsylvania charter of the proposed railroad—The New York, Wyoming & Western by name—only authorized its construction from a point in the Delaware river, in Northumberland county, Pennsylvania (being also the boundary line between the states of New Jersey and Pennsylvania), opposite or near Belvidere, New Jersey, and thence to a point in the Susquehanna river, within or near Pittston, Luzerne county, Pennsylvania, with the necessary branches or laterals, affects in any way the character of the combination charged as being illegal. It clearly appears from the evidence that a project for a railroad route from the coal fields in Pennsylvania to tide water in New York, was being discussed and ostensibly promoted by named parties interested in the coal regions, notably the firm of Simpson & Watkins, and that the charter above referred to had been obtained as a step towards the consummation of the purpose to construct such a route. I do not think we are called upon to consider and weigh the evidence, pro and con, as to whether the projectors of this route would or would not have been able to carry the same to completion. It matters not for present purposes whether the enterprise would have resulted, or not, in failure. The important fact is, that the defendants named, interested in the production and carriage of coal from Pennsylvania to tide water in New York, believed that the project of constructing such a route was a serious one, and that it induced them to combine, in order to thwart that purpose. The combination brought about the abandonment of the project, and the possibility of a competing road in interstate commerce was, for the time being, frustrated. I cannot escape the conclusion, therefore, that the decree of this court should denounce as illegal the combination by which this result was brought about, if a decree for an injunction, un-

der the prayers contained in the petition can be founded upon such denouncement.

The injunction or restraining order specifically prayed for in the petition should be granted, so far as it will serve "to prevent and restrain" the future or continuing violation of the act. This is the only jurisdiction conferred upon the court in such a proceeding as the one before us; and there can be no injunctive relief granted, unless it tends to restrain some specific future or continuing violation of the act.

BUFFINGTON, Circuit Judge (concurring and dissenting). I concur in the court holding the Temple Iron Company an illegal combination.

I dissent from its action in dismissing the bill as to the 65 per cent. contracts.

I restrict my opinion to discussing those two subjects.

I concur in the court's dismissal of the bill as to the other matters.

This petition, in the nature of a bill in equity, filed by the United States against certain railroads hereinafter named, and a number of other respondents, charges violations of section 1 of the act of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," which provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

And section 2, which provides that:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

The petition is filed in pursuance of section 4, which enacts that:

"It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

The case is on final hearing, and its determination involves two questions, viz.: First, the meaning of the law; and, second, whether the facts proven fall within its prohibitions.

In taking up the first question, it is well to note that, the validity of the law being conceded, the court's duty is simply to declare its meaning and enforce its provisions, for whether the law itself is in the line of sound commercial policy and industrial progress is a legislative, not a judicial, question. It suffices to say Congress has passed it; the executive, in pursuance of its terms, seeks to enforce it; it remains for the court not to question the wisdom of the Legislature in enacting, or the executive in enforcing, but simply to declare its meaning and give effect to its provisions.

The first section uses broad, inclusive words. The object of the law is to prevent "restraint of trade or commerce among the several states"; and this is accomplished by making illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." The

words "contract," "combination," "conspiracy," are clear, and "trade among the several states" is equally so. The coupling phrase "in restraint" would seem to be the only term open to question.

"Restraint" is a comprehensive word and covers the several individual kinds thereof described in—check; hinder; repress; curb; restrict. By the use of this broad phrase, "in restraint of trade or commerce," it would seem that one of the objects Congress had in view was the maintenance of that natural, free flow of commerce incident to its commercial, competitive character. We are therefore justified in holding that, although the word "competition" is not used therein, this act, as said in *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 620, 53 C. C. A. 256, 266 (a case in which two of the present justices of the Supreme Court sat), was "aimed to maintain interstate commerce on the basis of free competition." Such being the case, and the Supreme Court has likewise held, we have an aid both to its construction and enforcement, namely, the object for which the law was enacted.

Turning now to the decisions of the Supreme Court, it was decided in the *Northern Securities Case*, 193 U. S. 337, 24 Sup. Ct. 457 (48 L. Ed. 679) that:

"The means employed in respect of the combinations forbidden by the anti-trust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for interstate and international commerce, (not for domestic commerce), that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the anti-trust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men."

As further emphasizing free competition as the object of the statute, the court stated its preceding decisions established the proposition "that Congress * * * has prescribed the rule of free competition among those engaged in such commerce," and:

"We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain

such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight."

Since, then, the object of the act is to conserve free competition in interstate commerce, we are justified in holding that the phrase, "in restraint of trade or commerce among the several states," forbids everything that restricts free competition in interstate commerce. This brings us to inquire whether any combination of that nature exists in this case.

The anthracite coal supply of the United States is practically limited to a small area of less than 500 square miles in northeastern Pennsylvania. Its consumption is general in other states; practically four-fifths of the entire output entering into interstate commerce in 1905. Six interstate railroads, hereinafter called the defendant carriers, to wit, Reading Company (owning the Philadelphia & Reading Railway Company); the Lehigh Valley Railroad Company; the Delaware, Lackawanna & Western Railroad Company; the Central Railroad of New Jersey; the Erie Railroad Company; and the New York, Susquehanna & Western Railroad Company—haul about 80 per cent. of the output and control all means of transportation from the anthracite field to New York Harbor, the principal market for anthracite coal, save relatively small territorial facilities of the Pennsylvania Railroad Company and the New York, Ontario & Western Railroad Company. These six defendant railroads are not only competitors with each other by virtue of the natural conditions incident to all common carriers, but being themselves, through their several subsidiary coal companies, hereinafter called defendant coal companies, buyers of coal from operators, producers of coal themselves, and likewise sellers of such bought and produced coal, they are in keen competition with each other not only in transporting, but in buying coal to originate freights and in selling it to realize profits. It will be observed that since 1895 the defendant railroads have through their subsidiary coal companies increased their coal holdings by 30,000 acres and from producing, in 1900, 68 per cent. of the total output, they produced 78 per cent. in 1907. The substantial identity of the several defendant railroads and their respective subsidiary coal companies is shown in the proofs. Take, for example, the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. The coal company's stock is all owned by the railroad company. No dividend has ever been paid upon it. The funds to operate it are advanced by the railroad company. Its present indebtedness to the latter is about \$11,000,000. On this no interest is paid. Both companies have the same officers, and in its annual report the railroad company says:

"Under existing arrangements the Lehigh Valley Coal Company is compelled to depend upon the Railroad Company for working capital to carry on its operations."

In other words, the coal company is the subsidiary, corporate hand of the railroad company, and, while its corporate entity is separate, yet in work, profit, interest, and official personnel, it is but an alter ego of the railroad company itself. And such is the view taken of this relation by the courts. In *Interstate Commerce Commission v.*

Baird, 194 U. S. 42, 24 Sup. Ct. 568 (48 L. Ed. 860), the Supreme Court say:

"Here is a railroad company engaged at once in the purchase of coal through a company which it practically owns."

The anthracite field is divided into three regions, called the Lehigh, the Schuylkill, and the Wyoming or Lackawanna. In 1907, some 67,000,000 tons of anthracite were mined in these regions, of which over 17,000,000 were carried to New York Harbor. From 70 to 75 per cent. was produced by the defendant railroads through their coal companies, and the balance by individual operators. Their respective coal tonnages in that year were:

Philadelphia & Reading Railway Co.....	20.89	
Central Railroad of New Jersey.....	12.99	
Lehigh Valley Railroad Company.....	17.18	
Delaware, Lackawanna & Western R. R. Co.....	15.25	
Erie Railroad Company.....	10.66	
		76.97
Delaware & Hudson Company.....	9.78	
Pennsylvania Railroad Company.....	9.24	
New York, Ontario & Western.....	4.01	
		23.03
		100.

Referring, for convenience, to the summary for relief at the conclusion of the government's brief, we may say that the first, second, and fifth grounds of relief refer to general acts in which all the defendant railroads are alleged to have joined, while the third, fourth, sixth, seventh, and eighth concern acts in which some but not all of the defendant railroads participated. Objection to the joinder of such rights of action was first urged upon the court at final hearing. Without entering upon a discussion of the authorities bearing on multifariousness, we content ourselves with saying the omission of the respondents to urge this ground until the final hearing was a waiver thereof, and while a court on such hearing may, of its own motion, dismiss a bill, it will not do so if that objection does not embarrass or prevent it decreeing relief. Without, therefore, holding this bill free from objection in that regard, we are of opinion, in view of all the circumstances attending the conduct of the case, that it should not be dismissed on that ground, and we accordingly address ourselves to the merits, and in doing so we confine ourselves to the Temple Iron Company transaction and the 65 per cent. contracts, taking up first the combination of these six defendant railroads through the Temple Iron Company, for in our opinion that transaction involves the broad, underlying right of these railroads to combine in matters of interstate commerce and, in connection with the perpetual 65 per cent. contracts, is the real gist of the controversy.

The specific relief asked for in the government's brief in that regard is:

"Fifth. That the Temple Iron Company is a combination of the defendants, Reading Company, the Central Railroad of New Jersey, Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and the New York, Susquehanna & Western Rail-

road Company, in restraint of trade and commerce in anthracite, in violation of the said act, and every such defendant, and any subsidiary company or agent of either is enjoined from voting the stock of the Temple Iron Company, from receiving any dividends or other profits arising therefrom, and from exercising any control over the same."

This is based on subdivision "d" of paragraph 7, and is a condensed form of the fifth prayer of the bill, which, *inter alia*, is that the Simpson & Watkins collieries were acquired by the defendant railroads in pursuance generally of the combination charged in paragraph 7, "and specifically in pursuance of a combination or conspiracy between the defendants last named to defeat the construction of a competing railroad from the anthracite fields to tidewater, in violation of the aforesaid act of July 2, 1890."

A brief preliminary account of anthracite mining and marketing methods is helpful to an understanding of the case. We have seen that the sole means of transporting anthracite to market is by rail; that the defendant railroads, through the agency of their subsidiary coal companies, are themselves interested in mining coal, and in purchasing the coal produced by other mining companies and individuals, and in the sale of the same. The coal sold by the outside producer to the subsidiary coal companies is paid for on a percentage of the price coal commands at New York Harbor. Originally the coal producers' percentage of this was 40 per cent., but from time to time it has been increased to 65 per cent. The remaining 35 per cent. is the defendant railroads' share, which covers freight, selling expenses, and profit. The adjustment of these percentages has been a constant ground of contention between producers and railroads. An increase thereof has been urged by the former because of the greater cost of mining due to exhaustion, which compels a resort to deeper levels, and added expenses caused by pumping water therefrom; raising of miners' wages; shorter hours of labor; expense incident to safety laws, prevention of fires, and explosions; and finally to the high grade of coal preparation demanded by the public. It is, of course, also contended by the producers that the percentage retained by the defendant railroads gave them an undue freight rate. Without entering into a discussion of the merits of these contentions, it is to be noted that the difficulty that confronts both railroads and producers in the proper adjustment of their relative rights, and wholly without fault on the part of either, is complicated by the public market demand that the coal be prepared for use in such form as will meet the somewhat exacting demands of the purchasing public. In buying coal the public does not base its requirements so much on the real worth in heat units of the coal as on size and appearance. For example, the first breakage of coal which results in grate size is necessary. But the public demands a second breakage into smaller sizes, which is very expensive. Thus Mr. Sturges, a government witness, says:

"The expense of mining and preparing coal is very greatly added to by two requirements in our contract; the one compelling the breaking of our coal twice. There is a terrible loss on each breakage. The first breakage is necessary. * * * You cannot take those immense chunks of coal that come out of the mine and sell them in that way. That breakage reduces them to grate. If they could remain of the sizes made by the first breaking,

I think that coal could be sold at a profit 10 per cent. cheaper than it is today. The public will not take it, though; it has to be broken again. The dust, so far, is unsalable, although it is the purest of carbon."

Just what this requirement practically amounts to in dollars and cents Mr. Fuller shows:

"I could give you an approximate idea as to the less price received for coal by breaking it down. * * * One test we made was by taking 200 tons of grate coal, large coal, and breaking that down. The reason was that the market had got to a condition where it would not take grate coal. Figuring that coal on a basis of the price which was quoted at that time on that size, say \$2 a ton, and breaking that coal down, which gave us the smaller sizes and culm, there was a loss of about \$71 on the 200 tons."

The operators who sold their coal at the breakers to the subsidiary coal companies received, as we have paid, for some years 50 per cent. and then 60 per cent. of tide-water price. This left the carriers 50 per cent. and then 40 per cent. for freight and selling expense. The operators claimed the carrier received an undue share for freight, etc., and contended for a 65 per cent. rate.

The proofs show that in the early part of 1899 from 8,000,000 to 9,000,000 of operator's tonnage, which had been tied up on seven-year contracts with the subsidiary companies at 60 per cent., would expire. With a view to availing themselves of this fact, a number of operators in 1898 organized the New York, Wyoming & Western Railroad Company, which was empowered to build a line from the Susquehanna river near Pittston, the heart of the Wyoming region, to a point on the Delaware river opposite Belvidere, N. J. Its capital was subscribed for by independent operators, who pledged to it some 500,000 tons of output. Among its supporters was the partnership of Simpson & Watkins, which owned the controlling shares of eight collieries in the Wyoming region with a production of 1,300,000 tons, of which 500,000 tons were released by contract expiration. Mr. Sturges, the president of the road, testified that it was projected, "the same as all other organizations and movements of the independent operators, in the hopes of bettering their conditions, securing lower rates and a better market for coal—in fact, better net results for their business." Apart from the projected road's competitive effect in depriving the defendant railroads of the tonnage it might take from some of them, its retention of 35 per cent. instead of 40 per cent., to cover its freight, etc., for it proposed increasing the operators' price from 60 to 65 per cent. would have an unsettling effect on the tariffs of the other railroads. Its tendency would seem to be to cause competition among, as well as with, the defendant railroads themselves. We have seen that the northern division was served by eight railroads, whose tributary territory might be affected by the entrance of this ninth railroad. Moreover, at its eastern end at the Delaware river, the new road might make three of these defendant railroads, namely, the Delaware, Lackawanna & Western Railroad Company, the Lehigh Valley, and the Central Railroad of New Jersey, as well as the Pennsylvania Railroad Company, competitors for its freight to tide. It is now contended this new road was a paper project and would never have been built, and that, even if built, its charter would only carry

it to the border of Pennsylvania. But it is evident not only from what the defendant railroads actually did to prevent its construction, but from what they themselves say, that it was a possibly strong competitive factor to tide water, the elimination of which was necessary to preserve a noncompetitive status among these defendant railroads, the lines of several of which might be used as a connecting line to tide water from the terminus of the projected road. Mr. Thomas, then president of the Erie and the New York, Susquehanna & Western, and now president of the Lehigh Valley, testified in that regard as follows:

"A. * * * Simpson & Watkins, who were shippers on the line of the Erie and Lehigh Valley roads, as well as the Ontario & Western— Q. The Lackawanna also? A. Yes, they were shippers on the Lackawanna. They were, as usual, dissatisfied with the rates, thought they should have lower ones. We declined to lower the rates; they were reasonable. They got a lot of tonnage together, their own and that of other shippers, and threatened to build another road to the Delaware river opposite Easton. * * * Q. You understood at that time that the Simpson & Watkins' properties and those that were associated with them were seeking a market? A. I did. Q. And that the tonnage that was then tributary to the Erie Railroad might get away from it to some other railroad? A. There was every prospect that it would. Q. To either an existing railroad or some new railroad? A. Yes. Q. And it was the possibility of the loss of that tonnage that induced you to go in, as an officer of the Erie Railroad, to the Temple Iron Company transaction? A. It was. Q. And to protect the Erie Company? A. Yes, sir. Q. As to the Lehigh Valley, what were the motives that caused the Lehigh Valley to go into it? A. I do not know what their motives were, but I assume they were the same as mine. Part of the mines were on their lines, and I assume that they wanted to retain the tonnage they had. Somebody would have bought those properties, and it was better to buy them jointly and allow the tonnage to go to the roads that had formerly carried it, than otherwise."

These and other proofs that might be cited make it clear that the New York, Wyoming & Western Railroad Company threatened competition in the anthracite interstate trade in buying, carrying, and selling coal, and that which follows shows that such competition was defeated by a combination of the defendant railroads, which combination used the Temple Iron Company, a Pennsylvania corporation, as its instrument to preclude competition. This was done by the defendant railroads through such holding company buying the Simpson & Watkins' interests. The negotiations for such purchase were conducted by Mr. Simpson and by Mr. Bacon of the firm of Morgan & Co., Mr. Maxwell, then president of the Central Railroad of New Jersey, Mr. Thomas, then president of the Erie, and Mr. Twombly, then a director of the Philadelphia & Reading Railway Company and who was also financially interested in the Simpson & Watkins' interests; all being present. Mr. Simpson's testimony is:

"Q. When did you and Mr. Watkins sell out the interest in the collieries which you controlled to the Temple Iron Company? A. 1898 or 1899; I am not certain; nine or ten years ago. Q. Were you actively engaged, you personally, in the negotiations which led up to that sale? A. Yes, sir. Q. With whom did you negotiate? A. Robert Bacon, Esq. Q. Who is Robert Bacon, Esq.? A. A member of the firm of J. P. Morgan & Co. Q. What did J. P. Morgan & Co. have to do with the Temple Iron Company? A. Nothing that I know of. Q. What was Mr. Bacon's relationship to the Temple Iron Company? A. I was asked what I would take for the collieries, and we met one

afternoon, and Mr. Robert Bacon was there. I did not know whom he represented. The Temple Iron Company charter was bought afterwards, and we paid for it. Q. You met Mr. Robert Bacon somewhere? A. Yes. Q. Where was this? A. In Mr. H. McK. Twombly's office. Q. Where was that office? A. Mills Building here in New York City. Q. You met there Robert Bacon of the firm of J. P. Morgan & Co.? A. Yes, sir. Q. And he inquired what you would take for your collieries? A. Yes, sir. Q. Did you tell him? A. Yes, sir. Q. Follow the negotiations along. A. I told him. Q. Then what happened? A. He thought it was too high, and we discussed it, and we said we would not take anything less. We said, 'We have 40,000,000 tons of coal in the ground, and we have a capacity of 7,500 tons a day. We can mine it for so much a ton and we will have so much money for it. We have got so much invested in improvements. If our figures about improvements are not right, we will take off half a million dollars.' He said: 'Would you be willing to submit to a technical examination?' We said: 'No, we will not. We will get up our figures and show them to you, and if you do not like it you need not take it. If we haven't got that much money invested, we will take off half a million dollars.' On that basis we showed our figures and they took it. The Temple Iron Company we did not know anything about. Q. When these negotiations were going on with Mr. Robert Bacon, you knew nothing about the Temple Iron Company? A. No. Q. It was with Mr. Robert Bacon of this firm of bankers here in New York City that you had the negotiations, and it was to him you showed these figures? A. Yes, sir. Q. Did he accept the proposition? A. I don't know that I showed him the figures, but I furnished the figures and somebody showed them to him. The deal was consummated. Q. Did Mr. Bacon accept your proposition? A. Somebody gave us the money. Q. I want to know where you and Mr. Bacon came to an agreement, if such a thing happened? A. Really I never saw him afterwards. Q. Whom did you see after that in connection with this matter? A. Nobody, except we went to the Guaranty Trust Company and got our money. Q. You did not know who supplied it? A. No. Q. Did the Guaranty Company pay you in cash? A. Check, and I very gladly indorsed it. I am awfully sorry now I took it. Q. You do not know whom Mr. Bacon represented? A. No. Q. You had not heard of the Temple Iron Company up to that time? A. No, sir. Q. What was your first information about the Temple Iron Company? A. I understood they had a charter that you could do almost anything under except commit murder, and they bought it for that purpose. Q. Who bought it? A. This crowd that was to buy our collieries. I do not know who bought it. Q. Did you have anything to do with the purchase of the charter? A. We paid for it. Q. Who is 'we'? A. Simpson & Watkins and our other partners paid \$150,000 for the Temple Iron Company charter. Q. Simpson & Watkins bought the Temple Iron Company charter? A. I mean the crowd. I am not saying Simpson & Watkins did it, but we thought it was a good charter, and we bought it and used it. Q. Who was it that wanted it? A. I do not know. Q. For whom were you acting when you bought the charter of the Temple Iron Company? A. That was part of the deal. Q. Understood between you and Mr. Bacon? A. No, we thought we had a good charter and we would finance the company and turn in the stock, and we paid in a hundred and fifty-one thousand dollars for the charter and gave them four hundred and odd thousand dollars working capital and we took stock and bonds. Q. Who paid that hundred and fifty-one thousand dollars? A. I suppose it was paid out of what might be called a syndicate. Q. You do not know who the other members of the syndicate were? A. No. Q. Were you at any time president of the Temple Iron Company? A. Never. Q. Was Mr. Watkins? A. Yes, sir. Q. When? A. When it was formed and took over this property. He was president for one or two years. Q. What was the business of the Temple Iron Company prior to the time it was bought out by you gentlemen? A. It owned a little pig iron furnace. Q. Down in Reading? A. Near Reading. Q. What was the object in buying up that charter? A. Because it had a broad charter. Q. The purpose was to get the use of that charter? A. Yes. Q. Do you know what the capital stock of the Temple Iron Company was at that time? A. At that time? Q. Yes, sir. \$240,000, do you remember? A. I do not know. Q. You paid

\$151,000 for it. A. Yes. Q. Was the stock then increased with your concurrence and active assistance? A. Surely. Q. To what point? A. I think \$6,000,000. Q. Did you take stock in it for your collieries, or were you paid cash for the collieries? A. We took stock and cash and bonds."

Mr. Baer, president of the Reading, states he first heard of the purchase through Mr. Coster, a member of Morgan & Co., and his account is this:

"Mr. Coster, who was on the executive committee of the Reading Company, was exceedingly anxious that the Reading Company should join in the purchase of those properties. The purpose of it was to help the Erie: the situation was a financial one really. J. P. Morgan & Co. had reorganized the Erie Railroad. They had just a year or two before taken hold of the Lehigh Valley. I had been their counsel and made the mortgages for the Lehigh Valley and fixed up that loan, called the general mortgage or consolidated mortgage, I have forgotten which. The Reading had just been taken out of the hands of the receivers, and when these collieries were offered for sale in New York the Erie people became very much alarmed. They were afraid of losing that tonnage, and, although it seemed to be tied to them, they argued that they might lose the tonnage and the Lehigh Valley would lose the tonnage and that would seriously affect those properties and the general financial condition of the country, so that our stock would be affected and all other stocks would be affected for the time being; that it would be a disturbing factor. I protested personally that I could not see anything in the suggestion of building that railroad. I did not see that it would amount to anything. I did not believe in it at all. It did not go to the New York waters, and I did not see how they could get coal to New York Harbor or to any other terminals so that they could be a serious factor. To that the answer simply was that the mere threat of doing that would affect Erie securities and affect all the rest of us. * * * In the meantime the New York parties concluded that in some way they would take these collieries, whether we went in or not, and then I was called upon again to see in what way, if they did take them, a holding company could be created. The usual suggestion was made in New York that they become a Jersey corporation; but as a Pennsylvanian I had been adverse to New Jersey getting jurisdiction over Pennsylvania property, and I have always tried in my business and in my practice to have Pennsylvania corporations hold Pennsylvania properties. I think it is wiser and better to have the governmental jurisdiction where the property is. I got thinking over it and just about that time my co-stockholders in the Temple Iron Company were very tired of the business and so was I. It just occurred to me that that charter was the very one that would answer this purpose, and I sent for the Messrs. Smith and asked them whether they would sell their stock, and they said they would, at a figure that they named; and there was Frank Smith and Broden who had a few shares, a small interest in the company, and they all agreed. After finding we could do that, I told the Reading people that the advantage to the Reading Company would not only be in having an interest in these coal properties, which were reported very valuable by this committee, but that it would insure the continuance of that Temple Furnace on the line of the Reading road, and that I was not sure that we would continue it long, that I was too busy to be bothering with running an anthracite furnace. It was very important; how important it is you may understand when I say that a furnace on a railroad is about the best freight producing plant that you can have. That iron furnace pays over on the average about \$30,000—probably higher than that—a month freight on the inward freight alone. The consumption of coal, of limestone, and ore, that we call the raw materials that go into a furnace for the smelting of iron, creates a great many tons, and, whilst the rates are not very high on those raw materials, the tonnage is very heavy. We finally agreed on the part of the Reading Company that if the New York friends, Coster, insisted upon it, we would join them on one other condition, namely, that we should go in the syndicate. I thought that probably there might be some money made in the syndicate, as there was, of course. I mean that the

bonds were sold at a figure that was tempting. * * * Then we agreed simply to take the Simpson & Watkins collieries, and the question came up of guaranty. These people that were selling and the bankers who were to handle the bonds wanted what we called a joint guaranty. I did not want a joint guaranty with some of the companies that I did not think were quite as strong as we were, and the executive board of the Reading, Mr. Harris, and Mr. Welsh and Mr. Dickson, sustained me in that. Then the question was how to fix up the guaranty. I suggested that we take the tonnage of each of the companies that had gone in for the preceding year and divide that up and make that the percentage that each was to guaranty.

"By Mr. Reynolds: Q. The anthracite tonnage? A. The anthracite tonnage, and divide it up and that fixed the percentages. That was reported to the different presidents, and I suppose their boards took action; I do not know. They are all separate agreements. That is a matter of record."

The transaction was then carried out as theretofore arranged as follows: On January 26, 1899, the capital stock of the Temple Iron Company having been purchased as noted, its stock was raised to two and a half millions and its bonds issued for three and a half millions. On February 27th, Simpson & Watkins conveyed to it the capital stock of the eight collieries, taking in payment \$2,260,000 of its capital stock and \$3,500,000 of the bonds. On the same day they transferred to the Guaranty Trust Company, as trustee, this \$2,260,000 of stock and \$2,100,000 of bonds, and received therefor \$3,238,396.66 in cash and certificates of beneficial ownership in \$1,000,000 of the stock; the trustee purchasing from Mr. Baer for \$151,603.34 the remaining \$240,000 of original shares of the Temple Iron Company. On the same day, as part of the plan, the Reading Company, the Central Railroad of New Jersey, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, severally contracted with the Guaranty Trust Company and the Temple Iron Company to buy at par 29.96 per cent., 17.12 per cent., 22.88 per cent., 19.52 per cent., 5.84 per cent., and 4.68 per cent., respectively, in all 100 per cent., of the capital stock of the Temple Iron Company, and to guaranty the same percentages of its funded debt, principal and interest. These percentages as testified to by Mr. Baer, were arrived at on the basis of the respective anthracite tonnage of the several roads as quoted above. At the same time it was covenanted that, if in any period of six months the earnings of the Temple Iron Company should be insufficient to provide for its sinking fund, the interest on the bonds, and its "stock reserve" charge, the carrier-guarantors should pay the trust company up to 12½ cents per ton on every ton of coal carried by them from the mines of the company, and, if there still remained a deficit, it should be paid by the carrier-guarantors in the proportions noted above. Subsequently, on April 12th, each carrier entered into a supplementary contract with the trust company, to enable the latter "to take such action as may be necessary to enforce the terms of guaranty and the other covenants of said agreement of 27th of February, 1899, so as to work out equitable results and protect and safeguard the rights and obligations of * * * the several guarantors in the event of the failure of * * * any one or more of the guarantors to

comply with the terms of any such guaranty and to keep and perform the covenants in any such agreement."

The consummation of this plan effectually defeated the project of the new railroad and led to its abandonment, and it is to this the witness Sturges refers in his testimony:

"A few months afterwards, I cannot give the exact dates, a number of these collieries pledged to our road, or rather the stock in a number of these companies, and the collieries too, were sold. I only know to whom by hearsay, except in one case. That, of course, absolutely crippled our road."

Does this combination of all of the defendant railroads for the avowed purpose and with the effect of preventing the threatened building of a competitive road for the transporting of coal in interstate commerce fall within the ban of the statute? That the Temple Iron Company is a mere holding company, the instrument for effecting the purpose of the combination, is apparent from the proof, and indeed, as we have seen in the testimony of Mr. Baer, is conceded. The ownership of its stock was and is now in the defendant railroads, the Temple Iron Company being a mere convenient, unitary holding agency for joint, combining railroad interests. If this combination, which the proofs show was made by all these defendant railroads, is not within the prohibition of the statute, what legal bar is there to these railroads, through the agency of the Temple Iron Company, jointly and in combination, absorbing the remaining anthracite coal not now owned by their subsidiary coal companies? There is none. The gist of the statute is combination; combination "in restraint of trade or commerce among the several states." Indeed, there is a potency in the united members of a combination so far in excess of the aggregate of the separate disunited strength of its members that the law, apart from this statute, has not overlooked it. In *Morris v. Barclay*, 68 Pa. St. 173, 8 Am. Rep. 159, the Supreme Court of Pennsylvania, referring to a combination affecting a single region only of the bituminous field, which covers many thousand miles where the anthracite covers a few hundred, said:

"The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit their own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. * * * Men can often do by the combination of many what severally no one could accomplish and even what, when done by one would be innocent. * * * There is a potency in numbers when combined which the law cannot overlook, where injury is the consequence."

And it will be observed that it is the calling of this combination into existence the law strikes at, without awaiting the exercise of its powers. "It is no answer," said the Supreme Court of Ohio, in *Central Company v. Guthrie*, 35 Ohio St. 666, "to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted on the public;

it is enough to know that the inevitable tendency of such contracts is injurious to the public." The purpose and effect of the combination of these defendant interstate railroads and of the defendant subsidiary coal companies would seem, therefore, to bring this transaction within the doctrine of the Northern Securities Case, 193 U. S. 197, 331, 24 Sup. Ct. 436, 454 (48 L. Ed. 679), where it was said "that every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce is made illegal by the act," for the statute covers all combinations in restraint of interstate trade, whether by way of transportation or otherwise. It is no answer to this to say the Temple Iron Company has corporate power to hold the stock of mining companies. Concededly it has. The law forbids not the use, but the abuse, of the corporate powers of this Pennsylvania corporation. The question before us is not whether the Temple Iron Company had corporate power to own mines and mining stocks, but whether these six railroad companies have made the lawful corporate power of the Temple Iron Company to hold mines and mining companies' shares an instrument to enable them to jointly combine "in restraint of trade or commerce among the several states." If so, the act makes the combination unlawful without reference to the particular means used to effect the unlawful end. Indeed, to the contention that the Temple Iron Company was simply exercising its legal corporate powers it may be replied, as it was in *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154, and reiterated in *Swift v. United States*, 196 U. S. 396, 25 Sup. Ct. 279 (49 L. Ed. 518):

"It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

And of the office of this holding Temple Iron Company it may be here said, as was of the combination using the Northern Securities Company in that case, that it is one which "restrains interstate commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them." So, also, in *Harriman v. Northern Securities Company*, 197 U. S. 291, 25 Sup. Ct. 503 (49 L. Ed. 739), the court in speaking of the Northern Securities Case and that company said:

"Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of the title was."

But it is urged that, because these eight collieries sell their product at the breaker, the transaction is wholly an intrastate act, and under *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the act does not apply. Let us look at the kernel and not the shell of this transaction. The stock of the collieries which sell is owned by the Temple Iron Company, and the stock of the Temple Iron Company is owned by the defendant railroads. The latter are therefore the real sellers. And who are the real purchasers at the breaker? The

defendant coal companies whose stock is owned by the defendant railroads. And for what purpose do these latter buy this coal from themselves but to transport and sell the major part in interstate commerce? That the major part was interstate commerce the proofs show. Mr. Simpson, of the firm of Simpson & Watkins, says, referring to such product:

"Q. Where did you sell it when you sold it yourselves? A. In the general market—New York, Oswego, Buffalo—wherever we could get a market for it. * * * Q. What was your principal market while you were operating independently and selling in your own independent way? A. New York was the principal market. * * * Q. And with whom were you in competition in the markets in New York City and in other parts of New York state when you were selling coals on your own account? A. Everybody that was in the business. Q. Your principal competitors then were either the anthracite coal carrying roads, operating in their own name, or operating through coal companies which they controlled? A. The Delaware, Lackawanna & Western Railroad Company, the Lehigh Valley Railroad Company, and the Ontario & Western Railroad Company through Dickson & Eddy, their sales agent."

To the same effect is the testimony of E. B. Thomas, president of one of the carrier roads:

"Q. Where was the coal from the Simpson & Watkins' collieries moving at that time? A. Moved over all of those roads. Q. Where? To what point? A. All over, wherever they could find a market for it. Q. Was it coming to tide water? A. Some of it came to tide water. Some of it went west to different points."

And that railroad carriers are "instruments of commerce and their business is commerce itself" was held in *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. So while in isolation this is a sale of the coal at the breaker by one corporation to another corporation—a local transaction—yet in combination it is but one of the elements in a chain whereby the six defendant railroads handle their joint produce in interstate trade—a product which might otherwise have gone to this projected road. The several acts which contribute to the final result must be judged not in isolation, but in combination. For, while it is said in the *Addyston Pipe Case*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, that, "where the contract affects interstate commerce only incidentally and not directly, the fact that it is not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress," it was also held that "any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national Legislature and violates its statute."

It is manifest, therefore, that while in corporate forms there are sales, corporate holdings, etc., which in isolation may be intrastate, the fact is equally clear that when combined the transaction as a whole falls within the domain of interstate commerce. For, as was said in *Loewe v. Lawlor*, 208 U. S. 301, 28 Sup. Ct. 301 (52 L. Ed. 488):

"Although some of the means whereby the interstate traffic was to be destroyed were acts within a state and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out."

Singly and uncombined these six defendant railroads may continue their lawful operations with that natural, untrammelled competition incident to individual rivalry; for, as we have seen above, "when competition is left free, individual error or folly will generally find a correction in the conduct of others." But it is when and because they unite—for the words "contract," "combination," "conspiracy," imply a coupling with others—and when that coupling is "in restraint of trade or commerce among the several states," that the federal statute becomes applicable.

It appears then by the proofs:

First. That the construction into the anthracite region of an additional competitive carrier of interstate commerce, the New York, Wyoming & Western Railroad, was threatened and feared.

Second. That the product of Simpson & Watkins' eight collieries entered largely into interstate commerce, and the diversion of this product and other interstate commerce was promised to and threatened to be divided by such new road.

Third. That the six defendant railroads combined to prevent the building of the competitive road, and the possible diversion of interstate commerce by the reorganization of the Temple Iron Company and the joint ownership of its stock, by purchasing through such company the stock of the Simpson & Watkins collieries, detaching such collieries from the support of the proposed road, thereby causing its abandonment and later removing the interstate product of such collieries for all time from the field of interstate freight competition, as they did in some cases when the perpetual 65 per cent. contracts were later agreed upon.

To us it is therefore clear that the combination of these six defendant railroads in the Temple Iron Company was a combination "in restraint of trade or commerce among the several states," and falls within the prohibition of the statute.

We are next brought to consider whether certain contracts, known as the 65 per cent. contracts, entered into between these railroads, through their subsidiary coal companies, with mineowners who are parties to this bill, were also "in restraint of trade or commerce among the several states." This part of the case is covered by the second ground of relief, set forth in the government's brief which is as follows:

"That the 65 per cent. contracts, so called, made by the defendants, the Philadelphia & Reading Coal & Iron Company, the Lehigh & Wilkes-Barre Coal Company, the Lehigh Valley Coal Company, the Delaware, Lackawanna & Western Railroad Company, and Hillside Coal & Iron Company, with the various producers who are before the court, for the control of their output, are in violation of the said act, and that all parties thereto, respectively, are enjoined from further carrying them out."

—being charged in clause “a” of paragraph 7 of the bill, and relief for which is asked in the petition’s second prayer for relief.

The proofs before us show, and the Supreme Court in *Interstate Commerce Com. v. Baird*, 194 U. S. 42, 24 Sup. Ct. 563, 48 L. Ed. 860, held, that these contracts involved interstate commerce. The length of this opinion will not permit reference to the testimony, but it shows that the terms of these contracts were agreed upon by the joint action of the six defendant railroads, their subsidiary coal companies and mineowners, and that all of said persons and companies were concerned in and were thereby affecting interstate commerce. The form of contracts being thus agreed upon, they were thereafter entered into by individual mineowners and the subsidiary coal companies of the six defendant railroads on whose lines the mines were located. Under each of these contracts the entire product of a particular mine was sold until exhaustion to one of the subsidiary coal companies at the breaker, and shipments therefrom were only to be made as that company required. Not only had the owner no power to mine except as the buyer required, but he had nothing to do with fixing the price which was determined by the general tidewater rate. Save in operation the mine was practically owned by the subsidiary coal company, the only guaranty of production the operator had was that the coal company agreed “it will not discriminate in favor of its own mines, or that of any persons, firms or companies with which it had contracts to buy coal, but that the quantity to be ordered monthly shall be a just proportion of the entire quantity of coal agreed to be purchased by the buyer, measured by the colliery capacity of the respective sellers.” It further appears that where similar contracts had been limited to seven years, as they usually had been up to that time, they had not precluded competition. Indeed, the expiration of such seven-year contracts had made possible the projection of two carrier roads, and the testimony shows that the perpetuity clause was insisted on and inserted in the contracts thereafter by the combined action of the defendant railroads and their coal companies in order to withdraw from competition for all time the freights of these producers. The result of the combination was the operators got a raise to 65 per cent., and the defendant railroads eliminated competition. It would therefore seem clear that the product of these mines, which had before entered into competitive interstate commerce, was withdrawn therefrom, and, such being the case, it follows that the instrument by which this was done, to wit, the contracts entered into in pursuance of joint action, was a combination, “in restraint of trade or commerce among the several states.” It is contended, however, the right of contract is a personal, absolute one, and if a mineowner and a carrier agree thereto the law cannot interfere. But the answer to this is, we are here dealing with a combination, a combination of interstate carriers and owners of a product entering into interstate commerce, and, when such is the case, even the right to contract and combine must give way to a statute which declares that such contracts and combinations where “in restraint of trade and commerce among the several states” are illegal. It is but just to say that taking into consideration all the

factors involved in ownership, mining, transporting, and sale of coal, these contracts may on the whole be as fair, reasonable, and satisfactory a solution of the intricate economic questions involved as can be worked out. To quote from the testimony of an operator of long experience and broad-minded view:

"Q. Why did you think the railroads ought to purchase the individual operators' coal? A. I thought that was the best way to handle the business. Understand that anthracite coal is a domestic fuel and it is used in the winter time, and to get the dealer and the consumer to buy it through the summer time you have to give them some inducement. I talked to the railroad people a good many years. I said: 'The thing you ought to do is to buy the individual operators' coal at the mines on some agreed system, or price, or something of that kind, because we cannot induce the consumer to take our coal in the summer time and give the men full work through the summer time. We cannot get the dealers to stock up and we cannot afford to have yards and agencies all over, as you can.'"

But conceding the fairness, as we have said, of these contracts, the fact still remains they are at variance with the adjudged intent of the statute to maintain in interstate trade an untrammelled flow of commerce in obedience to free and unrestrained competition. That these contracts do restrain commerce is clear from their terms and effect, and if they do not fall within the ban of a statute "aimed," as was said in *Chesapeake & Ohio Fuel Co. v. United States*, supra, to "maintain interstate commerce on the basis of free competition," then that statute is made of no avail by contracts which shut out competition for all time, and which, if increased in number, may without absolute purchase and ownership end in the defendant railroads' acquisition of the remaining coal area. We are therefore of opinion these contracts, as they now stand, are illegal.

Seeing, then, that these six defendant railroads did unlawfully combine together, through the Temple Iron Company, and that thereafter in further combination they brought about these illegal perpetual contracts, the duty of the court seems clear to forbid them further maintaining their unlawful combination in the Temple Iron Company and from continuing these unlawful contracts; for, if the Temple combination was illegitimate in birth, when did the taint of illegitimacy leave it? The anti-trust act, as it seems to me, is directed not only at the illegal acts an illegal combination does, but also at the existence and continuance of such illegal combination. Moreover, in this case it is not only because the combination in the Temple Iron Company was originally illegal, but because it can be used in the future as it has been in the past, and because its existence to-day tends to forbid, prevent, and restrain competition, that this court should decree such illegal combination should end. And this case exemplifies the need of such a decree. Following the absorption of the stock of the Simpson & Watkins collieries by the Temple Iron Company, the product of some of those collieries was, when the 65 per cent. contracts were afterwards determined on, bound in perpetuity to certain of these carriers through such contracts. By such perpetual contracts in their joint holdings and by the perpetual contracts these defendant railroads through their subsidiary coal companies severally made with other collieries these combiners withdrew, and still continue to with-

draw, such product, for all time, from competition, either in interstate transportation or sale. To my mind there is no more subtle and effective agency for the gradual, unnoted absorption by interstate carriers of the remaining interstate product than these perpetual contracts. Holding then that they are in the words of the statute "contracts * * * in restraint of trade or commerce among the states," I record my dissent to the action of the court in refusing to enjoin them.

LANNING, Circuit Judge. The government charges in its petition that the defendants have entered into a series of combinations or conspiracies in violation of sections 1 and 2 of "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, hereinafter called the "anti-trust act." The allegations are that these combinations or conspiracies restrain interstate commerce and monopolize a part of such commerce in the sale and transportation of anthracite coal mined in the Wyoming region of Pennsylvania. The petition contains, in addition to the usual general prayer for relief, five specific prayers for the destruction of five of the combinations described. These combinations are: (1) The one by which, in 1898, the Erie Railroad Company, through an increase of its capital stock, acquired the capital stock of the New York, Susquehanna & Western Railroad Company; (2) the one by which the Temple Iron Company, in 1899, through an increase of its capital stock and an issue of bonds acquired the capital stocks, assets, and properties of what were known as the Simpson & Watkins Coal Companies, and by which the Reading Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company simultaneously entered into contracts for the acquisition of the capital stock of the Temple Iron Company; (3) the one by which, in 1901, the Reading Company, through an increase of its capital stock and bonded indebtedness, acquired the capital stock of the Central Railroad Company of New Jersey; (4) the one by which, in 1900 and subsequent years, the defendant carriers and their subsidiary coal companies agreed, in a series of contracts known in the record as the 65 per cent. contracts, to purchase from certain other coal companies all the anthracite coal thereafter produced by the collieries of the latter companies; and (5) a combination or conspiracy, alleged to have been formed in 1895 by the defendant carriers and their subsidiary coal companies for the control of interstate commerce in anthracite coal, and in the development of which it is further alleged the four preceding combinations and one other (the one by which, in 1899, the Erie Railroad Company acquired the capital stocks of the Pennsylvania Coal Company and the Delaware Valley & Kingston Railroad Company) were used as "steps."

Two preliminary matters should be first disposed of; one a motion to dismiss the petition on the ground of multifariousness, and the other a motion to strike out certain parts of the proofs offered by the United States and objected to by the defendants.

Twenty of the defendants have raised, either by way of objections embodied in their answers or by simple motions to dismiss, the defense of multifariousness. This defense was not brought to the attention of the court until after the United States had concluded its testimony in chief. The court then postponed its consideration until the final hearing. It is clear, however, that the defendants who insist upon this defense stand in no better position now than they did when they first brought the matter to the attention of the court. It is the general rule of practice in courts of equity that a defendant loses his right to insist upon an objection that a petition or bill is multifarious unless he raises that defense by demurrer or plea or answer filed specially for that purpose. He cannot, by answering generally and omitting to plead or demur, require a complainant to take his testimony and then, after the expense of taking such testimony has been incurred, insist, as a matter of right, upon multifariousness as a defense. Such a defense is not to the merits of the case but to the form of the suit. It follows, therefore, that as a rule if it is possible for the court, where the defense of multifariousness is not regularly presented in one of the ways above stated, to make a decree which shall properly dispose of the issues involved, the petition or bill will not be dismissed. *Veghte v. Raritan Water Power Company*, 19 N. J. Eq. 142; *Annin v. Annin*, 24 N. J. Eq. 184; *Bunnell et al. v. Stoddard et al.*, Fed. Cas. No. 2,135; *Oliver v. Piatt*, 3 How. 333, 411, 11 L. Ed. 622; *Nelson v. Hill*, 5 How. 127, 131, 12 L. Ed. 81; *Hefner v. Northwestern Life Insurance Company*, 123 U. S. 747, 751, 8 Sup. Ct. 337, 31 L. Ed. 309; *Graves v. Ashburn*, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. Ed. 217. Assuming that the petition is multifarious and that the defense might have been sustained on a simple demurrer, there is no difficulty, except that of examining the evidence as to the several issues involved, in disposing of the case and entering a decree consistent, as we think, with its equities.

The motion to strike out proofs relates to certain exhibits and testimony. It is not necessary to pass upon this motion for the reason that, whether the proofs be in or out, the conclusions expressed in this opinion, at least, will remain the same.

Before entering upon a consideration of the nature and effect of the combinations here complained of, it may be well, also, to recall some of the expressions of the Supreme Court as to the kind of combinations that are condemned by the anti-trust act.

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate." *Hopkins v. United States*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 45, 43 L. Ed. 290.

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose

or object." *Anderson v. United States*, 171 U. S. 604, 615, 19 Sup. Ct. 50, 54, 43 L. Ed. 300.

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce." *United States v. Joint Traffic Association*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 31, 43 L. Ed. 259.

"The purpose of the act of July 2, 1890, was to prevent the stifling and the substantial restriction of competition in interstate and international commerce. The test under that act of the legality of a combination or conspiracy is its direct and necessary effect upon such competition. If its necessary effect is but incidentally or indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violation of this law." *United States v. Standard Oil Company*, 173 Fed. 177, 188.

"If the necessary, direct, and immediate effect of the contract be to violate an act of Congress, and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed." *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 105, 44 L. Ed. 136.

1. Coming to the merits, the first question to be considered is: Was the acquisition, in 1898, by the Erie Railroad Company of the capital stock of the New York, Susquehanna & Western Railroad Company effected by a combination or conspiracy in restraint of trade or commerce among the several states, contrary to the provisions of section 1 of the anti-trust act, or promotive of a monopoly of any part of the trade or commerce among the several states contrary to the provisions of section 2 of that act?

On March 11, 1898, the Erie Railroad Company obtained from the New York, Susquehanna & Western Railroad Company a lease of the latter company's railroads, dated February 24, 1898, for the term of one year from March 1, 1898. The lease set forth, amongst other things, the purpose of the Erie to increase its capital stock by adding thereto \$13,000,000 of first preferred and \$13,000,000 of common stock and exchanging it, at the rates therein mentioned, for stock of the Susquehanna. On April 2, 1898, the Legislature of New Jersey consented to this lease. Between March 18 and June 30, 1898, the Erie Railroad Company acquired substantially all of the capital stock of the New York, Susquehanna & Western Railroad Company by exchanging its \$26,000,000 of stock for the stock of the Susquehanna.

It is alleged in the petition that the Erie and the Susquehanna operate substantially parallel, and, in the absence of a restraining agreement or combination, competitive lines of railroad between the anthracite coal regions in Pennsylvania and tidewater points at New York Harbor, and that the Erie, by issuing its additional stock to the amount of \$26,000,000 and exchanging it for the stock of the Susquehanna, brought the two formerly competitive railroad companies and their subsidiary coal companies under a common head and source of control and thereby, in violation of the anti-trust act, removed all inducements for competition between them and established a monopoly in interstate transportation and sale of anthracite coal. The answer

of the Erie denies that the two companies were ever in a true sense competitors, or that it has in any wise violated the anti-trust act, and avers that the Erie is one of the greatest carriers of western produce, that the Susquehanna has no such traffic, that both of the companies are carriers of anthracite coal to New York but from different sources of supply, that the Erie has a great freight and passenger business, that its terminal facilities at New York Harbor are inadequate, that the Susquehanna has larger tunnel and yard facilities at New York Harbor than it needs, and that the acquisition of the Susquehanna by the Erie enabled the Erie to use the tunnel and yard facilities of the Susquehanna. The answer of the Susquehanna also denies that the two companies are competitors for the transportation of coal, or that any competition between the two companies has been prevented or interfered with, or that the price of coal has by any of its agreements been in any manner controlled, and avers that the purchase of the stock of the Susquehanna by the Erie was made within the state of New York, that it was not in restraint of interstate trade or in violation of the anti-trust act, that, at the time of the exchange of stocks, the lines of the Erie were many miles distant from any territory in the coal regions served by the Susquehanna (though it is admitted that, since the purchase, by traffic arrangements with the Erie and Wyoming Valley Railroad Company, the Erie has reached some mines in the territory previously reached by the lines of the Susquehanna), and avers, further, that the two companies have continued to connect with and carry coal from different mines, except that the Susquehanna had received traffic previously carried over the lines of the Erie because of the greater convenience in delivering to purchasers.

In 1872 or 1873 the New Jersey Midland Railroad had been built from Jersey City, N. J., to Middletown, N. Y., a distance of 88 miles, and previous to 1883 it had passed under the management of the Susquehanna. The Erie was also then operating a road between the same points; both roads passing through Paterson and Passaic, in the state of New Jersey. Some time previous to 1883 the Susquehanna had extended its road to Gravel Place, three miles northwest of Stroudsburg, Pa. It then began to transport coal delivered to it at Gravel Place by the Delaware, Lackawanna & Western Railroad Company to West End, near New York Harbor, whence, in the absence at that time of a terminal of its own, it sent such coal over the lines of the Delaware, Lackawanna & Western to the latter's terminal at Hoboken, N. J. After the Susquehanna had acquired a terminal of its own at Edgewater, on New York Harbor, and extended its line through its ownership of the capital stock of a subsidiary company to Wilkes-Barre, Pa., both of which it did in 1893, its coal carrying business rapidly increased. The subsequent extension of its lines to Minooka in 1897, and its connection with the Delaware & Hudson Railroad, the Lehigh Valley Railroad, and the Central Railroad of New Jersey, in the Wyoming coal region, enabled it to declare in its annual report of June 30, 1897, that the completion of the road to Minooka placed the Susquehanna "in an independent position in respect to the transportation of coal." It was then in a position to

transport to its terminal at Edgewater coal from the mines tributary to the Delaware & Hudson Railroad in the valley between Wilkes-Barre and Carbondale, from the mines tributary to the Lehigh Valley Railroad in the same valley, and from the mines tributary to the New Jersey Central Railroad, as well as from the mines tributary to its own line. Though the Erie and the Susquehanna were free to extend their lines and thereby increase their business as common carriers of anthracite coal, it is clear that the more the business was thus increased the greater were the opportunities for competition between them. Each of them did, in fact, transport to New York Harbor coal from the collieries of the Pennsylvania Coal Company and the Hillside Coal & Iron Company. After the Susquehanna had put itself "in an independent position with respect to the transportation of coal," it and the Erie controlled lines which, without doubt, enabled them to compete in the procurement and the transportation of coal.

With such conditions existing prior to and at the time of the acquisition of the Susquehanna by the Erie, it is contended on behalf of the United States that the principles applied in *Northern Securities Company v. United States*, 193 U. S. 197, 326, 24 Sup. Ct. 436, 48 L. Ed. 679, are applicable. There it was held that the principal, if not the sole, object of the combination was to carry out the purpose of destroying competition between the constituent companies and thereby to put a restraint upon interstate commerce. Here, however, it is argued, on behalf of the defendants, that the proofs fail to show any purpose of destroying competition or of promoting a monopoly in interstate commerce. The principal object of the combination, the defendants say, was to promote public convenience and interests, and that, conceding that the combination does eliminate the competition that previously existed between the two railroads, it is but an incidental restraint of interstate commerce.

The tabulated statements in evidence do not show the gross earnings of the Erie and the Susquehanna systems for 1897 or 1898. They do show, however, that the gross earnings of the Erie for the fiscal year ending June 30, 1900, were something over \$38,000,000, and that the gross earnings of the Susquehanna for the fiscal year ending June 30, 1897, were but a little over \$2,000,000. In 1898 the two roads reached Paterson, N. J., and Middletown, N. Y.; but the competition between them at those places was certainly very inconsiderable. More than one-half of the gross earnings of the Susquehanna was from freight on coal alone; the remaining part being from freight on merchandise, and from passengers, mail, express, and miscellaneous sources. Whatever of competition between the two roads there was, it was almost exclusively in the coal carrying business from the Wyoming region. The Susquehanna has no through freight business except as a coal carrier. It appears, too, that in 1898 the Susquehanna had larger terminal facilities at Edgewater, N. J., than it required at that point, that the terminal at Weehawken, about five miles south of Edgewater, was not an adequate one at that point for Erie's great and growing business, that the terminal facilities of the Susquehanna's freight business, exclusive of coal, in Jersey City and

New York, were restricted to small quarters in the terminals of the Pennsylvania Railroad Company, that the acquisition of the Susquehanna by the Erie enabled the Susquehanna to take its general freight business from the Pennsylvania's terminals to those of the Erie in New York, and that by the acquisition the convenience of both the Erie and the Susquehanna was promoted and the interests of the public subserved. The total amount of anthracite coal transported to New York Harbor over the Erie in 1907 was 1,346,414 tons. Since the Erie acquired the stock of the Susquehanna, the latter road has lost much of its tonnage of anthracite coal, not to the Erie but to the Delaware & Hudson Railroad, and Mr. Johns, the superintendent of the Susquehanna, says that the Susquehanna cannot now stand alone for the reason that, if its relations with the Erie were now severed, it would have no coal business left to it except that of a few mines which for ten months in 1908 produced only 216,310 tons.

The argument that the primary object or effect of the acquisition of the stock of the Susquehanna by the Erie was to suppress competition in interstate commerce between those two roads is not convincing. So many other roads reached into the anthracite fields of Pennsylvania and transported coal to New York Harbor that the elimination of competition between the Erie and the Susquehanna in the anthracite coal business could have had no substantial effect upon the business, or upon the price of coal at New York Harbor. That suppression of competition was not the principal purpose of the combination seems to be shown by the lease of the Susquehanna to the Erie of February 24, 1898, which declared that the closer connection between the two roads thereby proposed would be for the public benefit, as well as for their mutual advantage, and by the act of the Legislature of New Jersey of April 2, 1898, by which consent to the proposed combination was given on condition that "neither of the said railroad companies shall increase the present rate or rates of the freight or passenger traffic of the said companies in this state." I think the proofs show that, whatever competition between them was eliminated by the combination, such elimination was so inconsiderable a thing that it did not enter into the objects which induced the Erie Railroad Company to increase its capital stock by \$26,000,000, and that it was but an incidental, and not the designed or principal, result of the combination. I conclude, therefore, that this combination is not violative of the anti-trust act.

2. The second question is: Was the scheme by which the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company acquired the capital stock of the Temple Iron Company, and by which the Temple Iron Company acquired the capital stocks, assets, and properties of the Simpson & Watkins Companies, a combination or conspiracy violative of the anti-trust act?

Previous to 1899 the Temple Iron Company had been engaged in the manufacture of iron at Temple, near Reading, Pa. It had, how-

ever, a liberal charter which enabled it to own and operate mines. Having authorized its capital stock to be increased from \$240,000 to \$2,500,000, and its bonds to be issued to the amount of \$3,500,000, or, perhaps, in anticipation of such authorization, it, on February 27, 1899, entered into a contract with Simpson & Watkins by which that firm agreed to sell all of the capital stocks, assets, and properties of the Forty Fort Coal Company, the Mount Lookout Coal Company, the Wyoming Land Company, the Wyoming Electric Light Company, the Babylon Coal Company, the Sterrick Creek Coal Company, the Edgerton Coal Company, the Hendrick Land Company, the Northwest Coal Company, and the Lackawanna Coal Company (the last a limited copartnership) to the Temple Iron Company, for \$2,260,000 of the capital stock of the Temple Iron Company and the \$3,500,000 of its bonds; the bonds to be secured by a mortgage or collateral trust deed. On the same day Simpson & Watkins agreed that simultaneously with their receipt from the Temple Iron Company of its stock and bonds above mentioned they would transfer and deliver to the Guaranty Trust Company of New York, as trustee, the whole of their stock of the Temple Iron Company (\$2,260,000) and \$2,100,000 of the \$3,500,000 of its bonds, and the trustee agreed to pay to Simpson & Watkins \$3,238,396.66 in cash and to issue to them certificates of beneficial interest in \$1,000,000 of the stock. The trustee further agreed to purchase from Mr. Baer the remaining outstanding stock of the Temple Iron Company (\$240,000) at 60 per cent. of its par value. It was also agreed that the trustee should have the power to sell beneficial interests in the stock; such interests to be expressed in certificates issued by the trustee to the purchasers. On the same day the Guaranty Trust Company, of the first part, and J. P. Morgan, and others, composing the underwriting syndicate, of the second part, entered into an agreement by which the parties of the second part agreed to purchase, on demand of the trustee, the \$2,100,000 of bonds at the rate of 90 per cent. of their par value, and \$1,500,000 of the certificates of beneficial interest in the stock (being the residue of such certificates after the delivery of \$1,000,000 of them to Simpson & Watkins) at par. Also, on the same day, the Reading Company (holding all of the capital stock of the Philadelphia & Reading Railway Company), the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company each entered into a tripartite agreement with the Temple Iron Company and the Guaranty Trust Company of New York, by which the Reading Company and the five railroad companies agreed to purchase from the trust company, not later than December 31, 1906, at par value with interest at 6 per centum per annum from the date of the last dividend thereon, all of the trust company's shares of the stock of the Temple Iron Company, in the following proportions, to wit (the proportions being the same as the total tonnages of coal carried by them from all sources in the year 1898): The Reading, 29.96 per cent.; the Lehigh Valley, 22.88 per cent.; the Delaware, Lackawanna & Western, 19.52 per

cent.; the Central, 17.12 per cent.; the Erie, 5.84 per cent.; and the New York, Susquehanna & Western, 4.68 per cent. In these tripartite agreements the Reading Company and the five railroad companies also severally agreed, that, if the earnings of the Temple Iron Company for any period of six months ending June 30th or December 31st should not be sufficient for the sinking fund and interest payments in the agreements provided for, and 3 per cent. on the par value of the stock of the Temple Iron Company, then each of the six companies would pay to the trust company, for the purpose of making up such deficiency, 12½ cents per ton for all coal carried by it from the Simpson & Watkins collieries for such period of six months, or so much of said sum as should be necessary to make up the deficiency, and, if there should still be a deficiency, then that each of the six companies would pay to the trust company such proportion of the remaining deficiency as should equal the proportion of stock agreed to be purchased by it. They also severally guaranteed, in the same proportions, the payment of the principal of the bonds at maturity, on January 1, 1925.

Thus was this combination effected. It went into operation, and, although the guarantor companies were compelled to pay to the trust company deficiencies in the earnings of the Temple Iron Company to the amount of \$483,000 for the year 1899 and the strike years of 1900 and 1902, the business of the Temple Iron Company has been highly successful. On December 4, 1908, when Mr. Law testified for the government, the Temple Iron Company had purchased out of its net earnings for its sinking fund \$1,900,000 of the bonds, the total issue of which was \$3,500,000, and had a surplus of a million dollars in its treasury; and on June 30, 1909, when Mr. Thomas testified for the defendants, all of the bonds except \$800,000 had been purchased by the Temple Iron Company and the \$483,000 paid by the guarantor companies to the trust company had been refunded. In December, 1906, the certificates of beneficial interest in the stock of the Temple Iron Company, which the trust company had issued for the whole of the 25,000 shares, and which were widely scattered amongst about 200 holders in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, and Pennsylvania, were called in by the trust company, and, pursuant to the provisions of the tripartite agreements, the whole of the capital stock of the Temple Iron Company, excepting 50 shares held by the directors, was acquired by the Reading Company and the five railroad companies who agreed to purchase it, except that the Reading Company's proportion was divided between it and some of its subsidiary corporations.

It appears, then, that the Guaranty Trust Company no longer holds any of the capital stock of the Temple Iron Company. It does hold, however, the trust mortgage by which the bonds of the Temple Iron Company are secured. What the terms of that mortgage are does not appear, nor is the trust company a party to this suit. The Erie Railroad Company, in its answer, avers that:

"The Guaranty Trust Company is still the trustee of the mortgage which secures the payment of the bonds which have been purchased by numerous

bondholders, whose rights should not be impaired herein without bringing them, or their trustee, into this court as a party defendant."

A similar averment is contained in the answer of the New York, Susquehanna & Western Railroad Company. The issue of the \$3,500,000 of bonds is one of the acts by which the Temple Iron combination was made possible. The destruction of the combination may impair the value of the bonds. The trustee of the bondholders would therefore seem to be a proper, if not an indispensable, party. Nevertheless, this point is not urged in the briefs, and I shall rest my decision on other features of this branch of the case.

A general act of the state of Pennsylvania, passed April 15, 1869 (P. L. 1869, p. 31), provides:

"That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber and other material interests of this commonwealth, by the purchase of their capital stock and bonds, or either of them, or by the guarantee of or agreement to purchase the principal and interest, or either, of such bonds, provided that this act shall not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the county of Schuylkill."

There is no allegation in the petition raising the question whether a common carrier engaged in interstate commerce, by the mere act of purchasing, for the purpose of securing its transportation business, the capital stock of a coal mining corporation also engaged in interstate commerce, monopolizes a part of that commerce, or restrains it, contrary to the provisions of the anti-trust act. If there were, then, since the contention of the government is that the defendant carriers by their purchase of the capital stock of the Temple Iron Company became the virtual owners of the mines whose capital stocks were owned by the Temple Iron Company, this court would, if it adopted that view, be required to consider one of the grave constitutional questions which the Supreme Court mentioned, but found it unnecessary to decide, in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, namely:

"Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been developed, their enterprises fostered, and vast investments of capital have been made possible?"

Nor does the petition contain any allegation to the effect that the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, by purchasing the capital stock of the Temple Iron Company, which had simultaneously purchased the capital stocks of the Simpson & Watkins Companies, and by guaranteeing the payment of the obligations of the Temple Iron Company, created a combination in the nature of a copartnership for sharing the profits and losses of the Temple Iron Company, and that they thereby, in violation of the anti-trust act, monopolized a part of the interstate commerce in anthracite coal.

Such a copartnership is suggested, it is true, in the brief of the government; but no issue of that kind is presented by the pleadings. As neither of these two important questions is in issue, they cannot properly be decided in this case.

The only complaint in the petition concerning the Temple Iron transactions is that after Simpson & Watkins and certain other independent operators in the Wyoming and Lehigh coal regions had "determined and agreed to promote the construction of a new line of railroad from the regions where their mines were located to tide water," and after, for that purpose, they had "caused the New York, Wyoming & Western Railroad Company to be organized under the laws of the state of Pennsylvania," had secured "large subscriptions" to the capital stock of the company, had made surveys of its line, had purchased 7,000 tons of steel rails, and had secured pledges to it of "the tonnages of the aforesaid independent operators not already pledged by contract," the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, entered into the series of contracts of February 27, 1899, hereinabove mentioned, and thereby, through their concerted action: (1) Caused the construction of the projected New York, Wyoming & Western Railroad to be abandoned; and (2) pooled and divided amongst themselves (excepting the Reading Company) the tonnages of the eight Simpson & Watkins collieries. And the only prayer of the petition which specifically relates to the Temple Iron transactions, besides a prayer for injunction, is that we shall adjudge them illegal because thereby: (1) The Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, through the instrumentality of the Temple Iron Company, acquired the Simpson & Watkins collieries "in pursuance of a combination or conspiracy between the defendants last named to defeat the construction of a competing railroad from the anthracite fields to tide water"; and because (2) "in so acquiring, through the purchase of agreed percentages of the capital stock of the Temple Iron Company, ownership in common of the aforesaid collieries formerly owned by Simpson & Watkins, the said Lehigh Valley Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and New York, Susquehanna & Western Railroad Company pooled and divided among themselves the tonnages from those collieries, thereby shutting out competition in its transportation." These two questions—one concerning the alleged defeat and abandonment of the proposed new railroad, and the other concerning the alleged pooling and division of tonnages—are the only questions on this branch of the case presented by the pleadings, and the only ones this court is now at liberty to consider.

It appears that Simpson & Watkins and other independent operators of anthracite coal mines were promoting the new railroad with

the declared intention of securing access to tide water at New York free from the domination of existing carriers whose transportation charges were complained of. But the charter of the new railroad authorized its construction "from a point in the Delaware river in Northampton county, Pa. (being also the boundary line between the states of New Jersey and Pennsylvania), opposite to or near Belvidere, N. J., and thence to a point on the Susquehanna river within or near Pittston, Luzerne county, Pa., with the necessary branches or laterals." It is not pretended that the new road was to extend to tide water or even across the Delaware river into New Jersey. It is said in the government's brief that at the point opposite to Belvidere—that is, at the eastern terminus of the proposed new road in Pennsylvania—connection could have been made with the Delaware, Lackawanna & Western Railroad, the Central Railroad of New Jersey, the Lehigh Valley Railroad, and the Pennsylvania Railroad, all of which do reach tide water. It appears, however, that no arrangements of any kind had been made for any such connection. Mr. Edward B. Sturges, who was interested in the proposed road and subscribed for 500 shares of its stock, testified as follows:

"Q. The charter, or the articles of incorporation, only authorized this road to build a line as far as a point opposite Belvidere, N. J., did they not?

"A. That is all.

"Q. How was it contemplated to get from there to tide water?

"A. We had not actually entered upon the construction of any road from there on. We thought we could get the transportation over some road. We knew that getting across New Jersey might be beyond our power.

"Q. What roads would you have connected with?

"A. We could not tell. We never had made any arrangements at that time.

"Q. I do not mean what roads you could have actually entered into contracts with, but which you would have physically connected with?

"A. The Delaware, Lackawanna & Western Railroad across the river, the New Jersey Central and the Lehigh Valley and the Pennsylvania below the Belvidere division. We never got that far because we felt that if we could get over to the New Jersey line we could get to New York or to tide water later. Later there was another arrangement made."

This admission by Mr. Sturges, who was a witness called for the government, taken with the fact that it does not appear that there was any railroad whatever on the Pennsylvania side of the Delaware river at or near the point opposite to Belvidere with which any connection could have been made, shows that the allegation of the petition that the purpose was to construct a new road from the coal regions to tide water is not supported by the evidence. It is certain that the new road could not, under its charter, have reached tide water or extended beyond the confines of the state of Pennsylvania. It matters not that the independent coal operators had been threatening to build a new road from the coal regions to tide water, or what influence that threat had, if any, upon the formation of the combination which absorbed the collieries of Simpson & Watkins. The allegation is that the combination defeated the construction of a new railroad from the coal regions to tide water; the fact is that the construction of such a road was never authorized by law, or even contemplated, and, consequently, that it was not defeated. Furthermore, there is no proof in the case that the Temple Iron combination di-

rectly defeated the construction of any railroad whatever, either from the coal regions to tide water or from the coal regions to the Delaware river. It did not acquire the capital stock of the new railroad company and does not in any manner control its charter.

It may be observed, further, that the allegation of the petition is that the construction of the proposed new railroad has already been defeated and abandoned. The fourth section of the anti-trust act confers on Circuit Courts "jurisdiction to prevent and restrain" violations of the act. But this court cannot prevent or restrain a past violation of the act. There is no suggestion in the petition that the Temple Iron combination is still preventing the construction of the projected railroad. Nor does it appear that if the prayer for injunction should be granted the new railroad would be built. That prayer, in substance, is that the railroad companies shall be enjoined from voting on the stock of the Temple Iron Company which they own, and that the Temple Iron Company shall be enjoined from paying dividends to the railroad companies. It is not proposed to enjoin the Temple Iron Company from voting on the stocks of the Simpson & Watkins Companies, or to enjoin the Simpson & Watkins Companies from paying dividends to the Temple Iron Company. How would the present situation, in respect of the alleged defeat of the construction of the proposed new railroad, be changed by enjoining the railroad companies from voting on the stock of the Temple Iron Company and enjoining the Temple Iron Company from paying dividends to the railroad companies? The gravamen of the complaint is that the construction of the proposed new railroad has been defeated, and that thereby interstate commerce has been restrained. The injunction we are asked to issue cannot restore a condition under which the probability of a resumption of the efforts to build the new railroad will be in any wise increased. Neither can we frame an injunction that will restore such a condition under the general prayer for relief. The petition makes no case on which a more sweeping injunction than the one specifically prayed for can be allowed, for none of the seven Simpson & Watkins Companies is a party defendant, except the Mount Lookout Coal Company and the Lackawanna Coal Company, and each of those two companies is a party defendant only in respect of the 65 per cent. contracts hereinafter considered.

If, then, any relief can be granted, under the allegations of the petition, against the Temple Iron combination, it must be because there was a pooling and division of the transportation business of the Simpson & Watkins collieries amongst the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company. It is not charged that the Philadelphia & Reading Railway Company (whose capital stock is held by the Reading Company) obtained any part of the tonnage of those collieries. The fact is that none of the eight Simpson & Watkins collieries is tributary to the Philadelphia & Reading Railway Company. I understand, too, that none of them is tributary to the Central Railroad Company of New Jersey. They are located at widely separated points in the Wyoming

region. With one or two exceptions, each of them is tributary to a single railroad. The productions of the Northwest, Edgerton, and Sterrick Creek collieries are carried by the Erie, of the Lackawanna colliery by the Erie, the Delaware, Lackawanna & Western, and the New York, Susquehanna & Western, of the Babylon and Mount Lookout collieries by the Lehigh Valley, of the Forty Fort and Harry E. collieries (both owned by the Forty Fort Coal Company) by the Lehigh Valley and the Delaware, Lackawanna & Western. The proportions in which the six carriers (considering the Reading Company, the holder of the capital stock of the Philadelphia & Reading Railway Company, as a carrier) agreed in the tripartite contracts to purchase the stock of the Temple Iron Company were not fixed by the tonnages of the eight collieries alone. Had they been, the Reading Company and the Central Railroad Company of New Jersey would have acquired none of the Temple Iron stock. Those proportions were based on the total shipments of anthracite coal carried by the six carriers from all sources for the year 1898 (according to Mr. Baer) or for the five years from 1894 to 1898 (according to the contention of the counsel for the government). Neither in the tripartite agreements, nor elsewhere, does it appear that the productions of the eight collieries were thereafter to be carried by the six carriers in the proportions in which they agreed to purchase the Temple Iron stock. The conditions were such as to forbid the making of such a contract. And the tripartite agreements themselves show that no attempt to make any such contract was in the minds of the parties, for they assumed that the tonnages from the eight collieries over the several roads would vary from time to time, and therefore provided that if the earnings of the Temple Iron Company should be insufficient to meet its sinking fund, interest, and other charges, the carriers should make up the deficiency, not primarily in the proportions of stock agreed to be purchased by them, but by the payment by each carrier of a sum not exceeding 12½ cents per ton on such amount of coal as it should actually carry from the eight collieries. By this arrangement the Reading Company and the Central Railroad Company of New Jersey were exempt from such payments. Nor is there anything in the tripartite agreements, or in any other proven agreements, that shows that these six carriers have entered into an agreement not to compete with one another in the coal transportation business, or that forbids any of the carriers from extending its line to any or all of the eight collieries and transporting as much of the coal produced by them as it can get. Not only is any suppression of competition denied in the answers and by the defendants' witnesses, but they deny any purpose of bringing about such a result. The burden is on the government, therefore, to show that, under the combination, there was in fact a pooling and division amongst the carriers of the tonnages of the eight collieries. This it has failed to show.

3. The third question is: Was the acquisition, in 1901, of the capital stock of the Central Railroad Company of New Jersey by the Reading Company, effected by a combination or conspiracy in restraint of trade or commerce among the several states?

The petition alleges that about January, 1901, the Reading Com-

pany, which then held and still holds all of the capital stock of the Philadelphia & Reading Railway Company, issued additional shares of its capital stock to the amount of \$3,017,650 of first preferred and \$1,713,750 of second preferred, par value, and created an additional bonded indebtedness of \$23,000,000, due in 1951, which it gave to the holders of the capital stock of the Central Railroad of New Jersey for 145,000, being a majority, of the shares of that stock, and thereby brought under one controlling power those two carrier companies, which, it is alleged, operated parallel and competitive lines. This, it is said, destroyed competition between them and their subsidiary coal companies and promoted monopoly. The answer of the Reading Company denies that the Philadelphia & Reading Railway and the Central are parallel or competitive lines, declares that they are connecting lines, admits that on or about January 7, 1901, it agreed to purchase 145,000 shares of the capital stock of the Central, and avers that, to secure the payment of the \$23,000,000 of bonds which it issued to aid in financing the enterprise, it pledged the stock purchased from the Central, with other stock, as collateral, under an agreement dated April 1, 1901, which it executed and delivered, with the certificates for the stock, to the Pennsylvania Company for Insurances on Lives and Granting Annuities. The answer of the Central also denies that the two carriers operate parallel or competing roads, or that the scheme throttles competition or promotes monopoly.

In 1890 the Philadelphia & Reading Railroad Company, the predecessor of the defendant Philadelphia & Reading Railway Company, the most easterly point of whose line was at Bound Brook, N. J., 20 miles west of New York Harbor, determined to promote the construction of the Port Reading Road from Bound Brook to Arthur Kill, on the tide waters of the New York Harbor, in order to secure on that harbor coal terminal facilities of its own. The road was completed in 1892. Substantially all of the capital stock of the Port Reading Road was owned by the Philadelphia & Reading Railroad Company and passed, upon the sale of the latter's assets under the receiver's proceedings in 1896, to the defendant the Reading Company. The Reading Company, from 1896 to the present time, has held, as owner, substantially all of the capital stocks of the Philadelphia & Reading Railway Company and the Port Reading Railroad Company. By this extension the Philadelphia & Reading Railroad Company secured an outlet to New York Harbor for its coal. The terminal on Arthur Kill was not a convenient one for passenger or general freight traffic, and up to 1901, when a majority of the stock of the New Jersey Central was purchased by the Reading Company, nearly all of the traffic of the Philadelphia & Reading Railway Company going to and from New York, except its coal traffic, passed over the New Jersey Central between Bound Brook and New York. Prior to 1901 contracts between the Philadelphia & Reading Railway Company, the Central, and other roads, had been entered into for the establishment of joint through routes over their lines. These contracts largely benefited the Philadelphia & Reading Railway Company. In December, 1900, Mr. Baer, president of the Philadelphia & Reading Railway Company, was informed that a majority of the

capital stock of the Central Railroad Company of New Jersey was on the market for sale, and that the Baltimore & Ohio Railroad Company was a prospective purchaser of it. Fearing that, if the control of the Central should pass into the hands of the Baltimore & Ohio, the Philadelphia & Reading would lose the benefit of its contracts for joint through routes and be disastrously hampered in, if not excluded from, the use of the Central's New York terminals, he quietly bought the stock for the Reading Company. Evidently, the predominating motive in the purchase was to preserve to the Philadelphia & Reading its traffic arrangements with the Central. The direct effect of the purchase was to preserve them. The necessary effect of the combination was also to eliminate all possible competition between the Philadelphia & Reading and the Central in the anthracite coal carrying business. In the circumstances, however, such elimination, though a necessary result of the combination, was incidental to its main purpose and not in contravention of the anti-trust act as it has heretofore been construed. The argument that the Philadelphia & Reading and the Central were not competing but were connecting roads is not sound. To a certain extent they did supplement each other, but as the Port Reading road gave to the Philadelphia & Reading an outlet to New York Harbor for its coal carrying business, without the use of the Central's road, the Philadelphia & Reading and the Central were, previous to the combination, in the position of competitive carriers of coal even though they did not reach the same mines or the same parts of the Wyoming region. Mr. Baer himself said:

"Q. What do you regard as competitors of the Philadelphia & Reading now in New York Harbor, as to anthracite coal?

"A. All of the companies.

"Q. Won't you be good enough to name them for us?

"A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware & Lackawanna, the Delaware & Hudson, the Erie, Ontario & Western. I guess they are all the roads leading to New York directly or indirectly.

"Q. Those roads are all carrying anthracite coal to the New York Harbor?

"A. Yes, sir.

"Q. And you regard them as competitors who must be considered in fixing rates?

"A. Yes, sir; unquestionably."

I prefer to base our opinion, not on the ground that the two roads were not competitors in the anthracite coal carrying business, but on the other, even though it be the narrower, ground that whatever suppression of competition resulted from the combination it was but an incidental effect of a scheme to save the business of the Philadelphia & Reading. Indeed, the elimination of competition between the Philadelphia & Reading and the Central, in the anthracite coal carrying business, was too small a thing to have been an important element in the object of the combination. The proximity of the lines of the Delaware, Lackawanna & Western, the New York, Susquehanna & Western, the New York, Ontario & Western, the Erie, and the Delaware & Hudson, to the line of the Central, and of the Pennsylvania's line to the line of the Philadelphia & Reading, left the competitive conditions in the coal carrying business very slightly affected by the elim-

nation of competition between the Central and the Philadelphia & Reading.

I conclude that this combination was not violative of the anti-trust act.

4. The fourth question is: Are the contracts, referred to in the record as the 65 per cent. contracts, contracts in restraint of interstate commerce?

The charge is that they are, and the prayer is that they be delivered up to be canceled, and that further operations thereunder be enjoined.

Long prior to 1869 the Delaware, Lackawanna & Western Railroad Company had been specially authorized by the Legislature of Pennsylvania to acquire and hold coal lands, and to mine, purchase, and vend coal. By a general act of that state, approved April 15, 1869, railroad and canal companies, as already stated, were authorized to aid corporations engaged in developing coal mines by the purchase of their capital stocks and bonds, or either of them. Pursuant to the policy of the state of Pennsylvania thus established, it appears that, before 1900, the Delaware, Lackawanna & Western Railroad Company had acquired coal lands, and that the Reading Company had acquired the capital stock of the Philadelphia & Reading Coal & Iron Company, the Lehigh Valley Railroad Company the capital stock of the Lehigh Valley Coal Company, the Central Railroad Company of New Jersey a majority of the capital stock of the Lehigh & Wilkes-Barre Coal Company, the Erie Railroad Company a majority of the capital stock of the Hillside Coal & Iron Company, and the New York, Susquehanna & Western Railroad Company a majority of the capital stock of the New York, Susquehanna & Western Coal Company. The Delaware, Lackawanna & Western Railroad Company and the above-mentioned subsidiary coal companies have each entered into one or more of the 65 per cent. contracts.

For many years previous to 1900, when the first of these contracts was entered into, many of the smaller coal producing companies sold the products of their mines to the larger coal companies, producing and shipping coal in their respective neighborhoods, for certain percentages of tide-water prices. These percentages were increased from time to time until they reached 60 per cent. In the early fall of 1900 a general strike of the coal miners and laborers of the whole anthracite region took place, resulting in an entire cessation of the production of anthracite coal. Conferences were had, and a ten per cent. increase in wages was finally granted by the defendant carriers' subsidiary coal companies to their employes. This increase, of course, affected the independent coal companies. On October 1, 1900, at a meeting of "individual operators," in Wilkes-Barre, Pa., a committee was appointed "to confer with the presidents of the transportation companies and endeavor to learn if there is to be a reduction in the rates of freight to cover the advance in wages that they have offered to their employes." On October 5, 1900, at another meeting, in Scranton, Pa., the committee reported a recommendation that the "individual operators," post the "notice of advance of wages already made by the companies." The minutes of this meeting then proceed as follows:

"After the reading of this report, Mr. Kemmerer [one of the members of the committee], in answer to the question as to what the presidents of the transportation companies had said regarding a reduction in the rates of freight to cover the proposed advance of ten per cent. in wages, said that the committee could not report a definite promise from them that there would be a reduction in the freight rates, but that they expressed their sympathy with the individual operators, and he intimated that they had said something would be done for the individual operators to improve the present conditions of the coal business."

The meeting resolved to post the notices, and then appointed a new committee of three persons "to confer with the various carrying companies relative to a new contract." This committee had a number of meetings with other gentlemen, who were officers of the defendant carriers and also of their subsidiary coal companies, in which there were negotiations concerning the terms of the proposed new contracts. The independent operators were demanding 65 per cent. The demand upon them was that, instead of having the contracts extend for a period of years, as the previous percentage contracts had done, they should continue for the life of their collieries. Mr. Cumming, vice president of the Erie Railroad Company and an officer of its subsidiary, the Hillside Coal & Iron Company, says that his reason for desiring the new contracts to cover the entire life of the collieries was "to have the question settled once for all." Other concessions were demanded of the operators. Finally, the form of contract now under examination was agreed on. It provides, amongst other things, that "the seller hereby sells and agrees to deliver on cars at the breaker to the buyer all the anthracite coal hereafter mined from any of its mines now opened and operated, or which may hereafter open and operate on the premises intended to be covered by this contract"; that "shipments shall be made from time to time as called for by the buyer"; that the buyer will "arrange to take the coal in as nearly equal daily or weekly quantities as in its judgment the requirements of the market will permit"; that the buyer will "use its best efforts to find a market for the seller's coal so as to enable the seller's collieries to be worked as many days as practicable with due regard to the general market conditions"; and that the buyer "will not discriminate in favor of its own mines, or any persons, firms or companies with which it has contracts to buy coal, but that the quantity to be ordered monthly shall be a just proportion of the entire quantity of coal agreed to be purchased by the buyer, measured by the colliery capacity of the respective sellers, it being understood that so far as practicable the quantity ordered shall not be less than a just proportion of all the anthracite coal which the requirements of the market may from time to time demand."

This proves conclusively that the representatives of the subsidiary coal companies did agree upon the form of the contracts before any of them were actually signed. They deny that in their negotiations with the committee of the "individual operators" they represented the defendant carriers. They say they represented only the subsidiary coal companies. Unquestionably, however, the carriers had an interest in the negotiations, and, as they were officers of both the carriers and their subsidiary coal companies, they must be considered as having

represented both. The form having been agreed on, the following contracts were entered into:

Name of Seller.	Name of Buyer.	Date of Contract.
Green Ridge Coal Co.	Hillside Coal & Iron Co.	Nov. 1, 1900.
(1) Robertson & Law	" " "	" "
Jermyn et al.	N. Y. Sus. & West. Coal Co.	" "
Nay Aug Coal Co.	Hillside Coal & Iron Co.	Feb. 1, 1901.
Austin Coal Co.	L. V. Coal Co.	Mar. 26, "
Parrish Coal Co.	L. & W. Coal Co.	May 1, "
Red Ash Coal Co.	" " "	" "
Melville Coal Co.	" " "	June 1, "
Midvalley Coal Co.	L. V. Coal Co.	" 24, "
Lentz & Co.	" " "	" "
Temple Iron Co.	Hillside Coal & Iron Co.	July 1, "
Howe et al., Executors,	L. V. Coal Co.	" 9, "
St. Clair Coal Co.	P. & R. Coal & Iron Co.	" 12, "
Enterprise Coal Co.	" " "	" 17, "
Pine Hill Coal Co.	" " "	Aug. 17, "
Lackawanna Coal Co.	D. L. & W. R. R. Co.	" 27, "
Temple Iron Co.	L. V. Coal Co.	Sept. 20, "
Clear Spring Coal Co.	D. L. & W. R. R. Co.	" 21, "
Richard White et al.	P. & R. Coal & Iron Co.	Oct. 15, "
Buck Run Coal Co.	" " "	Mar. 12, 1902.
Raub Coal Co.	L. V. Coal Co.	May 1, "
(2) Delaware & Hudson Co.	Hillside Coal & Iron Co.	June 30, "
Geo. F. Lee Coal Co.	D. L. & W. R. R. Co.	Mar. 11, 1903.
Clarence Coal Co.	Hillside Coal & Iron Co.	" 23, "
Lackawanna Coal Co.	" " "	Oct. 21, "
Dolph Coal Co.	" " "	Apr. 14, 1904.
Coxe Bros. & Co.	L. V. Coal Co.	Mar. 29, 1906.
North End Coal Co.	D. L. & W. R. R. Co.	May 26, "

(1) Canceled by mutual consent of parties on May 17, 1909.

(2) Expired April 1, 1908.

These facts seem to show that the custom of buying and selling coal on percentage contracts did not have its origin in any general agreement or concerted action on the part of the defendants. Rather does it seem that the contracts were the natural outgrowth of conditions attending the mining of coal. But the petition charges that there are special features in the 65 per cent. contracts, and such action concerning their adoption that, as to them at least, there was and is an unlawful combination or conspiracy. The substantial part of the charge is in the following language:

"Upon the termination of these contracts [the contracts which it is alleged were for terms expiring in 1900], the said defendant carriers, either directly or through the instrumentality of their said subsidiary companies and agents, the defendant coal companies, in pursuance of a previous agreement between themselves, severally offered to make and did make and conclude with nearly all the independent operators along their lines new contracts containing substantially uniform provisions agreed upon beforehand by the defendant carriers in concert, some of the operators contracting with one of the defendants and some with another, in which contracts the independent operators severally agreed to deliver, on cars at the breakers, to one or the other of the defendant carriers or its subsidiary coal company, as the case might be, all the anthracite coal thereafter mined from any of their mines now opened and operated or which they might thereafter open and operate, deliveries or shipments to be made from time to time as called for by the said carriers or their subsidiary coal companies; in consideration whereof

the said carriers or their subsidiary coal companies severally agreed to pay the independent operators for prepared sizes of anthracite 65 per cent. of the general average free on board prices of like sizes prevailing at tide-water points at or near New York, as computed from month to month, and for pea coal and sizes below that proportionately smaller percentages, declining as the sizes decline; and the defendant carriers controlling, as aforesaid, all the lines of transportation between the anthracite regions and tide water, save those of the Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, and therefore controlling the rates for the transportation of anthracite to tide water except in respect to the output of the limited number of collieries reached by the lines of the said Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, acting either directly or through the agency of their subsidiary coal companies, fixed the said percentages to be paid by them or their coal companies under said contract at a point that bore such a relation to the published rates of transportation that, taking for a basis the average tide-water prices of anthracite when the contracts were made and during many years previous (barring strike periods), the independent operator who entered into one of these contracts realized upon his coal from 15 to 50 cents more a ton, approximately (depending upon the length of the haul and variations in the tide-water price), than was realized by the independent operator who shipped his coal to tide water on his own account, paying the published rates of transportation himself, and sold it there in competition with the coal of the defendant carriers and their coal companies, which difference or advantage represents the amount per ton that the defendant carriers or their coal companies paid for the privilege of controlling the sale and disposition of the independent output so as to prevent it from selling in competition with the output of their own mines, as aforesaid. The result of this arrangement, as was intended, was to draw, if not to force, the great majority of the independent operators into making the aforesaid contracts, thereby enabling the defendant carriers and their subsidiary companies, the defendant coal companies, to control absolutely and until the mines are exhausted the output of most of the independent anthracite mines, and to prevent it, as aforesaid, from being sold in competition with the output of their own mines in the markets of the several states, particularly in the great tide-water markets."

In the brief of the government there are inserted tabulated statements intended to show that after deducting from the amounts received by the Lehigh Valley Coal Company for its coal shipped to New York Harbor between November, 1900, and December 1, 1901, and between January and December, 1907, the 65 per cent paid to the selling companies, the expense of selling, and the loss by wastage, the amounts remaining did not equal the published freight rates of the Lehigh Valley Railroad Company, the owner of its capital stock and over whose road the shipments were made. Other tabulated statements are intended to show the same condition as to coal purchased by the Philadelphia & Reading Coal & Iron Company and shipped over the Philadelphia & Reading Railway Company's line between November, 1900, and December, 1901. Assuming these tabulated statements, prepared under the direction of counsel and not verified by any witness, to be free from error, we fail to find any evidence of concerted action designed to bring about that result. We are dealing here with concerted action, with a contract, combination, or conspiracy, and not with individual unlawful transactions. If it is a fact that the Lehigh Valley Railroad Company is carrying coal for the Lehigh Valley Coal Company at less than its published rates, its conduct is violative of the act to regulate commerce of February 4, 1887, and its amendments, and may be corrected by a proceeding instituted before the Interstate

Commerce Commission or some court; but, to be violative of the anti-trust act, the discrimination in favor of the Lehigh Valley Coal Company and against other coal companies shipping over the Lehigh Valley road must be the result of a contract, combination, or conspiracy in restraint of interstate commerce. It is not shown that the effect of these contracts was to require each of the defendant carriers to carry coal at less than its published rate. Nor are we satisfied that even in the case of the Lehigh Valley Railroad Company the tabulated statements in the government's brief, above referred to, are free from error. They assume that all the coal shipped to New York Harbor by the Lehigh Valley Coal Company in any particular month was sold during that month. Other possible errors in the statements are pointed out in the brief for the Lehigh Valley Railroad Company.

Nor does it appear that the conferees ever met after the form of the contracts was agreed on. The first three of the contracts, as we have seen, are dated November 1, 1900. No obligation was imposed upon any party to enter into one of them, but each independent operator was left free to do so or not as it might please. Consequently, it may be said, and in effect it is said, that there could have been no combination of carriers, or of their subsidiary coal companies, after November 1, 1900. But in 1907 the total production of anthracite coal in Pennsylvania was 76,836,082 tons. Of this amount 41,963,055 tons were produced by the Delaware, Lackawanna & Western Railroad Company, and the coal companies subsidiary to the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, and about 6,000,000 tons were produced by the selling coal companies that had entered into the 65 per cent. contracts. By these contracts the buyers (the subsidiary coal companies) were enabled in 1907, to add to the coal produced by themselves that produced and sold under the contracts. Not only have the buyers the right, under these contracts, to all the coal that the sellers' collieries shall ever produce, but they alone are the judges of the requirements of the market, they alone determine when calls for deliveries by the sellers shall be made, and they alone determine what shall be the sellers' "just proportion of all the anthracite coal which the requirements of the market may from time to time demand." Here is something more than mere acquisition of property. It is a plan for future acquisition of property and future regulation of the supplies to be furnished by the subsidiary coal companies and the selling companies. It is accordingly contended that the contracts between one of the buyers and its sellers are so related to the contracts between each of the other buyers and its sellers that all the contracts must be considered together as one series of contracts which were entered into and are maintained by a combination of buyers and sellers who thereby restrain interstate commerce and monopolize a part of it. We have seen that the form of the contracts had its origin in a conference of buyers and sellers in October, 1900. But all that the conference did was to agree upon the form, and when that agreement was reached its work was done. Nor is there any evidence showing that the con-

tracts are maintained by any combination whatever. On their faces, they are contracts between individual buyers and individual sellers. They are not contracts between or with any combination of buyers or sellers. Each buyer has the power to regulate only the supply furnished by its particular sellers. There is no joint power to regulate the supplies furnished by all the sellers. To grant the injunction asked for, namely, "that the said contracts be delivered up to be canceled, and that the defendants, their agents and servants, and all persons acting or assuming to act under their authority, be forever enjoined from further executing or carrying into effect any of the provisions of the said contracts, and from making or entering into any contracts of like character or effect hereafter," means, not that we shall enjoin acts which shall prevent an existing combination from continuing to restrain interstate commerce or to monopolize a part of it, but that we shall severally enjoin the parties who have entered into the 28 independent contracts hereinabove mentioned from operating thereunder. That would be to grant relief on a petition far more multifarious than any one has suggested the present petition to be. It presents no such multifariousness. Its purpose is to secure an injunction against these contracts on the ground that they were devised and are maintained by an unlawful combination. We do not find this ground of complaint supported by the evidence.

This conclusion renders it unnecessary to inquire whether the contracts, separately considered, are wholly intrastate contracts, as the defendants contend, or whether, separately considered, they are in restraint of interstate commerce, as the government's counsel contend. In either case, no relief can be granted in this proceeding, for, while the anti-trust act condemns all contracts as well as all combinations in restraint of interstate commerce, we are not here asked to award a series of injunctions against defendants who have entered into and are maintaining a series of separate and independent contracts which are in restraint of interstate commerce, but to enjoin an alleged combination from further maintaining a series of alleged unlawful contracts. As no such combination exists, no relief, in respect of the 65 per cent. contracts, can be granted.

5. The fifth question is: Do the facts show a general combination or conspiracy in restraint of interstate commerce?

The charge is that, under the influence of competition, the average price of stove coal declined from \$4.15 and \$4.19 a ton in 1892 and 1893 to \$3.60 a ton in 1894 and \$3.12 a ton in 1895. "Whereupon," says the petition—that is, in 1895—"the defendant the Reading Company and the defendant carriers and the defendant coal companies, owning or controlling 90 per cent., more or less, of all the anthracite deposits, and producing 75 per cent., more or less, of the annual anthracite supply, and controlling all the means of transportation between the anthracite mines and tide water, save the railroads operated by the Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, which, as aforesaid, reach only a limited number of collieries, entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to con-

trol, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states, with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed and the price thereof to consumers greatly enhanced." It is further charged that:

"As steps in the development of this illegal combination, and in furtherance of its illegal purposes, the defendants herein named, or some of them, engaged in and became parties to the following additional acts, schemes, and contracts, among others, in violation of the aforesaid act of July 2, 1890."

The additional acts, schemes, and contracts described in the petition are the four combinations already considered and one other, namely, that in the year 1899, after the abandonment of the projected New York, Wyoming & Western Railroad, and after the Pennsylvania Coal Company had caused to be organized, under the laws of the state of New York, the Delaware Valley & Kingston Railroad Company, the Erie Railroad Company, through the agency of the banking house of J. P. Morgan & Co., and in violation of the anti-trust act, acquired nearly all the capital stock of the Pennsylvania Coal Company and the Delaware Valley & Kingston Railroad Company, and thereby defeated the construction of the proposed railroad of the Delaware Valley & Kingston Railroad Company from the Wyoming region to tide water.

I have not separately considered the charge that the Erie Railroad Company's acquisition of the capital stocks of the Pennsylvania Coal Company and the Delaware Valley & Kingston Railroad Company created an unlawful combination for the reason that there is no specific prayer in the petition for relief as to that particular transaction. It seems to have been embodied in the petition merely because it was supposed to have been one of the "steps" in aid of the alleged general combination or conspiracy. Nor have I separately considered the acquisition, in 1905, of the capital stock of Coxe Bros. & Co. by the Lehigh Valley Railroad Company, concerning which much is said in the proofs and the briefs, for the reason that it is not mentioned in the petition, and must therefore be considered merely as a part of the proofs relating to the general charge.

What we are asked to do is to find that in 1895 the defendants "entered into an agreement, scheme, combination, or conspiracy" of the broad sweep above mentioned, and that in the development of it they used "as steps" the Erie and Susquehanna combination of 1898, the Temple Iron combination of 1899, the Erie and Pennsylvania Coal Company combination of 1899, the combination formed through the instrumentality of the 65 per cent. contracts in 1900, and the Reading and Central combination of 1901. We are also asked to consider the acquisition of the capital stock of Coxe Bros. & Co. by the Lehigh Valley Railroad Company, in 1905, as an element of proof to support the charge of a general combination or conspiracy. But there is no satisfactory proof that these combinations were parts of or steps to a scheme, entered into by the defendants generally, for the control of the anthracite coal business. They were independent combinations,

the first of them having been created three years, and the last ten years after it is alleged the general combination or conspiracy was formed. What "contract, combination in the form of trust or otherwise, or conspiracy," for example, existed amongst the defendants generally for the purchase by the Reading Company of the capital stock of the Central? These combinations cannot be tied together in one gigantic trust or conspiracy without proof. They have no common board of control, no common scheme of managing their affairs, and no common business interests. Each of them is wholly separate from and independent of the others. I am satisfied that the proofs fail to show the existence of a general combination or conspiracy of the nature set forth in the petition.

Finding no ground, under the petition as it is framed, on which any part of the relief prayed for can be granted, I think a decree should be entered dismissing the petition on the merits as to the first, third, fourth, and fifth combinations above mentioned. As to the second combination, the one known as the Temple Iron combination, I think the petition should be dismissed without prejudice.

PER CURIAM. The result of the foregoing opinions is that the court unanimously agree that the petition should be dismissed: (1) As to the charge in paragraph 7b of the petition concerning the acquisition by the Erie Railroad Company of the capital stock of the New York, Susquehanna & Western Railroad Company; (2) as to the charge in paragraph 7c concerning the acquisition by the Reading Company of the majority of the capital stock of the Central Railroad Company of New Jersey; and (3) as to the general charge of a combination or conspiracy in violation of the anti-trust act of July 2, 1890, in the development of which it is charged the other combinations set forth in the petition were used, as steps, set forth in paragraph 7 of the petition.

A majority of the court hold that the petition should be dismissed as to the charge in paragraph 7a of the petition concerning the so-called 65 per cent. contracts.

A majority of the court also hold that the charge of an illegal combination in respect of the matters relating to the Temple Iron Company set forth in paragraph 7d of the petition should be sustained, and that the injunction or restraining order specifically prayed for in the petition should be granted so far as it will serve to prevent and restrain a continuing violation of the act.

Counsel will be heard as to the form of a decree.

In re SOUTHERN STEEL CO.

WICKERSHAM v. ALABAMA STEEL & WIRE CO.

(District Court, N. D. Alabama, S. D. December 7, 1910.)

No. 7,977.

1. BANKRUPTCY (§ 320*)—PROVABLE DEBTS—UNLIQUIDATED CLAIMS—CONSTRUCTION OF STATUTE.

Bankr. Act July 1, 1898, c. 541, § 63b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), which provides that unliquidated claims against a bankrupt may be liquidated by direction of the court, and thereafter proved and allowed against the estate, does not enlarge the class of debts which may be proved under subdivision "a" of such section, but merely permits the liquidation of unliquidated claims which come within such subdivision.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 320.*]

2. BANKRUPTCY (§ 314*)—PROVABLE DEBTS—NATURE OF LIABILITY.

The remedy by which a liability is enforced is not determinative of its provability in bankruptcy, but the nature of the liability rather is the test.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

3. BANKRUPTCY (§ 314*)—PROVABLE "DEBT"—STATUTORY PENALTIES.

The liability of a bankrupt for the statutory penalty for cutting trees, imposed by Code Ala. 1907, § 6035 et seq., is not a "debt" founded upon an implied contract, which can be proved against his estate in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 63a (4), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

In the matter of the Southern Steel Company, bankrupt. On motion for leave to liquidate claim. Denied.

See, also, 169 Fed. 702.

A. G. & E. D. Smith, for plaintiff.

Campbell & Johnston, for defendant.

GRUBB, District Judge. The question presented by the petition is whether a liability of the bankrupt for the statutory penalty for cutting trees (Code Ala. 1907, § 6035 et seq.) is a provable debt in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 63a (4), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), which reads:

"Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account or upon a contract express or implied."

The contention of the petitioner, that subdivision "b" of section 63 extends the scope of provable debts beyond those classified in the five subdivisions of subdivision "a" of that section, is, as stated in his brief, left undecided by the Supreme Court in the case of Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. However, in the case of Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, that court, through Justice Peckham, said (page 350 of 190 U. S., page 761 of 23 Sup. Ct., 47 L. Ed. 1084):

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"In section 63b, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against the estate. This paragraph 'b,' however, adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provision of section 63a, to be liquidated as the court should direct."

Following this intimation, I think the provability of the plaintiff's claim depends upon whether it comes within the scope of section 63a (4), above set out.

It is conceded that the liability to constitute a provable claim must be one arising out of an implied contract. Quasi contractual liabilities, such as torts, which admit of waiver and an election to sue as for a contract, are within the class. Remington (page 377) says:

"However, in cases where the tort may be waived and suit be brought in contract, the claim may be proved in bankruptcy, but may not be so proved where the tort cannot be waived and suit be brought in contract. Not every tort is of such a nature that it may be waived and suit brought on an implied contract. Only those torts that have resulted in the enrichment of the wrongdoer are such, for the measure of the enrichment is the measure of the implied contract"—citing *In re United Button Co.* (D. C.) 15 Am. Bankr. Rep. 391, 140 Fed. 495.

Using this test, the conversion of the trees, to the extent of actual damage caused, would constitute a provable claim; the bankrupt wrongdoer having been enriched to that extent. The statutory penalty, on the contrary, is not the measure of the implied contract, but an arbitrary fine imposed on the wrongdoer. Damages for conversion could be obtained, separately from the penalty and contemporaneously with it, and would constitute a provable claim, because the actual damages would have enriched the wrongdoer and would constitute the measure of the implied contract. The arbitrary penalty of the statute could in no sense be said to be the measure of the implied contract, and, for that reason, is not within the class of claims arising out of torts that are provable.

In the case of *Wilson v. National Bank of Rolla* (C. C.) 3 Fed. 391, the court said—construing the act of 1867—of a penalty imposed by a statute against usury (page 393):

"It is very clear that a liability for violation of a penal statute is not a debt within the terms of the law, and that is all the claim there was in favor of the bankrupt at the time of the adjudication in bankruptcy."

Remington (section 683) reads:

"But even certain classes of judgments have been construed not to be claims provable in bankruptcy, such as judgments by way of penal fines, for alimony, and judgments and agreements for the support of a wife and children, or of a bastard child."

Loveland (section 110, p. 339), after defining the statutory term "debt," says:

"If this is the meaning of debt in this section [63a], it is clear that a judgment for a fine or penalty, or a claim for alimony, or any other claim not founded upon an agreement or contract, however just and lawful in itself, is not provable in bankruptcy."

As persuasive that Congress did not intend that liabilities for penalties should be proven, regardless of the actual damage done by the bankrupt's wrongful act to the claimant, the law limits the right of the United States, a state, a county or district, or a municipality to prove for a penalty, except for the amount of the pecuniary loss sustained by the act out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby, and such interest as may have accrued thereon according to law (section 57j). Of the purpose of this provision, Collier says (7th edition, p. 607):

"The purpose of subdivision 'j' is clear. The creditors at large are not to be mulcted, except to the amount of the pecuniary loss sustained, interest, and costs, because of debts owing the sovereign as a penalty or forfeiture."

The same reasoning would apply, and with greater force, to a penalty claimed by an individual. It is not conceivable that Congress would have placed an individual in better condition than his sovereign in respect to penalty claims. The sole alternative is that penalties are not provable by individuals, at all.

Petitioner relies on the case of *Rogers v. Brooks*, 99 Ala. 31, 11 South. 753, as showing that penalties under this statute are liabilities arising out of implied contracts, and, for that reason, provable. The court in that case said (page 35 of 99 Ala., page 754 of 11 South.):

"At common law the action of debt is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise, which the law annexes. The rule of decision in this state is in harmony with the common law, and has been stated thus: 'When a statute creates a liability to pay money, but does not prescribe any remedy by which a recovery shall be had, debt is the proper remedy.'"

And again, after stating the facts alleged in the complaint, the court said:

"And from these facts, so averred, the law implies the promise of defendant to pay the penalty, prescribed by the statute."

The court did not construe the particular statute, imposing the penalty in question, as one creating a contractual liability, but proceeded upon the principle of common law that to all statutes, imposing penalties and prescribing no remedies for their recovery, was annexed an implied promise of the wrongdoer to pay. This is a matter of general, and not local, law. This rule of common-law construction is confined to the purpose of furnishing a remedy where the statute provided none. The remedy by which a liability is enforced is not determinative of its provability as a debt in bankruptcy. The nature of the liability is rather the test. Clearly a statutory penalty has none of the elements of contract or tort which can be waived, and so converted into quasi contract. The essential element of consent is absent, and the law in this class of cases imposes liability without either express or implied consent. If the Alabama case is an authority for the provability of this particular penalty, it is because all statutory penalties, recoverable by an action of debt, are provable in bankruptcy. Such a rule would give undue weight to the arbitrary form of remedy as against the inherent nature of the

cause of action. There is no element of contract, express or implied, about a statutory penalty, except the common-law form of action by which it may be enforced, when no specific remedy is prescribed. Statutory and common-law liabilities of different kinds, not predicated on contract, have been held nondischargeable or nonprovable in bankruptcy in the following cases: *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084; *In re Baker* (D. C.) 96 Fed. 954; *In re Hubbard* (D. C.) 98 Fed. 710; *In re Moore* (D. C.) 111 Fed. 145; *Wilson v. National Bank* (C. C.) 3 Fed. 391; *Spalding v. New York*, 4 How. 21, 11 L. Ed. 858; *Wetmore v. Markoe*, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390.

An order will be entered, denying leave to liquidate the claim in the bankruptcy court, and dissolving the injunction, and permitting the petitioner to proceed with his suit in the state court.

In re RICHARDS.

(District Court, W. D. Arkansas, Ft. Smith Division. December 14, 1910.)

1. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—FAILURE TO PAY OVER—ORDER—CONCLUSIVENESS—CONTEMPT PROCEEDINGS.

Where a bankrupt ignored an order of the referee directing him to pay to his trustee \$500 as withheld assets, and the order became final for want of a petition to review, the court, on an application to punish the bankrupt for contempt, would not review the referee's finding of fact which was the basis of the referee's order that the bankrupt had in his possession \$500 which he had withheld and which he was ordered to pay over.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—CONTEMPT—ABILITY TO COMPLY WITH ORDER.

A bankrupt will not be punished for contempt for failure to turn over assets alleged to have been withheld, provided he is able to prove to the court's satisfaction that he has no ability to comply with the order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

3. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—CONTEMPT—FAILURE TO PAY OVER.

Evidence held to justify a referee's finding that at the making of an order requiring a bankrupt to turn over \$500 to his trustee as withheld assets, and at the time proceedings were instituted against the bankrupt for contempt in failing to comply with such order, he had the ability to do so, and that his conduct in pleading that he had no funds "belonging to the estate" was fraudulent and contemptuous.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of bankruptcy proceedings of J. A. Richards. On motion to show cause why the bankrupt should not be committed for contempt in refusing to turn over to a trustee money alleged to have been withheld. Order allowed, and bankrupt committed.

On June 13, 1910, J. A. Richards was adjudged a bankrupt in this court. On July 6, 1910, and on subsequent dates up to and including August 17, 1910, an examination of the bankrupt was had; he being represented by counsel. This resulted in the filing by the trustee on August 17, 1910, of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

motion before the referee to compel the bankrupt to appear and show cause why the referee should not enter an order requiring him to pay over \$2,500 then in his possession to the trustee, which amount it was alleged was not contained in his schedule. The order was made bearing date August 2, 1910, returnable August 16, 1910. The bankrupt appeared in response to the citation and answered, denying under oath that he had withheld any amount from the trustee. On the same day the bankrupt was examined under oath, and other testimony pro and con was taken and reduced to writing. The original testimony of the bankrupt previously taken before the referee was by consent admitted as evidence. On this hearing the bankrupt was represented by counsel, and the same, having been argued and submitted, was taken under advisement by the referee. On August 30, 1910, the referee filed a written opinion, carefully reviewing all the facts, and entered an order as follows:

"Upon this 30th day of August, 1910, comes on to be heard the matter, continued from the 17th day of August, 1910, of the petition of the trustee for an order requiring the bankrupt to turn over certain concealed assets, belonging to said estate; and the court, having heard all of the testimony and argument of counsel, doth find that the said J. A. Richards, the said bankrupt, has in possession and concealed from the trustee of said estate, goods, wares and merchandise to the value of \$500, as follows:

To mdse and fixtures on hand Jan. 1, 1910.....	\$5,000 00
" " purchased since Jan. 1, 1910.....	225 00
" cash of J. E. Wood for the sale of his interest in the secondhand store.....	230 00
	<hr/>
	\$5,455 00

"And the bankrupt is to be credited with the following:

Salary, to son Walter 5 months, less amount paid by bankrupt, out of exemptions.....	\$ 100 00
Incidental expenses of store.....	125 00
B. & L. Ass., on storehouse for Jan. 1910.....	47 33
" " dwelling, 2 payments.....	21 37
Ins. premium on dwelling.....	10 00
Dealfield for labor at store.....	20 00
Expenses of trip to Texas.....	100 00
Exemptions \$400.00 cash, Mdse. \$100.00.....	500 00
Clothing and other incidentals.....	100 00
Physician	20 00
Household expenses, 5 months.....	200 00
Drinking, etc.,.....	200 00
Discount on sale of merchandise \$400 to Padden, at 25 per ct. discount	100 00
Paid on mdse accts.....	269 90
	<hr/>
	\$2,012 70

Inventory of stock on hand May 5, 1910..... 2,840 60

\$4,853 30

Balance unaccounted for.....	\$ 601 30
Allowed for errors and omissions.....	101 30

\$ 500 00

"It is therefore adjudged and ordered that the said J. A. Richards, the bankrupt, within 15 days from this date, pay over to M. A. Stratton, trustee of the said bankrupt estate, the sum of \$500, withheld and concealed by him from the said trustee belonging to said bankrupt estate; and it is further ordered that the bankrupt have 15 days in which to file a motion for review by the district judge of these findings and order."

The bankrupt ignored the foregoing order, filed no petition for a review thereof, and the same became final.

On October 7, 1910, the trustee filed a petition with the referee, praying the referee to certify the record to this court, and the same was done on that date. The record was certified, including the written evidence taken before the referee, and was filed in this court October 10, 1910. October 8th, two days previous, the trustee filed in this court a petition briefly reciting the previous proceedings before the referee, including the order to pay over, and asked for an order citing the bankrupt to appear and show cause why he should not be punished for contempt in refusing to obey the referee's order to pay over \$500 then in his possession. The order was made by the judge of this court returnable October 20, 1910. The order was not served until October 19, 1910. On October 21, 1910, the bankrupt appeared in person, and on motion of his attorney the matter was set down for hearing on the 3d of November, 1910. On November 3d the case was heard, the bankrupt being present and being examined by his counsel and also one other witness produced by him, and the testimony reduced to writing, and the case was then submitted on that testimony and the original evidence and proceedings before the referee, and taken under advisement by the court.

Kimpel & Daily, for trustee.

Pole McPhetridge, for bankrupt.

ROGERS, District Judge (after stating the facts as above). I have examined with care the entire record in this case. As the bankrupt asked no review of the referee's order, he must be held to have acquiesced in the referee's finding of fact that on August 31st, when the referee's order was made, he had in his possession \$500 which he had withheld from his schedules, and which he had been ordered to pay over within 15 days.

This inquiry now before the court begins with the entering of the order by the referee, which the court must accept as final and conclusive. In the case of *In re Marks* (D. C.) 176 Fed. 1018, McPherson, Judge, gives a clear exposition of the law of a case like this, and what he says is as applicable to this case as to the one then under consideration. I adopt it as the law governing the practice in this case. It is as follows:

"For the purpose of enforcing it the trustee obtained a rule requiring the bankrupt to show cause why he should not be committed for contempt in failing to pay. He answered the rule, and a hearing was had before me in open court on December 29 and 30, 1909, when such testimony was presented as either party desired to offer. The question for decision is whether the bankrupt should be committed to prison for failure to comply with the order of June 24th; and upon this question the brief of the trustee's counsel concedes that: 'All the cases are practically harmonious in the declaration that, if the court is convinced that the bankrupt is unable to comply with the order, he should not be committed for contempt. Without the physical ability to comply, there can be no contempt.'

"Unquestionably that is the rule in this circuit. The Court of Appeals approved it in *Trust Co. v. Wallis*, 11 Am. Bankr. Rep. 360, 126 Fed. 464, 61 C. C. A. 342; and there are decisions elsewhere to the same effect. It will be observed that the present case differs from those which involved the preliminary question whether the referee or the District Court should make an order on the bankrupt to pay money or deliver goods. Here that point has been passed. It has been finally decided that in February, 1908, the bankrupt had in his possession or under his control the sum of \$3,000 belonging to his estate in bankruptcy; and it only remains to inquire whether he is now able to pay. In this proceeding the court will not re-examine the question whether the order should ever have been made—either at all, or in the particular amount fixed by the referee. The trustee has there-

fore an unimpeachable right to the money specified in the order, and presumptively the bankrupt is able to pay it; but the admission must nevertheless be made that the presumption may not correspond with the fact, and that in reality the bankrupt cannot comply with the order. Unless he has the physical ability to comply, he should not be committed for contempt. In practical effect, although perhaps not in legal contemplation, this would revive the abolished penalty of imprisonment for debt. If he cannot pay, and if this inability is the result of his own criminal act, he may, of course, be punished by the criminal law, although no civil remedy may be available in the situation. Even if he has misappropriated the money, the court has not the power to imprison him in a proceeding for contempt; for this would deprive him of his constitutional right to submit the charge of misappropriation to a jury in the proper criminal court, and would deprive him also of the inseparable right to be exempt from imprisonment for such an offense until he shall have been lawfully convicted. And it is also true that he cannot be imprisoned in a proceeding for contempt, if for any other reason he cannot produce the money; for the court cannot imprison as a punishment. It can only imprison to compel obedience to its order. But with an order to pay in force against him, and with need to overcome the presumption of his ability to comply, it will no doubt happen at times that a bankrupt may fail to meet the burden of proof, and may be obliged to go to jail until he satisfied the court that he was telling the truth when he pleaded poverty. Certainly his bare denial of present ability to pay may be properly regarded with suspicion, and he may be required to satisfy the court with clearness that obedience to the order is wholly beyond his power. Such situations must be dealt with as they arise. No general rule can be laid down, and each case must stand upon its own facts. A decision upon the general subject has been recently reported from the Second Circuit. In *re Stavrah*, 174 Fed. 330 [98 C. C. A. 202]."

This case is sustained by the case of *In re Stavrah*, 174 Fed. 330, 98 C. C. A. 202, decided by the Court of Appeals of the Second Circuit. Aside from the questions of practice, the principles here decided have the sanction of the Circuit Court of Appeals for this, the Eighth circuit. In *re Rosser*, 101 Fed. 562, 41 C. C. A. 497; *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451; In *re De Gottardi et al.* (D. C.) 114 Fed. 328; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645.

Notwithstanding these and other like decisions, out of abundance of caution I have reviewed the action of the referee, and the testimony has driven me to the conclusion that the liberality of the referee in making allowances to the bankrupt was not justified by the testimony. He might well have found a larger sum in his possession than \$500. If the referee's findings were before me on review, upon petition by both parties, I should feel called upon to restate the account, and charge the bankrupt with a larger sum unaccounted for. The rule governing the court in such cases is correctly stated in the case of *In re Cole*, 16 Am. Bankr. Rep. 302, 144 Fed. 392, 75 C. C. A. 330, by the United States Court of Appeals for the First Circuit, as follows:

"Unless the affirmance of an order directing the bankrupt to turn over certain money to her trustee is so wholly unjustified on the proofs as would require this court on writ of error to set aside a verdict for want of evidence to sustain it, the determination of the court below is not reviewable here on petition to revise."

The real question left for the court to determine now is whether the bankrupt has it in his power to comply with the order of the referee. It was held in the case of *In re De Gottardi et al.* (D. C.) 114 Fed. 329:

"Where a bankrupt admits having had money or property a short time before his bankruptcy, which is not shown by his schedules, it is incumbent upon him to clearly account for the same to the satisfaction of the court; otherwise, he must be held to still have it in his possession, and to be able to turn it over to his trustee."

The principle there stated is sound, absolutely indispensable to the practical enforcement of the bankrupt law, and it is the law of this circuit. In *re Schulman* (D. C.) 167 Fed. 238; In *re Deuell* (D. C.) 100 Fed. 633; In *re Alexander R. Meier*, 182 Fed. 799, by the Eighth Circuit Court of Appeals, and cases there cited. In the last case *Reed*, District Judge, speaking for an undivided court, said:

"It appears without dispute that on June 9, 1908, about a week before the filing of the petition in bankruptcy, the petitioner as treasurer of the bankrupt corporation received from the National Bank of Commerce, St. Louis, \$12,500 in money, the property of said corporation; and on June 12th, \$8,750 more as the proceeds of the sale of the remainder of its assets. The night before the petition in bankruptcy was filed, the petitioner left St. Louis, and did not return until the fall of the year following. Upon the hearing before the referee he not only failed to account for the money so received by him, but refused to answer all questions asked him relative to its disposition upon the ground, as stated by him, 'that his answers might tend to incriminate him.' His counsel asked of him but one question, which is: 'Have you any property in your possession of the Meier China & Glass Company?' He answered, 'No, sir.' This is the only showing he has seen fit to make of the disposition of over \$20,000 in money of the bankrupt corporation so received by him as its treasurer within a few days prior to its bankruptcy. That the petitioner received the money of the corporation as stated is not disputed, and the only thing said in support of the petition to revise is that there is no presumption that the petitioner had this money or any part of it in his possession when the order requiring him to turn over \$12,500 thereof to the trustee was made. But the settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate. *Mueller v. Nugent*, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405]; *Boyd v. Glucklich*, 116 Fed. 135-143 [53 C. C. A. 451]; *Schweer v. Brown*, 130 Fed. 328 [64 C. C. A. 574]; In *re Salkey*, Fed. Cas. Nos. 12,253, 12,254.

"In this case the petitioner does not even deny that he has the money in his possession or under his control, but only denies that it is the property of the bankrupt estate. This is wholly insufficient to escape an order for its surrender. Even if he had denied having the money in his possession or under his control, the referee was not required to accept such denial as conclusive; and if otherwise clearly satisfied from the evidence that he did have it in his possession or under his control it was his duty to order him to surrender it. To most of the questions asked the petitioner upon the hearing before the referee relative to his dealings with the bankrupt estate which he did answer, he returned only the stereotyped answer, 'I don't remember.' Such answers do not conceal the falsehood they are intended to hide.

"The least that can be said of the conduct of this petitioner with reference to the money so received by him is that it was a bold and deliberate attempt to defraud his creditors of, and appropriate to his own use, at least \$12,500 of the property of this bankrupt estate; and, while he cannot be punished in this proceeding for his reprehensible and dishonest conduct, he can and should be required to comply with the order of the court made in due course of the bankruptcy proceedings by confinement, if necessary, as for contempt until such order is complied with."

The only question having any relevancy to this contempt proceeding which the bankrupt's counsel asked him on the trial was:

"I will ask if you concealed or refused to account for any article or asset of property in your possession. No, sir."

So the language of the opinion just quoted is directly in point. In this case the petitioner does not even deny that he has the money in his possession or under his control, but only denies that he concealed or refused to account for any article or asset of property in his possession. This answer is in keeping with his whole course of conduct, and manifestly untrue. A witness whose testimony is shown to be as false, deceitful, disingenuous, and dishonest as this bankrupt's testimony has been shown to be in many instances, is not to be credited at all, and may be absolutely disregarded, or ought to be.

In the case at bar there is clearly shown to be a deficit in the bankrupt stock of merchandise and other assets occurring between the 1st of January, 1910, and the 13th of June, 1910 (the date proceedings in bankruptcy were begun) of not less than \$1,000, after allowing him for more than just credits, credits which I do not believe the evidence fairly warrants. \$500 of this sum was for the first time disclosed on the trial of this proceeding for contempt as being in his possession in the latter part of May just before the bankruptcy proceedings were begun. It was not even mentioned by him or the witness Wood on the trial before the referee, though both of them were examined before the referee. All efforts to draw from the bankrupt any account of what went with his assets were met with the answer, "I don't know, I can't remember," and the like. As said in *Re Schulman et al.* (D. C.) 167 Fed. 238:

"On very numerous occasions his reply was the stock answer of the prevaricator, 'I don't remember,' and the whole examination from the beginning to the end is a perfectly transparent case of duplicity, intentional evasion, and refusal to make any explanation of the facts connected with his bankruptcy under the pretense of ignorance and stupidity. The whole attitude of the bankrupt in the entire proceeding is that of contempt of this court and of its authority, and a deliberate determination to conceal from his creditors all the material facts within his knowledge relating to the affairs of his firm."

This record shows conclusively and beyond all reasonable doubt that when the bankrupt found he could not meet his obligations, and was sued or about to be sued, he made up his mind to convert all of his assets he could into money and first refuse to pay any creditors, and then after the bankruptcy to defy the bankrupt court by the false statement that he did not know how to account for the deficit in his assets. Indeed, he says that he sold a wholesale bill to one man for about \$300, intending at the time to pay it to one of his creditors, but upon getting it he changed his mind and decided not to pay his creditor, and pocketed the money. He says he sold his interest in the secondhand store about January 1, 1910, and yet swears that he cannot tell what he got for it. The man who bought it knew and testified to the facts in detail. The conclusion cannot be escaped that the bankrupt knew it also; that he did not is incredible. He discounted a part of the commercial paper taken in part for that stock only a short time before,

and to a solvent merchant, and pocketed the money; he refurnished his house out of his stock and did not schedule the furniture so taken, saying he had given it to his wife; he made no pretense she had paid for it, or that it was other than a pure gift; he closed his account at the bank early in 1910, and subsequently made no deposits; he gave in part what he took in to his wife and kept the other, keeping no account of the amount of either; he kept no account of sales or collections; he concealed the cash book he had kept before he began his scheme to swindle his creditors, and he sold goods at 25 per cent. below wholesale price, and kept no account of them, and pocketed the money; he continued to buy goods during the conduct related, and to sell and not pay those he purchased of; he paid no creditors after the scheme began.

Is a court of conscience to be blind to the shamelessness and dishonesty of a man who presents himself in this attitude and makes no attempt to excuse it or explain it except by saying, "I don't know," or, "I can't remember"? In *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, the Supreme Court of the United States said:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (*Bank v. Sherman*, 101 U. S. 403 [25 L. Ed. 866]), and on adjudication title to the bankrupt's property became vested in the trustee (sections 70, 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court."

The \$500 the bankrupt had in his possession in May was as much vested in the trustee as the goods in his store. He has not yet denied he had it then. Indeed, he introduces the witness Wood who swore he had it, and he made no effort to explain what he did with it. He did not even return to the witness stand to say where he got it, or what disposition he had made of it. He had previously given nearly that much to his wife in money, and subsequently took \$400 as exemptions. There is no reasonable doubt of the bankrupt's guilt of all he is charged with, and more.

The order is that he will be committed to the United States jail at Ft. Smith for four months; the court reserving the case for such future order as may seem proper in the event he complies with the order of the referee to pay over to the trustee the \$500.

THE STELLA B.

(District Court, E. D. New York. September 15, 1910.)

1. NAVIGABLE WATERS (§ 2*)—POWER OF UNITED STATES TO REGULATE NAVIGATION—EFFECT OF COLONIAL CHARTERS.

The rights granted to the town of Huntington, on Long Island, by the charter of 1666, signed by Richard Nicoll, Governor General, by authority of James, Duke of York, later confirmed by other grants by authority of the sovereigns of England, so far as relates to navigable waters within the town, were subject to the general sovereignty and jurisdiction of the government under which the town existed, to which general jurisdiction the state of New York and the United States have legally succeeded, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

laws of the United States regulating navigation are applicable to and binding on all craft on that portion of Great South Bay within the town, the same as upon vessels on navigable waters elsewhere.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. SHIPPING (§ 16*)—VIOLATION OF INLAND NAVIGATION RULES—ACTION FOR PENALTY.

Penalties incurred by a vessel for violation of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2875]) are recoverable by action brought by the United States under section 4 of the act, although the offense may have been committed on waters within a district having jurisdiction to prescribe local rules.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30–44; Dec. Dig. § 16.*]

In Admiralty. Action by the United States against the power boat *Stella B.* Decree for libellant.

William J. Youngs, U. S. Atty. (Wm. P. Allen and Wm. A. Moore, Asst. U. S. Attys., of counsel), for libellant.

Raymond C. Haff, in pro. per.

CHATFIELD, District Judge. The power boat *Stella B.*, on July 30, 1908, was being operated upon a portion of the waters of what is generally known as Great South Bay, or one of the navigable arms thereof, and did not comply with the provisions of Act June 7, 1897, c. 4, 30 Stat. 96 (U. S. Comp. St. 1901, p. 2875), requiring the maintenance of a red port light, a green starboard light, and a white masthead light placed and constructed according to the provisions of the statute. On the other hand, the boat did comply with the local and town ordinances and rules (if any there be) of the township of Huntington, within whose limits it was at the time. The United States has filed a libel for the statutory penalty upon the assumption that the boat was subject to the law of Congress referred to, and has alleged that it was upon an arm of the sea capable of being used for interstate commerce, and within the admiralty jurisdiction of the United States.

The contention of the claimant is that the statute relied upon has no application, and that the United States has no jurisdiction, inasmuch as the town of Huntington received by charter from the Governor of the colony of New York, under the crown of England, title to all of the territory, including the locality in question, both land and water, and the various rights to and uses of that land and water, which patent or charter, by authority of James, Duke of York, dated November 30, 1666, and signed and sealed by Richard Nicoll, as Governor General, later confirmed on the 2d of August, 1688, by Gov. Dongan, under the authority of James II, king of England, and again on the 5th of October, 1694, confirmed by Benj. Fletcher, under the authority of William and Mary, king and queen of England, was recognized and confirmed by an act of the colonial Legislature on the 6th of May, 1691. The claimant alleges that the treaty of peace between Great Britain and the United States at the close of the Revolution confirmed these grants of land to the town of Hunting-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ton, and that the various Constitutions of the state of New York, in the years 1777, 1821, 1846, and 1894, have provided that all grants made by authority of the king of Great Britain or his predecessors, or charters to bodies politic or corporate, by him or persons acting with his authority, shall be valid and not affected by any of the provisions of said constitutions, if said charters were made prior to October, 1775.

The charter granted by Gov. Nicolls gave not only property rights, but certain corporate or political franchises. It conveys certain lands, described by boundaries, with all "Havens Harbours Creekes Quarries Woodland Meadows Pastures Marshes Waters Lakes ffishing Hawking Hunting and ffowling And all other Proffitts, Commodities, Emolumts, and Hereditamts * * * To have & to hold the said Lands and Necks of Lands Hereditamts and prmises with their and every of their Appurtenances and of every Part & Parcell thereof to the said Patentees and their Associates their Heires Successors and Assignes forever." This conveyed the property and rights in the property itself.

But the charter also confirmed and granted unto the said patentees and their associates, their heirs, successors and assigns, "all the Priviledges belonging to a Towne within this Governmt and that the Place of their prsent Habitacon shall continue and retaine the Name of Huntington."

The charter of Gov. Dongan confirmed the first under substantially the same description, but provided for the creation of a body known as the "trustees of the freeholders and commonalty of the town of Huntington," with perpetual succession.

The third charter, from Gov. Fletcher, is again confirmatory of the two previous charters, and makes some changes in the boundaries, but has no bearing upon the question with which we have to deal.

These charters and the political rights granted thereby are referred to in the case of *Lowndes v. Huntington*, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615. The particular question before the court in that case was as to the boundaries of the grants under these various charters, and as to whether a certain bay, known as Huntington Bay, was included within the properties and rights given to the town of Huntington. The court affirmed the decision of the court below, holding that the plaintiff, the town, was entitled to eject the defendant from the lands determined to be within the grants of these various charters, and also held (page 19 of 153 U. S., 14 Sup. Ct. 758, 38 L. Ed. 615) that the recognized rules of real property, both as to the rights attaching to certain lands within the territorial limits of the state and the extent and purposes to and for which the state might give the title and control of submerged lands, depended upon the settled law of the state. The law of the state, as to the extent of the rights given under these charters, is so thoroughly discussed, and the various cases referred to, in the opinion of Chief Justice Parker in *People ex rel. Howell v. Jessup*, 160 N. Y. 249, 54 N. E. 682, that they need not be discussed here. The Jessup Case decided that the title to the lands under water and the right of possession and control of

the waters in question were in the trustees of the town, "who had the right in their sovereign character to do in the discharge of their trust precisely what their predecessor sovereign could have done, or what the state, had it, instead of the town, succeeded to the title and rights of the English government, might have done, or may yet do, shall it hereafter so succeed, by an exercise of its right of eminent domain." But the court says (page 262 of 160 N. Y., page 686 of 54 N. E.), where it refers to the various cases in the Court of Appeals of New York upon the terms of these various charters, that "the trustees were invested with the power of management and authorized to perform such acts and make such orders, not repugnant to the laws of England, as they might see fit." The court took into consideration the proposition that a grant of land under water by the king to private individuals did not include the right of navigation (which rested in the crown with Parliament), but did include all conveyable rights expressly given by the grant, and that since the Revolution the states of this Union have succeeded to the rights of both crown and Parliament in navigable waters as well as in the soil, subject only to such charters as had been previously given. The court quotes the language of Chief Justice Taney from the case of *Martin v. Waddell*, 16 Pet. 412, 10 L. Ed. 997, where he says as to a similar charter:

"It is not a deed conveying private property, to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed."

And the Court of Appeals says:

"We could, guided by this rule alone, quite readily reach the conclusion that the letters patent were broad enough in terms to grant to the trustees of the freeholders and commonalty of the town of Southampton not only lands under the waters, but the sovereignty over the waters itself for the benefit of the freeholders and inhabitants of the town, to such extent at least as would enable them to authorize such a construction as that involved in this action."

The construction involved in that action was the maintenance of a bridge over waters held by the court not to be navigable. But, even if those waters were navigable, the Court of Appeals held that the charters referred to were broad enough to give the town authority over such structures, subject only to the rights of the United States (*Kerr v. West Shore R. R. Co.*, 127 N. Y. 269, 27 N. E. 833), using the following language:

"The sovereign authority may authorize the construction of bridges, piers, * * * or other obstructions in navigable waters; and, when such obstructions are not obnoxious to the regulations of Congress and do not come in conflict with the paramount authority of the United States, they are not nuisances."

The right of the United States to exercise jurisdiction in matters relating to navigable waters has been further upheld in the case of *Blue Point Oyster Co. v. Briggs*, 198 N. Y. 287, 91 N. E. 846, so far as charters from the sovereign to individuals are concerned.

It is impossible to see what difference there would be between a grant from the sovereign to certain individuals and from the sovereign

to trustees or to a community exercising limited rights under the sovereignty.

We need not here consider whether the patent to the Duke of York, discussed in the Waddell Case, reserved all of the same powers to the crown of England as were reserved in the grants by the colonial governors to the town of Huntington, for it is apparent, as recognized by the decisions of the Court of Appeals of New York and by the language of the charters themselves, that there was no intention of giving to the town of Huntington the rights of an independent government, but merely that of an independent and self-governing township, under the protection of the realm and subject to the general laws of the realm, where they did not conflict with the freedom or private rights and public privileges which were vested in the beneficiary under these charters. The court will take judicial notice of the fact that the Great South Bay and its tributaries are navigable as arms of the sea, and hence that the waters in which the Stella B was operating were navigable waters at the time of the occurrence. Being navigable waters and there being nothing in the colonial charters cited which put the township outside the general jurisdiction of the government under which the town existed and to which general jurisdiction the state of New York and the United States have legally succeeded, it must be held that the laws of the United States regulating navigation are applicable to and binding upon all craft within the limits of the town of Huntington in the same way in which they are binding upon vessels elsewhere. The point as to the jurisdiction must be decided in favor of the United States.

The statute in question says:

"Preamble.

"Whereas the provisions of chapter eight hundred and two of the laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea, apply to all waters of the United States connected with the high seas navigable by seagoing vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and

"Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States except the Great Lakes * * * shall be stated in one act: Therefore

"Be it enacted," etc. Act June 7, 1897, c. 4, 30 Stat. 96 (U. S. Comp. St. 1901, p. 2875).

Then follow the provisions as to lights, and by section 4 of said act it is provided that a vessel "navigated without complying with the provisions of this act shall be liable to a penalty of two hundred dollars, one-half to go to the informer, for which sum the vessel so navigated shall be liable and may be seized and proceeded against by action in any district court of the United States having jurisdiction of the offense."

The claimant makes the further contention that, inasmuch as the statute contains the provision as to local rules, the United States cannot through its attorney attempt to collect the penalties incurred, and that, if there be jurisdiction and if the boat be liable for the penalty specified, then such penalty belongs to the local district for which the rules are adopted, and the present action should be dismissed as not

properly instituted. This contention disregards, however, the plain meaning of the statute in providing a penalty for any violation. Congress may allow some local organization or district to prescribe rules, and those rules may prevail when they are not in conflict with the statutes of Congress; or Congress may pass laws which shall be in effect recognized as local rules, as in the present case. But a general penalty provided by a law of Congress, and not particularly specifying that the penalty shall go to somebody else, must carry with it the payment of the penalty into the treasury of the United States. Its subsequent disposal, or whether some one may be entitled thereto at the hands of the United States, cannot affect the form of the action under which the penalty should be sought to be recovered.

The libelant should recover, and may have a decree.

STIFFEL & FREEMAN CO. v. AMERICAN FERROFIX BRAZING CO.

(Circuit Court, E. D. Pennsylvania. December 6, 1910.)

No. 1,028.

EXPLOSIVES (§ 7*)—QUESTIONS FOR JURY—CONFLICTING EVIDENCE.

Conflicting evidence with respect to the cause of an explosion *held* sufficient to require the submission to the jury of the question whether it was caused by the negligence of defendant's agent.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 7.*]

At Law. Action by the Stiffel & Freeman Company against the American Ferrofix Brazing Company. On motions by defendant for new trial and for judgment notwithstanding the verdict. Motions denied.

H. M. McCaughey and Wm. S. Furst, for plaintiff.

Jere J. Crowley and Henry N. Smaltz, for defendant.

J. B. McPHERSON, District Judge. In my opinion there was competent testimony concerning the cause of the explosion, which required the court to submit the question. The witnesses did not agree, and the jury alone could decide the dispute, and say what the facts were and what inferences were properly to be drawn therefrom. The verdict was not a guess, without evidence. Concededly the defendant's agent was in a position where his incautious act might do harm; he was about to use a tool with which a spark might be generated; and I think the inference was legitimate that the explosion was the effect of such a spark. No doubt there was opposing testimony concerning the cause of the disaster, but the jury was the sole judge in this controversy.

A new trial is refused. Judgment notwithstanding the verdict is also refused, and to this refusal an exception is granted in favor of the defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

STANDARD FUEL SUPPLY CO. v. GRAY.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1910.)

No. 2,087.

SHIPPING (§ 184*)—DEMURRAGE—LIABILITY OF CHARTERER—EVIDENCE.

A charterer *held* on the evidence not liable for demurrage because of delay in discharging beyond the lay days fixed by the charter, where it was the duty of the ship to discharge, and it appeared that the charterer supplied facilities for receiving cargo from both hatches, but that the stevedore employed by the master refused to discharge from both because he was paid by the ton and could discharge from one hatch only with less expense to himself.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 596; Dec. Dig. § 184.*]

Appeal from the District Court of the United States for the Southern District of Florida.

Suit in admiralty by W. P. Gray, master of the schooner Kelly, against the Standard Fuel Supply Company. Decree for libellant, and respondent appeals. Reversed.

W. E. Kay, for appellant.

E. P. Axtell and C. D. Rinehart, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The issues in this case arise under the sixth article of the libel, to the effect that the charterer did not provide ample and sufficient facilities for the discharge of cargo, causing delay in unloading beyond the limit provided in the charter.

The charter party provided as follows:

"It is agreed that the lay days for loading and discharging shall be as follows: Commencing from the time the captain reports himself ready to receive or discharge the cargo ten running days for loading and discharging, Sundays and legal holidays excepted, and twenty-four hours reporting time at loading and discharging ports. And for each and every day's detention by default of said party of the second part, or agent, 5¢ per ton B/L weight per day, day by day shall be paid by said party of the second part, or agent, to said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside within reach of the vessel's tackles."

The main delay of the libellant in discharging cargo, to wit, from July 10th to July 13th, was caused by the master's misunderstanding the provision of his charter party as to whose duty it was to discharge the cargo, and late conclusion that it was the duty of the ship and that he needed therefor a stevedore.

There was only one stevedore available, to wit, a Mr. Warrell, who was agent of the Florida East Coast Railway and also agent of the charterer, and necessarily the libellant employed Warrell to discharge the cargo and thereby got ready to discharge, and commenced discharging on the morning of Tuesday, July 13, 1909, and completed discharging at 10:30 a. m. on the morning of the 19th of July.

It appears, from the master's evidence, the ship reported in Newport News, ready for cargo, at 9 a. m., June 25th; allowing, as re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quired by the contract, 24 hours for reporting time, the loading days commenced June 26, 1909, and the loading was completed July 1st. As an intervening day was Sunday, exactly five days were taken for loading, leaving five days, exclusive of holidays and Sundays, for unloading within the time fixed in the contract. It follows that on the 17th of July the whole ten days for loading and discharging had expired. Counting from that time, day by day, the ship was delayed the 25th of July and part of the 26th.

The question presented is whether that delay was caused by the fault of the charterer.

Under the contract the ship had a right to deliver cargo at the end of its tackle—that is, on the wharf alongside of the ship—and it was the duty of the charterer or his consignee to there receive cargo as the ship delivered the same.

The ship had two hatches, but actually delivered from only one hatch at a time. The contention is not that the charterer was in fault for not receiving as delivered, but that the ship could have discharged at both hatches and did not, because the charterer had not provided facilities to receive the cargo that would have been thus delivered.

There is no evidence that the ship specifically tendered to the charterer cargo from more than one hatch. The master testifies:

"We could only work one hatch at a time. I made the offer to use our steam, but Mr. Warrell said they could not do anything with but one hatch—one gang."

Being asked how soon this was after discharging commenced, he said:

"I don't remember. I know that it was one day he was on the wharf working one gang, and I asked if he could not put two gangs on if they used our steam, and he said he could not do anything with two gangs."

He afterwards fixed the time as the day after discharging commenced.

Warrell was the only other witness on the subject, and to understand his evidence in all its bearings it is given in full in note at the end of this case.

From the evidence of neither the libelant nor Warrell can it be found that a tender of cargo from more than one hatch was specifically made by libelant to Warrell as charterer's agent, and yet such tender was necessary to put the charterer in default for not furnishing facilities to receive cargo at ship's side.

The case seems to be that the libelant discussed the matter with Warrell as stevedore, and the libelant did not have the ability to discharge from more than one hatch at a time, because his stevedore could not or would not furnish more men; and, besides, he had only one hoister, and he would not at his own expense and loss use the ship's steam. The situation was peculiar, owing to the conditions at Mayport as to getting stevedore and discharging gang, knowledge of which is chargeable to the libelant, who was required under the contract to discharge his own ship, and although the delay for loading and discharging was limited.

To recover demurrage, the libelant must prove by a preponderance of evidence that the delay was caused by the fault or neglect of the charterer in failing to provide ample and sufficient facilities for the discharge of cargo. The evidence is that ample and sufficient facilities were furnished for all that, under the circumstances, the libelant did or could discharge, and, if the charterer was in fault, it is because it was responsible to the libelant for the circumstances which limited the libelant's capacity to discharge cargo. The libelant knew that Warrell was the agent of the charterer, and yet he employed him to be the ship's agent in the capacity of stevedore. As such stevedore, he seems to have controlled the situation, and apparently he did not much consider the interest of either the libelant or the charterer, but, in the interest of his real principal, the Florida East Coast Railway Company, conducted the business with the view of making most money under his contract which was to discharge the cargo at 25 cents per ton. Any delay over the time limit which resulted is not, under the evidence, imputable to the charterer—certainly not to any such extent as to make him liable for demurrage. The district judge was so doubtful about it that, although he allowed demurrage, he refused libelant costs for lack of diligence in asserting his rights.

It necessarily follows that the decree appealed from should be reversed.

And it is so ordered.

NOTE.

The evidence of Warrell, referred to in the opinion, is as follows:

"H. O. Warrell, being called as a witness in behalf of the respondent, and being first duly sworn, testified as follows:

"Questions by Col. Kay:

"Q. What is your position at Mayport?

"A. Agent of the Florida East Coast Railway, and do you want to know about the other agency?

"Q. What relation do you bear to the Standard Fuel Supply Company at the time this transaction with the schooner Kelly arose?

"A. As I understand it, I was authorized as their agent to sell their coal.

"Q. The matter I want you to direct your testimony to is in reference to the discharge of this 1,002 tons of coal which arrived in July, 1909, at Mayport, consigned to the Standard Fuel & Supply Company.

"A. And you want me to—

"Court (interrupting): Why didn't you work two hatches?

"A. You see it would have cost us more as stevedores to put up two runways to the vessel, and I told him at the time we reported that we were short of men and had green men working, about half and half, and we would have to send and recruit men to work two hatches, and to work green would cost more than working regular men.

"Q. Who pays for that?

"A. The captain pays for that, so much per ton.

"Q. Who was stevedore for the Kelly?

"A. The Florida East Coast Railway.

"Q. What interest did the Standard Fuel & Supply have in the stevedoring of the vessel?

"A. Nothing in the world.

"Q. The captain has testified that the main reason why two hatches could not be worked was to have discharged from two hatches it would have been necessary to cover with soft coal, hard coal already there. Is that claim correct?

"A. No, sir.

"Q. I will get you to look at this photograph of the situation at Mayport.

"Court: The schooner lay broadside along the wharf?

"A. Yes, sir.

"Q. How was she to discharge cargo?

"A. A bin was built upon the dock—nothing but planking—and there was a runway the whole length of the bin; a runway on each side.

"Q. Show the court the photograph of the dock and point out where the soft coal and the hard coal was discharged.

"(Witness goes up to the judge's bench, with proctors, and explains photograph and answers questions in reference thereto, which the reporter could not hear.)

"(Note by the Judge: Such explanation of said photograph and testimony was in substance that the runway on the right was where the cargo of soft coal was discharged. That on the left was not used, the bin being filled with hard coal. The runway on the left could have been used by building an extension over the hard coal so the soft coal could have been put on the back of the bin without putting the soft coal over the hard coal, but that he had no authority to build such runway. James W. Locke, Judge.)

"Court: You did not understand that it was part of the duty of the Standard Fuel & Supply Company to provide a convenient place to put the coal?

"A. Yes, sir; but I say they could have delivered the cargo up here—referring to the photograph, pointing to the right hand—they had to take it whether it was convenient to them or not.

"The Court: They refused to take it there?

"A. No, sir; the question was never put up to them—they spoke to me once or twice about working two hatches, but I declined to discharge both hatches. When the captain left it was his intention to claim—he asked me to work two hatches, and I told him I could not.

"Court: As I understand it, had the hard coal not been there, there was no reason why you could not work two hatches?

"A. There was no reason why the coal could not be put out here (indicating on photograph, pointing to the back part of the hard coal bin).

"Court: Why didn't you do it?

"A. Because, judge, the stevedore was the Florida East Coast Railway, and I am not going to the expense of getting up a runway and hiring steam to put it there.

"Q. Now, Mr. Warrell, do I understand you that the existence of this hard coal did not prevent you from rigging up staging and discharging from two hatches?

"A. No, sir.

"Q. It was competent to let the hard coal remain, and put a runway over it and have ample space to discharge from two hatches from the Kelly?

"A. Yes, sir.

"Q. And the reason it was not done, it would cost the stevedore more to discharge from two hatches than one?

"A. Yes, sir.

"Q. You were getting 25 cents per ton from the captain to discharge the cargo, and, when the steam was offered, there was nothing said about charging for it?

"A. No, sir.

"Q. And they usually charge for stevedores using steam \$10 a day?

"A. Yes, sir.

"Q. You did not feel like paying that?

"A. No, sir.

"Q. What was the weather condition at the time the Kelly was there in July?

"A. I don't remember.

"Q. What time of year was it?

"A. Summer time.

"Q. Was it hot or cold?

"A. Hot.

"Q. What difference does hot weather make in getting men and in their efficiency?

"A. As for getting men, I could not say; but, of course, a man won't work down in the hold of a vessel when the weather is very hot as well as in the winter.

"Cross-examination:

"Q. Did not the master of the Kelly offer you coal to be taken out over that run?

"A. No, sir.

"Q. Did he say anything about it?

"A. He asked me if I could discharge it.

"Q. Didn't he say he did not offer it?

"A. No, sir; he asked me if I would.

"Q. You mean he should go down and shovel it up and offer it to you?

"A. When I say he did not offer the coal to be taken out of there, I mean he did not order me to—he suggested that we take cargo out of there.

"Q. Why didn't you?

"A. The Florida East Coast had only one hoister.

"Q. But you said nothing to him about what he would charge for his steam?

"A. No, sir; customary price is \$10.

"Q. The only thing, you would make more as a stevedore working one hatch?

"A. Yes, sir.

"Q. He wanted you to take out coal from both hatches?

"A. Yes, sir.

"Q. And the only reason you could not, you did not have men and could not get others there?

"A. I was short of men and did not have the men.

"Q. And because you did not have a place to put it?

"A. Yes, sir; I could put it back there, but we never argued the question. I told him I could not do it and that ended it.

"Court: The only question is whether the Standard Fuel & Supply Company offered ample facilities for the discharge of that coal within the lay days?

"Q. Did you have space there for the reasonable discharge of the vessel within the lay days?

"A. Yes, sir.

"Q. What figure did the hard coal cut in preventing the discharge if you had wanted to make it?

"(Witness again goes up to the judge's stand with proctors and testifies with reference to the photograph and points out and explains how a runway could have been put up from the main runway so as to have run it over the hard coal into the back of the bin.)

"Q. How many tons could you have put in here (pointing to photograph) and here (pointing to photograph)?

"A. About 400.

"Q. More than was put?

"A. No, before it was full, back here (indicating).

"Q. After you finished?

"A. No, sir; because it was full then.

"Q. You could have taken 1,002 tons?

"A. Yes, sir.

"The Court: The only thing you thought of was you could make more money?

"A. Yes, sir.

"Q. You did not think of demurrage?

"A. Demurrage—we did not think of that.

"Q. You thought you were employed by the captain?

"A. Yes, sir.

"Q. Didn't you consider you were under his orders?

"A. Yes, sir; but I did not think of it that way.

"Q. If you can take coal out of one hatch at a cost of 10 cents, and to take it out of two would cost 20 cents, and you are to get 25 cents, do you think you are doing your duty to only take out of one?

"A. I don't know about that. We did not hold ourselves out as stevedores for the public. About 90 per cent. of the freight coming there is for the Florida East Coast Railway. We did not take advantage of our position. We charged the same as is paid Jacksonville where they obtain 25 cents per ton, and, if we do it for them as cheap as any one else, they should not expect to load unnecessary expense upon us.

"Q. They got 25 cents for bringing a ton of coal? 25 cents per ton was charged for taking it out? They got 55 cents for bringing it?

"A. Yes, sir.

"Q. (by Mr. Axtell). Was Mr. Salas or any other person of the Standard Fuel & Supply Company there while the ship was there?

"A. No, sir.

"Q. You were the only person present representing them there?

"A. Yes, sir.

"Q. You were the person representing them there to say where the coal should be put?

"A. Yes, sir.

"Q. You were the only agent there while the coal was being discharged?

"A. Yes, sir.

"Q. (by Col. Kay). As agent did you have anything to do with the stevedoring the vessel?

"A. No, sir.

"Q. There was ample room to put the coal?

"A. Yes, sir.

"Q. And it was a question of facilities and not a question as to the stevedore?

"A. Yes, sir."

CLARKE v. ROGERS.

(Circuit Court of Appeals, First Circuit. December 13, 1910.)

No. 878.

1. BANKRUPTCY (§ 159*) — "PREFERENCE" — GENERAL NATURE — "CREDITOR" — "DEBT."

Nothing is within the purview of the provisions of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), relating to preferences except with reference to debts which may be proved for a dividend, but, on the other hand, anything which may be proved is within the purview of such provisions.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 159.*

For other definitions, see Words and Phrases, vol. 6, pp. 5498-5499; vol. 8, p. 7759; vol. 2, pp. 1864-1886; vol. 8, p. 7628; vol. 2, pp. 1713-1727; vol. 8, pp. 7622-7623.]

2 BANKRUPTCY (§ 318*)—PROVABLE CLAIMS—IMPLIED CONTRACTS.

Independently of his bond, there is an obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled, which is of a contractual character, and affords a basis for proof of a claim against his estate in bankruptcy therefor by his successor in the trust; the court not following the English practice in this particular.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

3. BANKRUPTCY (§ 163*)—"PREFERENCE"—RESTORATION OF EMBEZZLED TRUST FUND.

A bankrupt was testamentary trustee of a number of estates from all of which he had embezzled funds. While insolvent, at the instance of the surety on one of his bonds, he deposited the remaining securities in his hands belonging to the estate with others to make up his shortage, and the same passed into the hands of his successor in the trust after his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankruptcy. *Held*, that in equity the trustee occupies always a double capacity, so that as an individual he might theoretically be a debtor to himself as a trustee, and prefer himself as such; that, while there is no contract liability so long as there is no default, a contract liability arises on the default; and that consequently the transfer of such substituted securities constituted a preference, and they were recoverable by his trustee under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 163.*]

Appeal from the District Court of the United States for the District of Massachusetts.

In the matter of Shaw, bankrupt. Appeal by George Lemist Clarke, trustee, from an order of the District Court. Affirmed.

Harrison M. Davis and Dunbar & Rackemann (Felix Rackemann, on the brief), for appellant.

Melvin M. Johnson and Johnson & North (A. Farley Brewer, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is an appeal from the final decree of the District Court as to the matter of an alleged preference in bankruptcy. The bankrupt, Shaw, was trustee of various testamentary trusts, as that expression is known in the statutes of Massachusetts, and which in accordance with those statutes were subject to the jurisdiction of the probate courts. It may be that he was trustee of other trusts, but it is not necessary for us to go into details in reference thereto. The appellee, Rogers, is trustee in bankruptcy of Shaw's estate. The appellant Clarke is testamentary trustee under the will of Samuel Parsons as successor of said Shaw in said trust. Rogers as such trustee in bankruptcy seeks to recover from Clarke as such testamentary trustee certain securities alleged to have been received as the result of a transaction which operated as an unlawful preference under the statutes in bankruptcy. The decision was in favor of Rogers as trustee in bankruptcy, and thereupon Clarke as such testamentary trustee appealed to us.

Beyond what we have stated, the facts are sufficiently covered by the opinion of the District Court, as follows:

"The material facts are not in dispute. In the referee's opinion, which accompanies his certificate, he has found them and fully set them forth. They may be stated in brief as follows: The bankrupt, being insolvent and knowing himself to be insolvent, was discovered by the surety on his bond, as trustee under the Parsons will, not to be in possession of some of the securities which formed a part of the trust estate and which should have been in his possession as trustee. He was being urged by the surety to make good this shortage. For the purpose of doing so, he placed the bonds in question in a safe deposit box, taken and agreed on by himself and the surety as a separate place of deposit for the securities belonging to this trust. In the box were placed also those securities belonging to the trust funds which had not gone out of his possession. All the securities thus placed in the box and held as constituting the trust funds have since remained there. The bankrupt has been removed as trustee, and the respondent, his successor in the trust, has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at present the possession and control of the box, including the bonds in question.

"The bankrupt had at the time more than 25 other trust estates in his charge as trustee. There was, in the case of each, a shortage for which he was responsible and he knew the fact to be so. The total amount of these shortages exceeded \$350,000.

"It has not been shown that any of the bonds used as above to make good the shortage in the Parsons trust estate, or that any of the money wherewith the bankrupt purchased those bonds, can be identified as belonging to any one of the other trust estates in the bankrupt's charge. He drew out and used to purchase certain of the bonds a savings bank deposit of \$1500 belonging to one of the Parsons trust funds; but with that exception the money wherewith the bonds were bought as well as the bonds themselves must, for the purposes of the questions to be decided, be regarded as the bankrupt's individual property at the time he set them apart in the manner stated, to be thereafter held as trust property."

The provisions of the statutes in bankruptcy in regard to preferences, so far as they relate to this case, are found in Act July 1, 1898, c. 541, § 3, par. a, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as follows:

"Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."

In section 57g, referring to proofs of claims, "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," as amended by the act of February 5, 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]), in details not important here.

In section 60a, as amended by the act of February 5, 1903:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"b. If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

All the forms of transactions which are denounced by the statutes as preferences are found in the case at bar, and also the substance thereof; unless only that there are here no creditor and debtor as known to the common law, and nothing indeed except a tortious application by Shaw of the assets of the Parsons trust. The entire transaction, which consisted in the misappropriation by Shaw of securities in his hands as testamentary trustee, and returning the same, takes on in its general aspect none of the phases of the relations which grow out of giving credit and incurring debt, especially in the manner of merchants, which is the usual subject-matter of statutes in bankruptcy. We repeat that, so far as the mere forms to which we have referred are concerned, the transaction was within four months of the filing of the petition in bankruptcy; and the intent on the one side to prefer, and the reasonable cause on the other side to sufficiently charge the

creditor with knowledge of an intent to prefer, are found here. Therefore we must search beneath the surface in order to determine rightly the issues of this litigation.

It is not necessary that we should discuss the proposition as to intent and knowledge, because it is absolutely apparent that the views expressed by the learned judge of the District Court are correct, to the effect that for this purpose the intent entertained by Shaw was in his individual capacity, while the reasonable cause to assume the intent on the part of the preferred creditor appertained to Shaw as testamentary trustee in that capacity. Shaw was not a mere "dry" trustee, but is presumed as testamentary trustee to be the only person who can represent the estate in his hands; and his knowledge necessarily affects the entire trust with which he is charged, and stands for the knowledge, perhaps, of persons not yet in existence. There is no other way in which the conditions of knowledge, and the results which flow out of notice received or given, can be operative where a testamentary trust is in question. Therefore we address ourselves only to the peculiar features which we have named, postponing all question as to how far section 60b in referring to persons to be benefited by preference has application hereto.

Before proceeding further, we will give the provisions of the statutes defining claims provable in bankruptcy, because it seems to be an accepted doctrine that preferences are within the same subject-matter as claims provable, and it is only with reference to claims provable that preferences can be declared. *Richardson v. Shaw*, 209 U. S. 365, 381, 28 Sup. Ct. 512, 52 L. Ed. 835. Section 1 of the act of July 1, 1898, being the section with reference to definitions, enacts in paragraph 9 that "'creditor' shall include anyone who owns any demand or claim provable in bankruptcy," and in paragraph 11 that "'debt' shall include any debt, demand or claim provable in bankruptcy." Section 63 of the same statute reads as follows:

"Sec. 63a. Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. (b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

A claim based on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. For example, it is a settled rule that where a tort-feasor by conversion of

personal property has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract. This, of course, is a mere fiction of law; but, like all other such fictions, it is effectual when it will accomplish the ends of justice. So that, in that case, the owner of the property may proceed for a tort, or, at his option, on an implied contract, which would entitle him to make proof under section 63. An illustration appears in *Tindle v. Birkett*, 205 U. S. 183, 186, 27 Sup. Ct. 493, 51 L. Ed. 762. On the other hand, a mere tort, for example, a trespass involving a mere destruction of property, does not lay the foundation for a proceeding under that section. The force of *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, is not correctly understood by the appellee here. This is made plain by what is said in *Dunbar v. Dunbar*, 190 U. S. 340, 350, 23 Sup. Ct. 757, 47 L. Ed. 1084, in the opening paragraph; so that the result of it all is that claims for mere torts, like personal injuries and injuries to real property, are not provable, as was determined by the Circuit Court of Appeals for the Third Circuit in *Brown & Adams v. United Button Co.*, 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961 (1906), and by the Circuit Court of Appeals for the Second Circuit in *In re New York Tunnel Co.*, 159 Fed. 688, 86 C. C. A. 556 (1908). A clear historical account of all these decisions will be found in Mr. Woodman's excellent work on Trustees in Bankruptcy, pp. 690, 691, 692. The question whether Shaw's default with reference to the assets of his trust is to be classified with mere torts will be considered later.

Neither, as we have said, is there any difficulty arising from the fact that, in these transactions, Shaw as an individual was dealing with himself as trustee. We have several times observed on the fact that the administration of bankruptcy proceeds on equitable principles. At the common law the husband and wife are held as one; but yet we showed in an elaborate discussion in *James v. Gray*, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321 (1904), that a wife may under equitable rules prove against her husband's estate in bankruptcy. It must be at once conceded that we cannot proceed here on principles other than those which would govern us in the event Shaw had resigned his trust, and Clarke had been appointed his successor therein, before the loss to the trust had been made good. In other words, it follows beyond all question that we cannot find that what occurred here was not a preference in the event we should be compelled to find that the same transactions were a preference when passing between Shaw as an individual and his successor in the trust. However, as to this duality, the equitable rules are so clear that we do not find it necessary to cite further authorities, or adduce other propositions in regard thereto, than we have already cited and adduced.

While the definitions of "creditor" and "debt" do not assume to be exclusive, but only inclusive, nevertheless it is undoubtedly the general construction of the statutes in bankruptcy that nothing is within their purview so far as preferences are concerned, except with reference to debts which can be proved for a dividend. On the other hand, it must be accepted that anything which can be proved for a dividend is within the purview of those portions of the statutes which relate to

preferences, whether or not they are strictly shadowed out by the words "creditor" and "debt," as especially defined in the statute or as otherwise reasonably understood. We must admit this, notwithstanding we said at the outset that the transactions before us here were not on their face within the usual contemplation of statutes in bankruptcy. Moreover, it will be a great hardship if the various estates of which Shaw was trustee cannot recover any part of their loss of about \$350,000 by sharing in his bankrupt estate. This may, of course, in this instance, be but a very small dividend, but in another instance it might be very near the face of the default. Any construction which would leave such a result as that cannot, of course, be accepted unless fairly forced upon us.

The cases we have referred to show that in section 63b the words, "unliquidated claims" do not enlarge what precedes in section 63a, so that we must ascertain whether what is involved here comes within that portion of that section: (1) Relates to fixed liabilities; (2) to costs; (3) also to costs; (4) to open account or contracts express or implied; and (5) to judgments. None of these are available here unless it is "contracts express or implied."

The position of Shaw as testamentary trustee, until he was guilty of some breach of trust, involved no contract known to the common law. It can be said not to involve any contract whatever, because there is no person with whom he contracts; otherwise, perhaps, with a trust *inter vivos*. Aside from that distinction, the relation of a trustee, unless there is some express agreement on the face of the deed of trust, involves no contract. Pollock, in his *Principles of Contract* (7th Ed.) at pages 208 and 209, struggles with an attempt otherwise, but without success. He treats this under the head of a general discussion with reference to the rights of persons as to contracts between other parties. There is no occasion for such a discussion with reference to the rights of third persons under a proper trust, as a proper trust relates not to a matter of contract, but to a matter of conscience according to the development of the equitable law in reference thereto. The well-known proposition which Mr. Pollock restates that, by the creation of a trust, duties are imposed on, and undertaken by, the trustee which persons not even in existence at the time of the creation of the trust may afterwards enforce, puts it beyond doubt that there is no contract involved. He concludes by reiterating the proposition that, although every trust may be said to include a contract, it includes so much more, and trusts are so distinct, that the complex relations involved in them cannot be reduced to the ordinary elements of contract. The impossibility of likening the relation of a trustee, properly so speaking, to a contractor, is well illustrated in the *Girard Will Case*, 2 How. 127, 196, 11 L. Ed. 205, where it is pointed out that a valid trust may exist, although the common-law court cannot enforce it, and although there were no courts of equity existing at the time in the state of Pennsylvania, to which the opinion related, subject to such remedies as might afterwards be afforded by the Legislature. However, this topic is cleared up thoroughly by Hill on Trustees (4th Am. Ed.) 1, where the well-known fact is positively reiterated that, as against trustees of the class of

testamentary trustees, the only remedy is by the writ of subpoena issuing from the court of chancery.

At bar, however, we have a trustee guilty of a default. In Massachusetts he had violated a penal law, and was liable to imprisonment. Rev. Laws 1902, c. 208, § 48. He was, of course, under obligation to restore the assets which he had embezzled, or the value thereof, to the trust. It appears by the citations of the statutes of Massachusetts that this obligation would ordinarily be enforced by a removal from his office by the action of the probate court, followed by the appointment of his successor in the trust, further followed by an order to make good to the new trustee whatever deficiency there was. In the present case, it appears, that Shaw gave the usual probate bond, with a surety or sureties, and that the ultimate remedy would be by a suit on that bond. Therefore, in this particular case, there was an express contract obligation; that is, the bond. It is true that, in the ordinary course, enforcing the bond would be at the end of the proceedings, and not at the beginning. Nevertheless, as the equitable rules which govern in bankruptcy always look to the end, and disregard the intervening details as only steps to reach the end, there was in this case a contract from the beginning—that is, the bond—which was capable of liquidation on the rules explained in *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, already referred to. Aside from this, and independently of the bond, we believe there is an obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled, which is of a contractual character. The method of recovering upon this would be so far purely incidental that the Legislature might at any time provide for an action at common law in behalf of the successor as trustee, whatever might at any time be the preceding remedies either by a suit in equity, or by a suit on the bond, or by a summary order of the court having jurisdiction in reference thereto.

With reference to the authorities on this topic, no decisions of the federal courts have been brought to our attention which are in any way binding on us. *McNaboe v. Columbian Mfg. Co.*, 153 Fed. 967, 83 C. C. A. 81, a decision by the Circuit Court of Appeals for the Second Circuit (1907), went off on the single proposition that the party charged with receiving the preference had no knowledge whatever of the facts in reference thereto. It related to stolen money which had been restored. It was held that a preference had not been established; although, of course, as money was involved, the just owner of it had a right to an action for money had and received on an implied contract. *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, already referred to, only reiterated what we have already said in reference to the right on behalf of an injured party, in some cases of tort, to waive the tort and take his place with the creditors of the estate. The implication, of course, is that, without the waiving of the tort, the claim could not be proved, justifying positions which we have already taken, but not involving the crucial matter which we are now discussing.

The English decisions are not very satisfactory from any point of view. The principal difficulty in applying them with us is that

from the condition of the law as shown in Robson's Bankruptcy (2d Ed. 1872), 126, and sequence, continuing to the present time, a preference may not be invalid, provided it does not involve a leading purpose to give an advantage to the creditor. In other words, when the main purpose was to save the debtor through quieting the creditor by giving him a preference, the act may not be unlawful. Perhaps it cannot be said that this was at all times the only ground on which the line of English cases to which we refer rested, yet it was apparently the turning proposition in *Sharp v. Jackson* (1899) A. C. 419. This, of course, must be regarded as the leading and authoritative English decision. The holding there was that the trustee, who had been guilty of a breach of trust, and was insolvent, did not accomplish an unlawful preference where his purpose was to shield himself from the consequences of his default, although his preferential act was without any pressure or special request. William's Bankruptcy Practice (9th Ed. 1908) takes up this topic at page 272, without any positive proposition in the author's own behalf. The author cites the line of cases with a statement that it seems that a defaulting trustee and his cestui que trust, or cotrustee, do not stand in the relation of debtor and creditor. That is the principal proposition urged on us in this case. He proceeds that this doctrine has been disapproved by Lord Halsbury in *Sharp v. Jackson*, at page 426. Lord Halsbury said that misappropriation may involve something more, but that it does create the relation of debtor and creditor he could have no doubt. *Sharp v. Jackson* is found under another title, decided by the Court of Appeal in 1897, 2 Q. B. 19, and is put on the same ground as stated in the House of Lords. In the latest case in England on this topic, *In re Lake* (1901) 1 Q. B. 710, this dictum of Lord Halsbury was questioned, and the case put squarely on the same propositions as governed *Sharp v. Jackson*, although at page 718 Lord Justice Stirling quotes from Lord Esher in a way which comes to the proposition that a man should be allowed to repent and repair his former evil deeds, although the result would defeat the purposes of the bankruptcy statutes. The first pronouncement in this direction we find is in *Ex parte Stubbins*, 17 Ch. D. 58, decided by the Court of Appeal in 1880. This seems to be based on the objection with which we started at the outset, that there is nothing in the transactions here which is within the general purposes of statutes in bankruptcy. The next case was decided by the Court of Appeal in 1886, *Ex parte Taylor*, 18 Q. B. D. 295. Apparently that case rested on substantially the same grounds as *Ex parte Stubbins*; that is, that there is present no relation of debtor and creditor. In fact, it expressly followed *Ex parte Stubbins*. But, as we have said, we must adopt *Sharp v. Jackson* as the final view of the English courts, based, as we have also said, on the proposition that the primary purpose of the transfers was to save the debtor, rather than to aid the creditor. We do not understand that the federal courts have gone so far as to justify the application by us of so broad a rule. It may be that, under some circumstances of immediate intimidation, with threats to follow them by immediate action, we might be justified in holding that no elements of a voluntary preference are present, although we doubt that. So far as this case is con-

cerned, we cannot go beyond what we decided in *Hardy v. Gray* (1906) 144 Fed. 922, 925, 75 C. C. A. 562, where we applied *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971, the effect of which is to justify a transfer where the ruling motive is a belief that, if the immediate creditor was quieted, the debtor might go on with his affairs, ultimately recuperate his business and discharge all his debts.

On the whole, we find nothing either in the federal or the English decisions which we think would justify us in reversing the conclusions reached by the learned judge of the District Court.

In this case it appears that the surety on Shaw's bond as testamentary trustee under the Parsons will was aware of Shaw's general financial condition and of his defalcation, and urged the restoration of the trust. We have not deemed it necessary to consider whether, under the circumstances, this surety was benefited in such a way that a suit under the statutes in bankruptcy would lie against him as one benefited by a preference, even if the present proceedings were not maintainable. We prefer to put the case on the broader grounds which we have expounded.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal.

DONOVAN v. GREENFIELD & T. F. ST. RY. CO.†

(Circuit Court of Appeals, First Circuit. December 13, 1910.)

No. 865.

1. CARRIERS (§ 281*)—CARRIER OF PASSENGERS—DUTY OF CARE TO INTOXICATED PASSENGER.

A carrier, which by collecting fare from a person known to be intoxicated accepts him as a passenger, is bound to exercise reasonable care for his safety, having regard to his known condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1095; Dec. Dig. § 281.*]

2. CARRIERS (§ 383*)—ACTION FOR DEATH OF PASSENGER—QUESTIONS FOR JURY—EJECTION OF INTOXICATED PASSENGER.

Plaintiff's intestate, on a cold night in winter and when badly intoxicated, boarded an interurban car on defendant's electric line. The conductor collected his fare, but afterwards ejected him at a point three-quarters of a mile from any shelter and where the snow was 2½ feet deep, and he was struck and killed by the returning car. *Held*, in an action to recover for his death, that, whether or not defendant had the abstract legal right to eject him, it was liable if it failed to exercise reasonable care for his safety in doing so, in view of his known condition, which was a question for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 383.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action at law by John J. Donovan, administrator, against the Greenfield & Turner's Falls Street Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Joseph Madden, for plaintiff in error.

Frederick L. Greene, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 19, 1911.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. In this case the plaintiff's intestate, Cornelius Haggerty, boarded one of the defendant's cars at a place called Miller's Falls, in Massachusetts, about 6 o'clock in the afternoon, on the 14th of February, 1904. The night was cold and stormy, and Haggerty was so badly intoxicated that he staggered. His destination was Turner's Falls. His fare was collected by the conductor, and he rode 3 or 4 miles, and within $1\frac{1}{2}$ or 2 miles of his destination.

He was forcibly ejected, and the evidence tended to show that he was pushed or thrown off by the conductor while the car was moving slowly, and left within 10 or 12 feet of the car track, with his back towards the car. The snow was something like $2\frac{1}{2}$ feet deep above the track, and piled slanting upward and outward therefrom.

At the point where he was left there was no shelter or accommodation, except a waiting shed, open on two sides, and which was three-quarters of a mile from any habitation.

The run from the place where Haggerty was ejected to Turner's Falls required something like 10 or 12 minutes. Soon after its arrival the car was taken in charge by another conductor, for its return trip, who was told by the conductor who ejected Haggerty that he had left the man up there and to look out for him, and he was told this on account of the man's condition as to intoxication. The car, on its return trip, struck Haggerty in the head, and Haggerty died the next morning from the injury.

At the conclusion of the plaintiff's evidence, the defendant moved for a verdict, and the jury was thereupon directed to return a verdict for the defendant. The motion for the verdict is not set out in the record, and therefore the particular ground upon which the verdict was directed does not distinctly appear; but presumably it was upon the ground that the defendant had a right to eject a badly intoxicated person from its car.

We do not think the case necessarily turned upon the question of the defendant's abstract right in that respect.

It is conceded that Haggerty was on the car and that the conductor collected his fare. The defendant, therefore, accepted him as a passenger. Having thus accepted him, the care which the railroad was bound to exercise with respect to his safety would have reference to his known condition, and if he was so badly intoxicated and so badly behaving that his ejection was justifiable, and if he was in a helpless condition, the special duty was upon the defendant to exercise the right of ejection in a reasonable manner.

The general rule of care required of an intoxicated person, in dangerous situations, is the same as that required of a sober person; still, when a carrier, having knowledge of a person's condition in such respect, accepts him as a passenger, and when the relations of carrier and passenger exist, the carrier is bound to exercise greater care with respect to him than if he were sober.

We think the case of *Hudson v. Lynn & Boston Railroad Co.*, 178 Mass. 64, 59 N. E. 647, is in accordance with the cases which involve situations like this, and that case is to the effect that if the right of ejection is exercised in a wrongful or unreasonable manner, and injury follows, it gives the injured party a right of action. The right of action results, of course, not from the fact of ejection, which, in the abstract, is justifiable, but from the fact that the party exercising the legal right unreasonably and carelessly subjects the helpless party to danger and consequential injury.

The Massachusetts case, to which we have referred, is a strong case in favor of the plaintiff, and is so like the case at bar that its reasoning becomes especially pertinent.

That case deals with the situation, there in hand, as though it were manifestly unreasonable and wanton negligence to eject an intoxicated and helpless person in a dark road on a wet night, at a spot distant from human habitation, near the path of cars and other vehicles, and near marshes which adjoin the road on both sides, with no one to care for or protect him.

It is, of course, well understood that badly intoxicated persons may keep going while in a crowd and under excitement, but, if left alone in the darkness and cold, that they are quite likely to fall into a stupor, regardless of any situation of danger; and we think that in this case the plaintiff was entitled to go to the jury upon the question whether the defendant, having reference to the known condition of intoxication, exercised its right of ejection in a reasonable manner. The care required of the defendant, at the time of the ejection, was that degree of care which would be exercised by men of ordinary care and prudence in the enforcement of a legal right in a similar situation, and the similar situation would have reference, of course, to the time, the place, and the man's condition.

While it might not be culpably careless, but, on the contrary, proper, to eject a man in his right mind in such a place in the daytime in warm weather, it might amount to unwarrantable culpability to eject an intoxicated and helpless person at such a place on a cold winter night. The reasonableness of the ejection is something to be determined by a jury in a case like the one before us.

The judgment of the Circuit Court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers his costs of appeal.

CITY OF MEMPHIS et al. v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Sixth Circuit. November 17, 1910.)

No. 1,928.

1. COURTS (§ 405*)—FEDERAL COURTS—ASSIGNMENTS OF ERROR.

Even when the assignments of error in the Circuit Court of Appeals are insufficient, this does not of itself constitute ground compelling the dismissal of an appeal, as the court may nevertheless, under the proviso contained in rule 11 (150 Fed. xvii, 79 C. C. A. xvii), notice a plain error not assigned.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

2. RAILROADS (§ 75*)—RIGHT TO CONSTRUCT AND OPERATE—LEGISLATIVE GRANT—TENNESSEE STATUTE—"MANUFACTURING PLANT."

Acts Tenn. 1903, c. 110, § 1, granting authority to any company operating a railroad in the state to build lateral roads not exceeding 15 miles in length, extending from the main stem or any branch of its line "to any mill, quarry, mine, manufacturing plant or to the bank of any navigable stream, without the making of any amendment to the charter of said railroad," does not confer the right on a railroad company to the exclusion of the municipal authorities to build a branch track within the limits of a city to a connection with the private tracks of a cotton compress company a quarter of a mile from a river, the compress being 500 feet from the river and having no track connection therewith, on the ground that it is a lateral road to the bank of a "navigable stream," nor on the ground that the compress is a "manufacturing plant," within the meaning of the statute; it not being such a plant within any just or recognized definition of the term.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 184; Dec. Dig. § 75.*]

3. RAILROADS (§ 75*)—RIGHT TO CONSTRUCT AND OPERATE—LEGISLATIVE GRANT—TENNESSEE STATUTE—"TERMINAL FACILITY"—"TURNOUT"—"SWITCH."

Neither is such a track a terminal facility or a turnout or switch within the meaning of Acts Tenn. 1903, c. 216, authorizing the construction of such tracks.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 75.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6841-6842; vol. 8, p. 7138.]

4. RAILROADS (§ 75*)—RIGHT TO CONSTRUCT AND OPERATE—MUNICIPAL GRANT.

Under the provisions of the charter of the city of Memphis giving it entire control over all the city streets and power "to permit and regulate the laying off of railroad tracks and iron and the passage of railroad cars," vesting in the city council charge and control of the granting of all franchises and special privileges, and providing that "no franchise shall be granted or sold to any commercial railroad * * * or other quasi public corporation except by ordinance fully guarding and protecting the rights of the public," in the absence of direct legislative authority, a railroad company has no right or authority to build or maintain a track within the city and over its streets without the consent of the council, and where the council has granted such right by an ordinance, subject to certain conditions, one of which is that the company shall file a written acceptance of its provisions, such ordinance is an entirety, and its acceptance is a condition precedent to the grant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 183-191; Dec. Dig. § 75.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 183 F.—34

5. RAILROADS (§ 49*)—"TURNOUT"—"SWITCH."

The words "turnouts" and "switches," in Acts Tenn. 1903, c. 216, providing that any railroad company may build turnouts and switches without altering its charter, relate to tracks in the nature of side tracks adjacent to and used in connection with another line of track, and do not refer to a track which branches off entirely from the existing line to a distant objective point.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 110-112; Dec. Dig. § 49.*]

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

Suit in equity by the St. Louis & San Francisco Railroad Company against the City of Memphis and George T. O'Haver, its Chief of Police. Decree for complainant, and defendants appeal. Reversed.

C. M. Bryan, City Atty., and T. K. Riddick (Jas. L. McRee, of counsel), for appellants.

E. E. Wright and C. W. Metcalf, for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. This is a bill filed by the St. Louis & San Francisco Railroad Company, a Missouri corporation, the complainant below, against the city of Memphis, a municipal corporation of Tennessee, and George T. O'Haver, its chief of police, the defendants below, for the purpose of enjoining the defendants from interfering with the complainant in the construction and use of a lateral track in the city of Memphis.

A restraining order was granted under the bill and later a preliminary injunction. At the final hearing, a decree was rendered in which the court found, in general terms, that there was equity in the bill, and that the complainant was entitled to relief as therein prayed, and therefore ordered, adjudged, and decreed that the defendants be perpetually enjoined and restrained from interfering with the construction or reconstruction of the track in question, and from interfering in any manner with the quiet and peaceable use of such track for railroad purposes, and taxed the costs of the cause against the defendants. The defendants appealed to this court, filing an assignment of errors in substance as follows: (1) That the court erred in holding in its final decree that the complainant was entitled to an injunction and in perpetually enjoining and restraining the defendants from interfering with the construction and use of the complainant's track; (2) that the court erred in granting a preliminary injunction; and (3) that the court erred in adjudging the costs against the defendants.

The appellee as a preliminary matter has moved to dismiss the appeal because of the failure of the appellants to file sufficient assignments of error as prescribed by rule 11 of this court. This rule provides that the appellant shall file with his petition for appeal "an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged," and that "errors not assigned according to this rule will be disregarded, but the court, at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its option, may notice a plain error not assigned." 150 Fed. xxvii, 79 C. C. A. xxvii.

We are of the opinion that the motion to dismiss is not well taken. It appears to be true that under the decisions of this court in *Deering Harvester Co. v. Kelley*, 103 Fed. 261, 43 C. C. A. 225, *The Myrtie M. Ross*, 160 Fed. 19, 87 C. C. A. 175, and *Garrett v. Pope Motor Car Co.*, 168 Fed. 905, 94 C. C. A. 334, involving the sufficiency of general assignments of error to final decrees and judgments, and other decisions of this court and of the Circuit Courts of Appeals of other circuits therein cited, the assignments of error filed in this case, in so far at least as they relate to the final decree in the court below, are too vague and indefinite to comply with the requirements of rule 11. Whether under the rule stated in *Doan v. American Book Co.* (7th Circuit) 105 Fed. 772, 45 C. C. A. 42, the second assignment of error, relating to the granting of the preliminary injunction, is also insufficient, need not now be determined, since we are of the opinion that, even where the assignments of error are insufficient, this does not of itself constitute ground compelling the dismissal of an appeal, as the court may nevertheless, under the proviso contained in rule 11, notice a plain error not assigned. This has been held in two cases involving the effect of a similar rule of the Supreme Court, in which motions to dismiss writs of error and appeals were denied, although no assignments of error had been filed. *School District of Ackley v. Hall*, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237; *United States v. Pena*, 175 U. S. 500, 502, 20 Sup. Ct. 165, 44 L. Ed. 251. Hence, where sufficient assignment of errors have not been filed, the real question is whether the court shall determine, in the exercise of its option, to notice a plain error not assigned, or, on the other hand, if no error appears of which the court deems itself warranted in taking notice, the judgment or decree below shall be affirmed for want of sufficient assignment of errors, in accordance with the practice followed in *Garrett v. Pope Motor Car Co.*, *supra*, and other cases.

We accordingly overrule the motion to dismiss the appeal, and proceed to examine the record for the purpose of determining whether it presents any plain error "of a controlling character" of which the court would be warranted in taking notice, under the rule laid down by this court in *Mast & Co. v. Drill Co.*, 154 Fed. 45, 51, 83 C. C. A. 157.

The material facts essential to a determination of the legal questions involved are substantially these:

The complainant, the St. Louis & San Francisco Railroad Company, hereinafter designated as the Railroad Company, is a railroad corporation, organized under the laws of the state of Missouri, and engaged in operating an interstate railroad line about 4,000 miles in length. For many years it has operated about 12 miles of this line within the state of Tennessee. This portion of its line enters the city of Memphis from the west over a bridge across the Mississippi river, and extends in a southeasterly direction through the city, across the southwestern corner of the state of Tennessee, into the state of Mississippi. It has also had for some years another track, known as the

incline track, which branches off from this main line a short distance east of the end of the bridge, and extends southwestwardly on an incline to the river bank at a point where the Railroad Company used a ferry boat for crossing the river before the bridge was built.

How the Railroad Company acquired the right to construct and operate these lines in Tennessee does not appear. It is neither alleged nor proven that it has ever complied with the provisions of the Tennessee statutes prescribing the terms and conditions upon which a corporation organized under the laws of another state may carry on in Tennessee the business authorized by its charter (Shannon's Tenn. Code, § 2545 et seq.), nor that it built any portion of these tracks under the provisions of the Tennessee statute authorizing any railroad company created by the laws of any other state to extend its railroad into Tennessee a distance of not exceeding five miles for the purpose of reaching a terminal point or a general or union depot (Tenn. Acts of 1887, c. 160, § 1; Shannon's Code, § 1874); nor is it either alleged or proven that under its charter it is or was authorized or empowered to construct or operate either its original lines of track in Tennessee, or the additional track now in dispute.

In the year 1907 the complainant Railroad Company (together with another railroad company which is not a party to this suit and whose participation in the matters to be hereinafter referred to, being immaterial to the present issues, will be disregarded in the statement of the facts) entered into negotiations with an industrial corporation, styled the Gulf Compress Company, looking to the establishment by the latter company of a warehouse and cotton compress plant in the city of Memphis, and an extension of the Railroad Company's tracks to reach such plant. It was finally determined to locate this plant upon a tract of land of about 40 acres in the southwest corner of the city, lying upon the east bank of the river, about $\frac{3}{4}$ of a mile south of the above-mentioned incline track, and extending on the east to Riverside Boulevard, a city street which is also known as Livermore avenue, and which will be hereinafter designated by that name. One of the reasons for selecting this tract of land was that the Compress Company expected to be able by constructing a lift to the bank of the river to obtain also the benefit of river transportation for cotton.

Surveys were made to determine a route for reaching this plant with the railroad tracks. And, while it was possible to reach this plant by a line wholly outside the city, this was deemed impracticable on account of the large cost of the rights of way, and a route was finally selected for the Railroad Company's track, commencing at a point on the incline track above mentioned, west of its connection with the main line, and extending in a southwesterly direction to the eastern boundary of the tract of land on which it was proposed to erect the compress plant. The proposed line of this railroad track was altogether about 2,000 feet in length, and extended through a sparsely settled portion of the city, consisting mainly of unused fields, and crossing two comparatively deep ravines. It crossed several streets of the city, only one of which, however, had been ever opened and used, and this one had never been graded or paved.

As a result of these negotiations the Compress Company and the Railroad Company in May, 1907, entered into a contract by which the Compress Company agreed to acquire the tract of land above mentioned, to erect and maintain thereon warehouses and compress plants for the storage, handling and compressing of cotton, and also to construct on said property sufficient spur tracks extending to the eastern boundary of its property at the western line of Livermore avenue, over which the Railroad Company should have the right to operate its cars for delivering, transporting, and handling cotton covered by the agreement. And on its part the Railroad Company agreed to designate and use the warehouses of the Compress Company, subject to certain exceptions not here material, as its exclusive public station and warehouse for cotton, and to secure the right of way for and to construct and maintain a track extending from its above-mentioned incline track southwestwardly to points of connection at the west line of Livermore avenue with the spur tracks of the Compress Company. This contract, however, did not give the Railroad Company the right to use the spur tracks of the Compress Company for the purpose of handling any other freight than cotton covered by the agreement, which, so far as its terms disclosed, related only to cotton to be transported to or from the Compress Company's plant over the track of the Railroad Company; nor did it provide for any extension of the spur tracks of the Compress Company to the river, by means of a lift or otherwise, or give the Railroad Company any right to use the Compress Company's property, or any spur tracks thereon, for the purpose of making a river connection in any way.

It does appear, however, that the original outlay on the part of the Compress Company contemplated a river connection and lift, for which plans and specifications were made before the property was purchased, showing the method by which it was expected to get cotton to and from the boats on the river, and that this was understood by the Railroad Company; that the officials of the Compress Company and Railroad Company have discussed the advisability of also taking on logs at the proposed lift and loading them on the railroad cars at the compress, allowing the Railroad Company the free use of the Compress Company's tracks for that purpose; and, that, while no formal contract has been entered into, the understanding was that the Compress Company would co-operate with the Railroad Company in developing its business and using the lift for raising logs or lumber to be loaded on the railroad cars; and, further, that while nothing was originally discussed in this connection except cotton, lumber, and logs, since this suit was brought there have been negotiations between the Compress Company and the Railroad Company looking to the handling of other freight.

It does not appear, however, when the Compress Company expects to construct the lift from the river, or that it is under any actual contract obligation with the Railroad Company to construct such lift, or to permit the use thereof by the Railroad Company for any purpose whatsoever.

After the execution of the above-mentioned contract the Compress

Company proceeded, at great expense, to erect its plant upon the above-mentioned tract of land, and has constructed thereon the spur tracks called for in the contract, which commence at the western line of Livermore avenue, about a quarter of a mile from the river bank, and extend westwardly along its various warehouses and compresses, terminating some 400 or 500 feet from the river bank. The termination of these spur tracks is from 50 to 100 feet above the river level, and is separated from the river bank by very rough ground, covered with timber and an intervening bluff. No connection whatever has been made between these spur tracks and the river, and it is now impossible to receive or deliver cotton or other freight to or from the river.

In June, 1907, after the execution of the above-mentioned contract between the Compress Company and the Railroad Company, the Railroad Company presented its petition to the Memphis city council, stating that it desired to construct an additional track in the city for the purpose of reaching a new compress that was to be erected on the bank of the river west of Livermore avenue, and praying that it be granted permission to cross said avenue and the other intervening avenues with the tracks, and also presented therewith the draft of an ordinance granting it the right to construct and operate such track along a designated route for the period of 30 years.

After the ordinance had been passed upon first reading, it was urged by representatives of the Memphis Freight Bureau, an organization composed of various business enterprises in and around the city of Memphis—whose motives are assailed by the Railroad Company on the theory that they were in fact seeking merely to protect the interests of a rival compress company located in South Memphis—that the consent of the city council should not be given to the construction of the proposed track except upon various conditions, necessary, it was insisted, to protect the interests of cotton shippers, and the public generally. After much discussion the city council finally, in August, 1907, passed the ordinance, but in a materially amended form. By the first section of the ordinance as passed, the Railroad Company was granted the right, in the language of the original draft submitted by it, to construct and operate a railroad track commencing at a point on its incline track and running thence southwestwardly "to and across the property owned by the Gulf Compress Company, * * * to or near the west (east) bank of the Mississippi river," with the right to cross Livermore avenue and other intervening avenues of the city. By the subsequent sections of this ordinance, however, various requirements and conditions were imposed upon the Railroad Company, among others that it should switch without charge all loaded freight cars to and from other railroads and shippers located on their tracks within the switch limits of Memphis (which extended beyond the corporate limits) coming in or destined to go out over the lines of such railroads; that it should receive, transport, and switch all loaded freight cars offered by other railroads or shippers within the switch limits of Memphis on the same basis of charges, without discrimination, and should charge no more than \$2 per car therefor, empty cars to be switched free; that it should deliver to and receive at its then depots

and platforms and to and from other compresses and warehouses located on its tracks and those of connecting lines within the switch limits of Memphis and deliver to warehouses within the drayage limits of Memphis, all consignments of cotton containing not less than 16 bales, coming in or destined to go out over its tracks, and make the same freight rates and switching charges thereon as charged on shipments of like character to and from the Gulf Compress Company's plant; that it should never permit any other railroad company to enter Memphis over its tracks unless it should have first made with the city a contract not to discriminate against the city or its citizens in the carriage of freight and passengers; that these conditions should apply to all railroads which it might permit to use the tracks which it was authorized to lay under the ordinance; and that it should within 90 days from the passage of the ordinance pave with gravel a certain portion of a designated city street which was to be crossed by its track, which paving it is shown would cost about \$9,000. This ordinance also provided that the grant thereby made should be subject to the will of the city council and be revocable by the council at its pleasure; and, further, that the Railroad Company should accept the ordinance in writing within 30 days after its passage and approval, and that upon such acceptance the ordinance should constitute a contract between the city and the Railroad Company.

Prior, however, to the passage of the ordinance, the Railroad Company, through its attorney, notified the city council that it could not accept the grant under the proposed amended ordinance. And upon the passage and approval of the ordinance the Railroad Company did not execute its written acceptance within 30 days thereafter and has never executed such acceptance. It, however, proceeded with the construction of its proposed line of track, prosecuting its work at first over private property lying between the city streets, over which it had procured rights of way at large expense. And, finally, after notice that the mayor had instructed the police to stop its work if it should undertake to cross Livermore avenue, and without any subsequent authority from the city, it hastily laid its tracks across Livermore avenue at night time when the police were not on guard. This track was thereafter torn up by the city police acting under the direction of the mayor, whereupon the Railroad Company filed its bill in the court below praying an injunction to restrain the city and its chief of police from interfering with its track. And, upon the granting of a preliminary injunction, it proceeded to reconstruct the track that had been torn up, and has made connection at the western line of Livermore avenue with the spur tracks of the Compress Company.

The theory upon which the Railroad Company insists that it is entitled to the injunctive relief prayed in its bill is, as set forth in the averments of its bill and developed in argument, substantially this: That the track in question is a lateral road which it was building to the eastern bank of the Mississippi river, a navigable stream, and to the plant of the Compress Company on the bank of said river, where it was proposed there would be facilities for receiving and shipping cotton coming to and from the city of Memphis by boats on the Mississippi river; that it had direct legislative authority to construct such

lateral road under chapter 210 of the Tennessee Acts of 1903; that, having such direct legislative authority, the city had no legal right to withhold its consent to the construction of such road, or to annex to its consent any conditions which it might not impose upon all railroads alike by general ordinance, and had no power to require the Railroad Company to enter into a written contract with the city as a condition precedent to the exercise of its statutory right, but had, at most, the right in the exercise of its police power to regulate the location and construction of the track; that the conditions precedent imposed by the ordinance to the crossing of the city streets by the Railroad Company's tracks were beyond the authority of the city, unauthorized, and void; and that the city having, by the first section of the ordinance, completely exercised its valid police power and consented to the location and construction of the railroad tracks, the Railroad Company had hence the right to disregard the unauthorized conditions attached to the city's consent, and was entitled, under the consent legally given by the first section of the ordinance, to proceed with the construction of its track without complying with the other conditions imposed therein, and without accepting the ordinance as therein required.

Section 1, c. 210, Tenn. Acts of 1903, p. 461, upon which the Railroad Company relies as direct legislative authority for the construction of this track, amends section 1, c. 152, Acts 1895, p. 314, so as to read as follows:

"That any railroad chartered under the laws of the state of Tennessee or any other state or states, and now operating or which may hereafter operate any line of railroad in this state, is hereby granted authority and power to build lateral roads, not exceeding fifteen miles in length, extending from the main stem, or any branch of said line of railroad, to any mill, quarry, mine, manufacturing plant, or to the bank of any navigable stream, without the making of any amendment to the charter of said railroad; provided, private property shall not be taken for the uses of such railroad company, or the construction of such lateral branches, without the condemnation thereof, as now provided by law."

The city, on the other hand, contends, in substance, (1) that the track in question is not one of a character whose construction is authorized by the act of 1903; and (2) that, even if so authorized, yet nevertheless, under the broad charter powers of the city of Memphis, it could only be constructed through the city and over its streets by the consent of the city council; that in granting to the Railroad Company the right to lay its tracks through the city the council had the right to attach any conditions to the granting of such privilege, of a contractual nature or otherwise, which in its judgment the public interest required, even although such conditions would not have been valid as original and independent acts of legislation on its part; and that, the ordinance granting the Railroad Company such right upon specified conditions not having been accepted by the Railroad Company, it is entirely without authority to build the track in question.

After careful consideration of the questions involved we have reached the following conclusions:

1. Chapter 210 of the Tennessee Acts of 1903, being the enabling act upon which alone the Railroad Company relies, does not constitute legislative authority for the construction of the track in question, for

the reason that it is not being constructed as a lateral road to any of the points mentioned in the act; that is, either to a mill, quarry, mine, manufacturing plant, or the bank of a navigable stream.

We think it is clear that this track is not being constructed as a lateral road extending to the bank of a navigable stream. It is apparent from the contract between the Railroad Company and the Compress Company and the other proof in the case that the Railroad Company does not intend to construct this track to the river bank, but has constructed it merely as a lateral road for the purpose of reaching the eastern boundary of the property of the Compress Company, under the contract giving the Railroad Company the right to use, for the purpose of handling cotton, the spur tracks of the Compress Company, which extend only to its warehouses and compresses, and are not at present connected with the river in any way. And, while there has been an indefinite understanding between the Railroad Company and the Compress Company that the Compress Company would at some time construct a lift to the river and would then allow the Railroad Company the use of its spur tracks and lift for the purpose of handling lumber, logs, and cotton, there has been no definite contract upon this subject and not even an understanding with reference to the use of such tracks and lift for the purpose of handling other freight in general. That the railroad track is not intended for the purpose of reaching the bank of the river, but merely for the purpose of reaching the plant of the Compress Company, is emphasized by the fact that in the original petition of the Railroad Company to the city council it stated merely that it desired to construct an additional track for the purpose of reaching a new compress to be erected on the bank of the Mississippi river, the objective point being evidently the compress and the reference to the river merely for the purpose of describing the location of the compress.

However, giving to chapter 210 of the Acts of 1903 a just and reasonable construction, we think it clear that it was only intended to authorize a railroad company to extend a lateral road to the bank of a navigable stream when it proposes to extend its track direct to the bank of the river, for the purpose of forming a connection with river transportation and serving as a common carrier for the transportation of traffic to and from the river, and that, thus construed, the act manifestly does not authorize the construction of a lateral road which falls short more than a quarter of a mile of reaching the river bank, and when the Railroad Company does not propose to extend its track to the river, but merely proposes to handle for the present one particular kind of freight, namely, cotton, to and from a private plant located some 500 feet from the river bank, with no present connection whatever for the purposes of river transportation, and with only a vague expectation that at some future date this private plant may extend its tracks to the river and may then, if it sees fit, allow the Railroad Company to use its private tracks for the transportation of such commodities as may hereafter be mutually agreed upon.

Holding this view as the proper construction of chapter 210 of the Acts of 1903, it is not necessary to determine whether, if the track in question were otherwise authorized under the act for the purpose of

reaching the bank of the river, such right would be defeated, as the city insists, by the fact that the Railroad Company already has a direct connection with the river bank at a point about three-quarters of a mile away.

It is also suggested by counsel for the Railroad Company in argument, although the point is not pressed, that the track in question is authorized under this act of 1903 as a lateral road constructed for the purpose of reaching the Compress Company's plant upon the theory that the compress may be regarded as a manufacturing plant within the meaning of the act. We cannot, however, adopt this suggestion.

It is stated in the brief for the Railroad Company that a compress plant receives bales of cotton in their original state and by a process of compressing, rebinding, and recovering, if need be, with new bagging, changes the form, size, and condition of the bales so as to make them suitable for convenient transportation to distant points at home and abroad. We are of the opinion that such a compress is not a manufacturing plant within any just definition of that term. In Worcester's Dictionary the word "manufacture" is defined as "the process of making anything by art, or reducing materials into a form fit for use by hand or by machinery"; and in the Standard Dictionary, as "the making of wares or other products by hand, by machinery, or by other agencies."

While various definitions of the terms "manufacture" and "manufacturing plant" are given in the adjudged cases, making it difficult to frame an exact definition of the term "manufacturing plant" as defined by the unbroken weight of authority, the closest analogy to the precise question now under consideration is to be found in those decisions which hold that the cutting of natural ice on the surface of a pond into pieces of a convenient size for handling, and storing the pieces so cut in a building, is not a "manufacture" within the meaning of the tax laws, the material being in no way changed, or adapted to any new or different use, but remaining ice, to be used simply as ice (*Hittinger v. Westford*, 135 Mass. 258, 262); that a corporation organized to collect, store, and preserve natural ice, prepare it for market and transport and vend it, is not a manufacturing corporation within the meaning of the tax laws, its tools and conveniences being "for convenience in handling and marketing a product, and not at all for making it" (*People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 183, 1 N. E. 669); that a corporation engaged in roasting, mixing, and grinding coffee is not a manufacturing company within the meaning of the tax laws (*People v. Roberts*, 145 N. Y. 375, 40 N. E. 7; *City of New Orleans v. Coffee Co.*, 46 La. Ann. 86, 14 South. 502); that marble which has been cut into blocks simply for convenience in transportation is not a manufactured article within the meaning of the tariff laws (*United States v. Wilson*, 1 Hunt, Mer. Mag. 167, 28 Fed. Cas. 724); and that hay which has been pressed in bales ready for market is not a manufactured article within the meaning of the tariff laws, although labor has been expended in cutting and drying the grass and bailing the hay (*Frazee v. Moffitt* (C. C.) 20 Blatchf. 267, 18 Fed. 584); these last two cases, it is to be noted, being cited with approval in *Hartranft v. Wiegmann*, 121 U. S. 609, 615, 7 Sup. Ct. 1240, 30 L. Ed. 1012.

And so it is held that the mere fact of the application of labor to an article, either by hand or machinery, does not make it a manufactured article within the meaning of the tariff laws, unless the application of such labor effects some transformation in the character of the article and converts it into a new and different article, having a distinctive name, character, or use. *Hartranft v. Wiegmann*, 121 U. S. 609, 615, 7 Sup. Ct. 1240, 30 L. Ed. 1012; *Foppes v. Magone* (C. C.) 40 Fed. 570, 572; *United States v. Semmer* (C. C.) 41 Fed. 324, 326; *Baumgarten v. Magone* (C. C.) 50 Fed. 69, 71.

In view of these authorities, we are of the opinion that as a compress plant does not, in any way, transform the cotton into a new or different article, having any distinctive name, character or use, but merely adapts it for more convenient transportation, after which the cotton is used in exactly the same manner as before it was compressed, and for exactly the same uses and purposes, it cannot be properly said that a compress is a manufacturing plant.

We therefore conclude that in no aspect of the case can chapter 210 of the Acts of 1903 be construed as giving legislative authority to the Railroad Company for the construction of the lateral road in question.

It is also faintly suggested on behalf of the Railroad Company that authority to construct the track in question may be derived from chapter 216, Tenn. Acts 1903, p. 470, which provides that any railroad company owning or operating a railroad or any part thereof in Tennessee shall be authorized and empowered to relocate any part of its lines for the purpose of taking out curves and reducing curves, and to build second main or double tracks, turnouts, switches, stations, depots, and terminal facilities. It is a sufficient answer to this suggestion that there is no averment in the complainant's bill that the track in question is being constructed by the Railroad Company under the authority of the last-mentioned act, the bill predicated the right to construct this track solely upon the theory that it is a lateral road constructed under the authority of chapter 210 of the Acts of 1903. We furthermore think it clear that this track can neither be regarded as a terminal facility nor as a turnout or switch of the character contemplated by chapter 216 of the Acts of 1903. The phrases "turnouts" and "switches" in our opinion clearly relate to tracks in the nature of side tracks, adjacent to and used in connection with another line of track, and manifestly do not refer to a track such as that in dispute which branches off entirely from the existing line and extends laterally to a distant objective point, and which can only be properly described as a lateral road.

It results that in our opinion the complainant Railroad Company is under the proof in this case entirely without direct legislative authority for the construction of the track in question.

2. It necessarily follows in our opinion that it could not acquire any right, as against the city of Memphis, to construct or maintain this track through the city limits and over the city streets without accepting the ordinance passed by the city council granting it a right of way through the city upon the various terms and conditions set forth in the ordinance.

By the provisions of the Tennessee statutes constituting the charter of the city of Memphis, contained in chapter 11, Tenn. Acts 1879, p. 15, known as the Original Taxing District Act, and numerous amendments thereto, the streets of the city were transferred to the board of fire and police commissioners "to remain public property," for the uses to which they had been formerly applied (Acts 1879, p. 25, c. 11, § 14); and it was provided that the local government established by the act shall "have and exercise entire control over all streets"; that it shall "have power * * * to permit and regulate the laying off of railroad tracks or iron, and the passage of railroad cars" through the city (Acts 1879, p. 98, c. 84, § 1); that the city council shall "have charge and control of giving, granting and sale of all franchises, special privileges to individuals, firms or corporations" (Acts 1905, c. 54, § 28, p. 108); and "that no franchise shall be granted or sold to any commercial railroad * * * or other quasi-public corporation except by ordinance fully guarding and protecting the rights of the public" (Acts 1905, c. 54, § 29, p. 108).

It was held by this court in *Iron Mountain Railway Co. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410, in an opinion delivered by Judge Taft, that under the charter powers of the city of Memphis to regulate the laying of railroad iron and passage of cars through the city and to exercise complete control over all the city streets, a contract entered into between the city and a railroad company, as a condition precedent to granting the railroad company the right to lay its tracks through the streets of the city, that the railroad company would not during the term of the contract discriminate in rates against the city or its inhabitants in the carriage of freight or passengers, was a valid and enforceable contract, the obligation of which could not be thereafter impaired by resolution of the city council. And in *Memphis v. Postal Telegraph Co.*, 145 Fed. 602, 605, 76 C. C. A. 292, it was held by this court, in an opinion delivered by Judge Severens, that, under the provisions of the charter of the city of Memphis giving it entire control over all the city streets, it was authorized to demand and receive compensation for the use of its streets by a telegraph company, and that the control over the streets given to the city by the charter provisions of 1879 was not taken away by implication by a subsequent statute passed by the Tennessee Legislature in 1885, authorizing in general terms any telegraph company to construct, operate, and maintain its lines over the streets of the cities and towns of the state, but that such subsequent general law operated only as a permission to exercise in the streets of Memphis the franchise granted to telegraph companies subject to the control which the Legislature had already granted to the city.

It is, however, unnecessary to determine to what extent, if the Railroad Company were armed with direct legislative authority for the construction of the lateral road in question, its exercise of that right within the city limits of Memphis would, in the light of the above-mentioned decisions of this court and of various decisions of the Supreme Court of Tennessee that have been cited in argument, be sub-

ject to the consent of the city authorities under the city charter or general laws, or what terms, if any, might in such case be properly attached by the city as conditions to the giving of such consent. Nor are we called upon to determine the validity or enforceability, as between the city and the Railroad Company, of certain provisions of the ordinance granting it that right which are criticised by the Railroad Company as contravening the interstate commerce act. It is sufficient to say, for the purposes of the present case, that we are of the opinion that the ordinance granting the Railroad Company the right to construct and maintain its lateral road through the city of Memphis and across the city streets and embodying the terms upon which the city's consent is given thereto is an entirety; that an essential provision of this ordinance is that the Railroad Company shall accept it in writing as a contract between the city and the Railroad Company; that, not having thus accepted the ordinance and complied with this condition precedent upon which the city's consent was predicated, the Railroad Company has not brought itself within the terms of that consent; and that hence, in the absence of direct legislative authority, the Railroad Company has acquired no right, as against the city, to build or maintain its lateral road under the first section of the ordinance, and is not entitled to obtain from a court of equity an injunction restraining the city authorities from interfering with its construction, maintenance or use.

The court below was of opinion that the present case is controlled by *Frayser v. State*, 16 Lea (Tenn.) 671, and that under the doctrine of that case it must be held that the city of Memphis could not by ordinance force the Railroad Company to enter into a contract with the city before it should build its track over the city streets. That case, however, is in our opinion clearly distinguishable from the present case, in that the special charter of the Railroad Company which was there involved gave the company, in specific terms, the right to construct, maintain, use, and operate street railways over the streets of the city of Memphis, and the city sought, in violation of the specific power there given the company by its charter under direct legislative grant, to bind it by contracts affixing to the granting of a right of way by the city council certain stipulations as to the mode and manner of constructing its tracks.

For these reasons, therefore, we conclude that there was clear error in the decree of the court below in adjudging that the plaintiff was entitled to an injunction restraining the city of Memphis and its chief of police from interfering with the complainant's tracks; and this error being of a controlling character, vitally and directly affecting the rights of the parties, we are of the opinion that it is one of which this court should take notice, even without sufficient assignments of error, under the option reserved to the court by the concluding clause of rule 11.

A decree will accordingly be entered reversing the decree of the Circuit Court and remanding the case, with directions to dismiss the bill at the costs of the complainant.

NOTE.—The following is the opinion of McCall, District Judge, in the court below:

McCALL, District Judge. This case was heard on the merits in July, 1908. The primary and controlling question presented for adjudication is whether the defendant the city of Memphis, under its charter, has the authority to compel the Kansas City, Ft. Scott & Memphis Railway Company, and the St. Louis & San Francisco Railroad Company, complainants, by ordinance, to enter into a contract with the city, as a prerequisite to the right of the complainants to construct a railroad track across the streets of the city of Memphis, particularly Livermore avenue.

It appears that on August 8, 1907, the legislative council of the city of Memphis passed an ordinance, the first section of which grants to the complainants the right to construct a railroad track, commencing at some point between Kansas avenue and Louisiana avenue, running in a southwesterly direction to or near the west bank of the Mississippi river, with the right to cross, among others, Livermore avenue. The second section provides that the grant is made subject to all restrictions and conditions existing between the complainants and the defendant city. There are eight other sections of the ordinance, imposing other and different conditions and obligations upon the complainants. The eighth section is as follows: "Be it further ordained, that said railways shall accept this ordinance in writing, executed by the properly authorized officer or agent of said companies, and under the corporation seals thereof, within thirty days after its passage and approval, and upon such acceptance this ordinance shall constitute a contract between the city of Memphis and the St. Louis & San Francisco Railroad and the Kansas City, Ft. Scott & Memphis Railroad."

The complainant railway companies, without complying with this eighth section of the ordinance, proceeded to construct their track as provided for in the first section of the ordinance, and had crossed Livermore avenue. The city authorities then tore up the track across this avenue. At this juncture the complainants filed the bill in this cause to enjoin and restrain the city and its officers from interfering with them in constructing this railroad track, and from reconstructing same where defendants had destroyed it, and from interfering with the quiet and peaceable use of the same for railroad purposes. Upon this application a preliminary injunction was issued.

The complainants insist that they have the right to construct this piece of railway track under chapter 210, p. 461, Acts of 1903, which is as follows: "That any railroad company chartered under the laws of the state of Tennessee or any other state or states, and now operating or which may hereafter operate any line of railroad in this state, is hereby granted power and authority to build lateral roads not exceeding fifteen miles in length, extending from the main stem or any branch of said line of railroad to any mill, quarry, mine, manufacturing plant, or to the banks of any navigable stream, without making any amendment to the charter of said railroad."

The defendants insist that the city was authorized to enact the ordinance of August 8, 1907, and enforce the same, under and by virtue of section 3 of the charter of the city of Memphis, which is as follows: "Sec. 3. The local government established by this act shall have power * * * to permit and regulate the laying of railroad tracks of iron, and the passage of railroad cars through the city, and to remove such railroad track, if it obstructs public travel or does not conform to the laws of the district; * * * to repair, and keep in repair, streets, sidewalks and other public grounds and places in the city; to open and widen streets, to change the location [of] or to close same and to lay off new streets and alleys when necessary; to have and exercise entire control over the streets and other public property of the city, as well that within as that without the city."

Assuming that the ordinance in question was regularly passed, I conclude that the complainant railway companies, by constructing their tracks thereunder, are subject to all the conditions imposed therein that the legislative council of the city was authorized to enact under its charter, notwithstanding complainants constructed their tracks without accepting the ordinance in writing, as provided in section 8 of the ordinance. A compliance by the complainants with the eighth section would probably estop them from success-

fully resisting the enforcement by the city of such sections of the ordinance as were enacted without authority, and therefore void, unless agreed to by them in writing.

As stated in the opening paragraph of this memoranda: Had the city the authority to enact section 8 of the ordinance of August 8, 1907, and to prevent the complainants from crossing Livermore avenue with their tracks, unless they complied with said section 8? In other words, can the city by ordinance compel complainants to enter into a written contract which complainants conceive to be unduly burdensome, oppressive, and partial, in order to exercise a right granted to them by the Legislature of Tennessee?

I think not. And this conclusion is sustained by the Supreme Court of Tennessee in the case of *Frayser et al. v. State*, 16 Lea, 671. That case went up from the city of Memphis. One of the important questions involved was whether the city could by ordinance force the Memphis City Railroad Company to enter into a contract with the city before it should build its tracks along the streets of the city, as it had the right to do under its charter. In disposing of the case, Mr. Chief Justice Deadrick, speaking for the court, said: "The city may pass proper rules and regulations in respect to said road. The charter reserves that right to it. The law confers it, but they cannot force the company to contract with it. For any threatened or actual violation of law by the company, the city has its remedy."

Upon the *Frayser* Case I am satisfied to base the decision in this case. All I now decide is that the city had the right to pass the ordinance, and the railroad company, if it constructed its track under the ordinance, would be liable to such conditions and obligations as the city had authority to impose by ordinance. But I hold that the city had no authority to enact section 8, requiring the railroad company to sign an agreement that it would accept all the terms of the ordinance as a condition precedent to building its spur track. Whether or not other conditions imposed by this ordinance are reasonable and valid must be determined when it is shown that complainants have not complied with them.

A decree will be entered, making perpetual the preliminary injunction heretofore granted, as prayed for in the bill, and taxing the defendants with the costs of the cause. Also see *Railroad v. Railroad*, 116 Tenn. 526, 95 S. W. 1019.

PITTSBURGH & B. COAL CO. v. HUDAK.

(Circuit Court of Appeals, Third Circuit. November 26, 1910.)

No. 1,393.

1. MASTER AND SERVANT (§§ 285, 286, 289*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Plaintiff, a minor, was employed as a car driver in defendant's coal mine, and it was his duty, on taking loaded cars to the large room or flat, at the foot of the shaft, to couple the same to the other cars there standing on the track. The coupler on the last car so standing was left in such position that the arriving cars should couple by impact, but, if they did not, it was the driver's duty to see that the coupling was made. Plaintiff's cars on one trip having failed to couple by impact, he pushed them back, and went between the cars, and, finding the coupling on the standing car defective, was trying to adjust it so as to make a coupling, when another driver, without warning, ran his cars against those of the plaintiff, forcing them against the standing cars, and plaintiff's hand was caught between the bumpers and crushed. There was evidence that a large number of the cars were defective and that plaintiff had given notice of such fact to the foreman, who had promised to have them repaired; also, that the standing car with the defective coupling had been marked for the shop for repair. *Held*, that the questions of negligence and contributory negligence, and the question whether the defendant's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

negligence in failing to furnish properly equipped cars, if found, was a proximate cause of the injury, were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1016, 1010, 1132; Dec. Dig. §§ 285, 286, 289.*]

2. MASTER AND SERVANT (§ 285*) — ACTION FOR INJURY TO SERVANT — QUESTIONS FOR JURY—PROXIMATE CAUSE OF INJURY.

In an action against a master for an injury to a servant, the question of the proximate cause of the injury is generally one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002-1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action at law by Michael Hudak, in his own right and as father and next friend of John Hudak, a minor, against the Pittsburgh & Baltimore Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Clarence Burleigh and William A. Challener, for plaintiff in error.
L. K. & S. G. Porter and James B. Drew, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. This action was commenced in the court below by Michael Hudak, as father and next friend of his minor son, to recover damages sustained by the son by reason of an injury which he received through the alleged negligence of the defendant below while in its employ, and also for the expenses incurred by the father in the case of his son, as well as for the loss of his son's services. John Hudak was a minor about 17 years of age, and first entered the employment of the defendant below as a trapper in a coal mine, and continued to serve in that capacity for about one year. During that period he became familiar with the signals used in the mine for the stopping and starting of mine cars by the drivers who handled them, and also with the mode of coupling such cars. About two months prior to the accident, he was promoted and became a driver in the mine, and at the time of the accident was receiving the wages allowed adult experienced drivers. The business of a driver was to distribute empty cars to the miners and collect the loaded cars from them. Each driver had his own mule, and after he had collected his "trip" or load, consisting of about three cars, would proceed out to the mine's main entry to a place called a "flat," or "layout," which was a roomy, double-tracked place where the loaded cars were assembled, and from which they were removed from the mine by an electric motor; the loaded cars occupied one track of the flat and the empty cars the other, and on the day of the accident, October 2, 1907, a number of loaded cars had already been placed on the flat or layout. Prior to the accident, John Hudak on several occasions had, according to his testimony, notified one Coleman, the boss of the drivers in the mine and the person who had employed him, that a considerable number of the cars had uneven and defective bumpers and defective coupling links, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Coleman promised him he would have repaired, and it was in reliance upon this promise that he says he continued his work. It was the duty of a driver to couple his cars to the cars ahead and leave the coupling link of the rear car of his trip, so that the next driver, upon turning his mule to one side, could propel his cars against those standing ahead, and thereby effect a coupling by the impact of the cars. In order to do this, Hudak, on the day in question, came to the flat or layout with his trip of three loaded cars, and, following the above practice, caused his car to bump against the cars standing ahead, but the cars failed to couple. It was Hudak's duty to see that the cars were coupled, and, as they failed to couple by impact, he pushed his cars back about four feet, and entered between them and the cars ahead which he had found standing there, to make an examination, which disclosed that the coupling link on the rear standing car was twisted and the bumpers of an uneven height. While working with the link and trying to adjust the same, so as to bring the cars together, and effect their coupling, the driver of another trip of loaded cars behind him, without giving any notice or warning to Hudak, and without his knowledge, propelled his cars against Hudak's, and their impact forced Hudak's cars against those standing ahead, and Hudak's hand was caught between the bumper of his forward car and the bumper of the rear car of the standing trip.

The foregoing statement of facts was substantially taken from the brief of the counsel for the defendant in error. It differs, however, but little from that of the counsel of the plaintiff in error and wherein it does we think it is supported by the evidence. The case was submitted to the jury, and verdicts found for the plaintiff below. A motion was thereupon made by the plaintiff in error for judgment non obstante veredicto, which motion was, however, overruled and judgment entered on the verdicts, to review which this writ of error was taken.

According to the plaintiff's evidence, the coupling link and bumper of the car to which he attempted to couple his cars were defective. It also appears in evidence that there were 30 or 40 cars in use which bent or twisted links and bumpers, and that knowledge of their condition had been brought by young Hudak to the attention of Coleman, the boss of the drivers, who said: "All right, I will get them fixed. Go along and get to your work." There was also evidence that the car to which Hudak attempted to couple his cars was marked with chalk "shop," which, according to the evidence, meant that the car was damaged. The jury was therefore amply justified in finding that the coupling link in question was defective, and that the defendant company was guilty of negligence in failing to take ordinary care to provide young Hudak with reasonably safe appliances wherewith to work. As we have already seen, the cars failed to couple in the ordinary way, that consequently Hudak attempted to adjust the link and bumper so that a coupling might be effected, and that it was while thus engaged that his hand was injured. The evidence, furthermore, shows that it was not only Hudak's duty to make the coupling by the momentum and impact of the cars, but, if that method failed, to make it in the very manner in which he was attempting to

make it, when his hand was caught and injured. Upon this point the foreman testified as follows:

"Q. Then, when the boy brought these cars together and found they wouldn't couple, it was his duty to get in there and change that link and see if he couldn't couple them, wasn't it? A. He would have to push his wagon back, certainly.

"Q. Well, it was his duty to do it? A. Yes, sir.

"Q. And he was acting under your instructions when he did it? A. It was his duty to couple his cars.

"Q. And, if when he got them together the first time they didn't couple, it was his duty to shove them back, and change the coupling pin, and try it again, wasn't it? A. Yes, sir."

Under the circumstances, Hudak was not as a matter of law guilty of contributory negligence. That question was undoubtedly for the jury, and it was properly left to them, and they determined it adversely to the defendant below.

The principal point urged at the argument, however, was that, assuming that there was sufficient evidence of negligence on the part of the defendant below to go to the jury, still its negligence was not the proximate cause of the injury sustained by young Hudak. We think that there was a direct causal connection between the negligence of the defendant in failing to supply Hudak with reasonably safe appliances with which to do his work and the injury which resulted to him from a concurrent cause. The question of proximate cause is generally for the jury. Counsel for the defendant below requested the court to charge upon this point as follows:

"If the jury find from the evidence that the injury to the minor plaintiff, John Hudak, was caused by the act of another driver, by causing or permitting a load of cars to strike the cars which were in charge of Hudak, and these, in turn, were driven forward against the standing load of cars attached to the motor, thereby catching and crushing the hand of John Hudak between the bumpers, the verdict of the jury must be for the defendant."

This request was, as admitted at the argument, equivalent to asking for a binding instruction. The court, however, charged the request, but with the following addition:

"That if you believe that the injury was sustained by the minor plaintiff in the manner indicated in the instruction, coupled with the fact of the defective appliances of the defendant, then and in that case the plaintiff is not charged with the negligence of his co-employé; in other words, if the master fails to furnish a suitable appliance with which to work, and injury arises to an employé by reason of the negligence of another employé, and that of the master, concurring, then the doctrine of fellow-servant had no application."

The addition was perhaps irrelevant, but, however that may be, it did not essentially modify the request, and certainly did not warrant the allegation of the assignment of error that "the court erred in declining to give said instruction without any qualification whatsoever," because, as already stated, the effect of such compliance, since the facts were practically undisputed, would have been to withdraw the question entirely from the consideration of the jury. It seems entirely clear under the evidence that the bumping of the cars was not the proximate cause of the plaintiff's injury, and, were it necessary, it would perhaps not be going too far to say that substantially the

only question in the case for the jury to decide, outside of the question of contributory negligence, was whether there was satisfactory evidence of the negligence of the defendant in failing to supply a proper coupling link. It is evident that, if the couplings of the defendant's car had been in order, the accident would not have occurred. Since, however, they were not in order, the plaintiff, as a necessary sequence of such defect, was bound in the performance of his duty to go between the cars and make the coupling. His exposure to added danger was therefore a necessary consequence of defendant's negligence. Now while in that necessarily assumed and exposed position, and as an incident to it, he was injured, not by a new and independent cause, but by one which, in the course of the defendant's business, naturally and designedly followed in operation. The oncoming of the cars was not under the circumstances an independent, intervening agency that could properly be deemed the proximate cause of the accident. The defective link was the efficient and predominating cause, and, if the bumping of the cars brought up from the rear was a cause of the accident at all, it was a cause subordinate, dependent and incidental to the efficient or predominating cause.

In *Newark R. R. Co. v. McCann*, 58 N. J. Law, 642, 645, 34 Atl. 1052, 1054 (33 L. R. A. 127), the Court of Errors and Appeals speaking by Judge Dixon, said:

"The fact that between the defendant's fault and the plaintiff's injury there are intermediate acts of other persons, even of the plaintiff, will not render the injury too remote for legal contemplation and redress, if the intervening acts are not wrongful, and either naturally follow upon the defendant's misconduct or merely furnish the conditions on which that misconduct operates [citing several cases]."

In *Donegan v. Baltimore & N. Y. Ry. Co.*, 165 Fed. 869, 91 C. C. A. 555, there were presented to the Circuit Court of Appeals of the Second Circuit the following facts for consideration: The plaintiff, a brakeman on a freight train of the defendant, was directed to cut off two rear cars from a slowly moving train before it reached a certain designated switch. The automatic coupler of one of the cars was broken, and plaintiff went between the cars to uncouple them by hand, but failed to do so, and in endeavoring to step out from between the cars caught his foot in an unblocked frog of a switch leading to a turntable, was unable to extricate it, and was pulled down under the wheels and injured. The question in the case was whether the defendant's violation of the safety appliance act was the proximate cause of the accident. The Circuit Court ruled as a matter of law that it was not. The appellate court held this to be error and reversed the judgment below, and in the course of its opinion said:

"It is true that the direct instrumentality by which the plaintiff was injured was the frog. It was the immediate, but not necessarily the proximate, cause. It was for the jury to determine whether the failure of the defendant to equip the cars with the appliances required by the statute was, in view of all the facts and circumstances, a proximate cause of the accident. Had the car been properly equipped, there would have been no occasion for the plaintiff to go into a place of danger. We cannot say that the jury would not have been warranted in finding that the accident would never have occurred had the car been equipped with the statutory appliances, and consequently that the failure to have such appliances was a proximate cause of the plaintiff's injuries."

The question of proximate cause was considered by the Supreme Court of the United States in *Choctaw, Oklahoma & Gulf R. R. Co. v. Holloway*, 191 U. S. 334, 24 Sup. Ct. 102, 48 L. Ed. 207, a case brought to that court from the Circuit Court of Appeals for the Eighth Circuit; its opinion being reported in 114 Fed. 458, 52 C. C. A. 260. The opinion of the Supreme Court which affirmed the judgment below is, so far as it relates to the question of proximate cause, summarized in a syllabus as follows:

"Where the company has negligently failed to equip an engine with brakes and it is derailed by striking an obstacle which was on the track without negligence of the company, and there is evidence that the engine could have been stopped more quickly with than without brakes, it is for the jury to say whether there would have been an accident had the brakes been on and fit to use; and, if the obstacle caused the necessity for brakes, the neglect of the company to furnish them constitutes the immediate and proximate cause of the accident rather than the existence of the obstacle."

It is, however, unnecessary, and, moreover, impossible, to consider the well-nigh infinite number of cases dealing with this subject, which, notwithstanding they have established certain definite and reasonably clear rules, have not met, and necessarily cannot meet, the difficulty which inevitably arises the moment it is attempted to apply them to an individual case. We have no difficulty, however, in determining, under the evidence in this case, and for the reasons above given, that the bumping of the cars which came from the mine after Hudak's was not the proximate cause of the injury which he received, but rather the defendant's negligence in the respect already mentioned. Other errors have been assigned and have been carefully considered, but we find them all without merit.

The judgment below is therefore affirmed with costs.

MEEKER v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. December 2, 1910.)

No. 61.

1. MONOPOLIES (§ 28*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—ACTION FOR DAMAGES.

A complaint in an action to recover treble damages under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), which alleges a combination and conspiracy between defendant and other interstate railroad companies to restrain and monopolize interstate commerce in anthracite coal in violation of sections 1 and 2 of the act, which, as alleged, was carried into effect (1) by increasing the price of coal at the mines, through ownership by the conspirators of the coal companies, and (2) by increasing the charge for transportation of coal to New York, so that the two together exceeded the tide-water price, and which contains a sufficient allegation of damage to plaintiff in his business as a coal dealer, states a cause of action under the act which is within the jurisdiction of a Circuit Court, the gist of the action being the unlawful conspiracy, and the fact that one of the means for carrying it into effect was an increase in freight rates, the reasonableness of which per se must first be determined, under the provisions

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), by the Interstate Commerce Commission, not constituting any ground for depriving plaintiff of the right of action expressly given by the anti-trust act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

2. COURTS (§ 405*)—FEDERAL COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.

The question of the jurisdiction of a Circuit Court, when not the sole question determined, is reviewable by the Circuit Court of Appeals under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), on a writ of error bringing up the whole case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1103; Dec. Dig. § 405.*]

Jurisdiction of Circuit Court of Appeals in general, see notes to Law *Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold, Land & Em. Co. v. Gallegos*, 32 C. C. A. 475. Review of jurisdiction of Circuit Court, see note to *Excelsior Wooden-Pipe Co. v. Pacific Bridge Co.*, 48 C. C. A. 351.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Henry E. Meeker, as surviving partner, etc., against the Lehigh Valley Railroad Company. Judgment (175 Fed. 320) for defendant, and plaintiff brings error. Reversed.

Writ of error to review a final judgment of the Circuit Court, Southern District of New York, sustaining a demurrer to, and dismissing, an amended complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The action was brought to recover treble damages under the federal anti-trust statute (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]).

The complaint alleges that the plaintiff and his predecessors have been engaged in the city of New York in the business of buying, shipping, and selling anthracite coal; that this coal can be obtained only in a limited area in Pennsylvania; that the greater part of the anthracite coal product is shipped to New York City; that the only means of shipping coal from the anthracite regions to New York is over the lines of the defendant railroad company and certain other railroad companies designated as the "Anthracite Companies"; that these companies have for many years owned and controlled large tracts of coal lands in said regions and have for many years been engaged, either directly or through the control of coal companies, in mining and dealing in anthracite coal, and control the Eastern market for a very large part of such coal annually mined.

The complaint further alleges that prior to 1901 the plaintiff and other independent shippers were able to, and did, purchase coal in said anthracite regions at varying competitive prices and arranged for its transportation to New York by the various anthracite companies at varying competitive charges, but that in that year said corporations, including the defendant, "conspired and combined together to increase the prices of anthracite coal at the mines and the charges for the transportation of such coal from the mines in Pennsylvania to New York tidewater to such a point as would enable them to monopolize the trade and commerce in anthracite coal between the said states, and, by driving all independent shippers out of business, to obtain exclusive control of such business and to control absolutely, especially in the New York market, the market price of anthracite coal; and they have ever since maintained such conspiracy and combination."

The complaint further alleges that the instrumentality employed to make said company effective was the Temple Iron Company, a mining corporation,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all the stock of which was owned by the Anthracite Companies; that the directors of this corporation were officials of the Anthracite Companies; and that these persons, while ostensibly acting as directors, really met and acted for the purpose of considering the most effective means of insuring the success of the conspiracy.

It further alleges, in substance, that the conspiracy was carried into effect by increasing the price to be paid for coal at the breakers or mines to 65 per cent. of the tidewater prices and by charging 40 per cent. of the tidewater prices for transportation to New York tidewater. "This increase in price at the mines," so the complaint alleges, "was made so that the independent shippers would not then or at any time subsequently be able to sell anthracite coal in the New York market, in competition with the coal companies owned or controlled by the Anthracite Companies." And it is also alleged that, while the increased charge for transportation rendered it impossible for the coal companies owned by the Anthracite Companies to make a profit on coal shipped to New York tidewater, yet that this result made no difference to the Anthracite Companies as they gained what the coal companies lost.

The complaint also alleges that, as a result of the conspiracy, the Anthracite Companies have gained almost exclusive control of the New York market for anthracite coal, and, further, contains allegations of damage which are examined in the opinion.

The original complaint in this action was demurred to, and the demurrer was sustained by Judge Ray in an opinion reported in 162 Fed. 354. Thereupon the plaintiff filed the present amended complaint which is regarded as containing materially different facts from those appearing in the original complaint.

Shearman and Sterling (John A. Garver and William A. Glasgow, Jr., of counsel), for plaintiff in error.

Alexander & Green (Frank H. Platt, Allan McCulloh, and George S. Franklin, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The complaint sets forth a conspiracy on the part of the defendant and other railroad companies to force independent dealers in anthracite coal out of the field and to obtain control of the market for that product. This conspiracy was carried into effect, it is alleged, (1) by increasing the price paid at the mines, and (2) by increasing the charge for transportation so that the two together exceeded the tidewater price. Obviously independent dealers could not do business when the cost of buying coal and getting it to market was 105 per cent. of the market price.

These averments clearly state a violation of the federal anti-trust statute. A conspiracy to monopolize interstate commerce, as well as a conspiracy in constraint of such commerce, is charged. But it does not necessarily follow that every violation of the statute gives rise to a cause of action under its seventh section. The plaintiff must show that he has sustained damage by the violation. And here the defendant contends that the only damages which the plaintiff claims are those arising from unreasonable transportation charges, and that the Interstate Commerce Commission is the tribunal to which resort must be had in the first instance to determine the reasonableness of such charges.

It is well settled that a shipper seeking reparation based upon the unreasonableness of a freight rate must, primarily, seek redress through the Interstate Commerce Commission. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. See, also, *Baltimore, etc., R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292, and the opinion of this court in *Wickwire Steel Co. v. New York Central, etc., R. Co.* (decided in June, 1910) 181 Fed. 316.

The difficulty lies in the application of this rule here. The plaintiff is not seeking redress as a shipper. It is not alleged that the defendant carried any coal for him or that he offered any for shipment. The defendant is not sued as a carrier, but as a party to an unlawful conspiracy. The unreasonableness of the railroad rate was only one of the means employed to make the conspiracy effective. The increase of the price at the mines was as essential to that result as the increase in the transportation charge. That the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) creates a tribunal to which shippers must resort, primarily, for relief against excessive freight charges, is no reason why a person injured by an unlawful conspiracy cannot invoke the relief expressly granted by another and later federal statute. It might as well be claimed that the United States cannot proceed against a combination of railroad companies to fix rates until the reasonableness of such rates has been passed upon by the Interstate Commerce Commission. Yet combinations of that nature were enjoined in the *Trans-Missouri Freight Association Case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and in the *Joint Traffic Association Case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

It is true that the courts in determining as one of the elements of a conspiracy case the reasonableness of freight rates might pass upon the same question which would be presented to the Interstate Commerce Commission by a shipper proceeding under the act to regulate commerce. But the possibility of want of uniformity in decisions constitutes no ground for denying to an injured person a right of action granted by a statute of the United States separate and distinct from that act, however weighty such consideration might be in determining whether the common-law rights of a shipper and the right to demand damages given by the interstate commerce act itself are subjected to its other provisions. Obviously the same possibility would exist in case of proceedings by the government to enjoin unlawful railroad combinations.

It is also contended by the defendant that, if the object of the conspiracy were to drive the plaintiff and other independent shippers out of the market, the complaint does not allege any damages.

We think, however, that the allegations of damage, although somewhat general, are sufficient to stand the test of demurrer. It is stated that prior to the conspiracy the business of the plaintiff was extensive and profitable, but that since the conspiracy became effective such business has been greatly curtailed and has been conducted either at a loss or at only a small profit. The nature of the injuries is fairly

set forth, and the only inference possible from the allegations is that the damages arose as the direct consequence of the conspiracy charged.

The complaint is held to state a cause of action under the federal anti-trust statute. It follows that the demurrer was erroneously sustained by the Circuit Court.

But it is contended that this court has no power to reverse the judgment because a jurisdictional question was determined by the Circuit Court, reviewable only by the Supreme Court of the United States. The demurrer, however, was sustained upon the ground that the complaint failed to state a cause of action, not because the court had no jurisdiction. Even if it were necessary to allege in the complaint antecedent action by the Interstate Commerce Commission, the court had jurisdiction of the action. The failure to allege such an essential fact does not deprive a court of jurisdiction. And, even if the question of jurisdiction were before the Circuit Court, it was not the sole question there, and it came with all the other questions in the case for the determination of this court upon the writ of error. *Boston & Maine R. R. Co. v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002.

Judgment reversed.

MEMPHIS CONSOL. GAS & ELECTRIC CO. v. CREIGHTON et al.

(Circuit Court of Appeals, Sixth Circuit. December 21, 1910.)

No. 2,052.

1. GAS (§ 18*)—INJURIES FROM ESCAPE OR EXPLOSION OF GAS—CARE REQUIRED OF GAS COMPANY.

A gas company, which through its pipes supplies gas to a house and has control of the apparatus for cutting it off, when notified that gas is escaping in the house and informed of injury and danger to the inmates therefrom, owes a duty to the occupants of the house to exercise reasonable diligence in shutting off the gas therefrom, and it is immaterial that the pipes where the leak occurred were owned by the owner of the house.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 18.*]

2. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE OF INJURY—CONCURRENT CAUSES.

Where the negligence of two persons co-operates to produce an injury, both are liable, and inquiry as to the proximate cause is not pertinent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

3. GAS (§ 18*)—GAS COMPANIES—LIABILITY FOR NEGLIGENCE.

Plaintiff was injured by an explosion of gas in the house where she occupied a room. Early in the morning it was discovered that gas was escaping, and one occupant of the house became asphyxiated and was sent to a hospital. The owner of the house, being unable to shut off the gas from the building, between 8 and 9 o'clock, telephoned defendant gas company, which supplied the gas, stating the facts and asking that some one be sent at once, which was promised, but no one came until 2 o'clock in the afternoon. In the meantime, about noon, the owner, in attempting to find the leak, lighted a match, which caused the explosion of gas accumulated inside of a partition where there was a defect in a pipe which caused the leak. *Held* that, whether or not the owner was negligent, the negligence of defendant in failing to act with reasonable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

promptness, when notified of the dangerous condition of the premises, was one of the causes of plaintiff's injury, and that it was liable therefor.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 18.*]

4. NEGLIGENCE (§ 59*)—EFFICIENT CAUSE OF INJURY—LIABILITY FOR UNFORESEEN RESULTS.

If a thing done produces immediate danger of injury to others, it is not necessary that the author of it should have in mind all the particular results which might happen from the presence of the danger to render him liable for such result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action at law by Mrs. Lawrence Creighton and Lawrence Creighton against the Memphis Consolidated Gas & Electric Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Jas. F. Meagher and E. E. Wright, for plaintiff in error.

Bell, Terry & Bell and M. J. Anderson, for defendants in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. This is an action to recover damages for a personal injury to the plaintiff Mrs. Creighton, resulting from the alleged negligence of the defendant.

The facts upon which the action is founded are, substantially, as follows: The defendant, now plaintiff in error, is a corporation doing a general business such as its name implies in the city of Memphis. Among its patrons was a Mrs. Bramhall, who owned and occupied a house on Washington street in that city. She had rented out the rooms, one of them to the plaintiffs, who were occupying it. The defendant had made a contract with Mrs. Bramhall for supplying her house with gas in the usual way; that is, the company was to lay its own pipe into the house of Mrs. Bramhall, and she was to provide and install the pipes and fixtures through which the gas would be conveyed to the burners. The defendant laid the pipe to a place in the basement of the house, where it established a meter for measuring the gas to be delivered, and, at a short distance before the gas would come to the meter, it put into the pipe a stopcock or valve by which the flow of gas into the house could be arrested. Mrs. Bramhall had installed the house pipes and fixtures by which the gas would be delivered at the burners, and the supply and use of the gas was begun. Early in the morning of May 10, 1907, it was discovered that several of the rooms of the house were filling with gas to such an extent that a lady in a room adjoining the plaintiffs' had become partly asphyxiated, and was not long after taken to a hospital. At 8 o'clock Mrs. Bramhall attempted to turn off the gas at the stopcock in the basement, but she was unable to turn it; and a man in the house tried to, but could not close the valve. Thereupon she telephoned the gas company. Mrs. Bramhall testified to this and said:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"I told them the gas was escaping and there was a lady in the house asphyxiated and made unconscious, and we could not cut the gas off; sister and I had tried to and we wanted some one to come and do it right away. They said they would send some one right away."

This, according to Mrs. Bramhall, was between 8 and 9 o'clock. Instead of sending a man "right away," the "complaint clerk" made out a "complaint ticket," and some time before noon sent it to the headquarters of the gas-fitters, and a gas-fitter who got the ticket arrived on the scene at about 2 o'clock. Meantime, shortly before noon, Mrs. Bramhall, the gas still continuing to escape, was trying to find the place from which it was leaking. To do this she says, when testifying, she lighted a match, and tried the joints of the fixtures. She carried her match along the joints of a fixture back to the cap which covered the opening for the pipe in the wall. The gas coming out around the pipe took fire from the match, and the pent-up gas behind the ceiling exploded. The lath and plaster on the opposite room were blown off, the flooring blown upward, and Mrs. Creighton, who was sitting there, was seriously injured. It subsequently appeared that the gas had escaped through a sand hole in the pipe inside the partition wall.

Upon the trial at the close of the evidence, in which there was no material conflict, counsel for the defendant requested the direction of a verdict in its favor. This the court refused, and the counsel saved an exception. The jury found a verdict for the plaintiffs. Several exceptions to the rulings of the court upon questions of law were saved for the defendant. For the purpose of our consideration we have been aided by a summary of his points by counsel for the now plaintiff in error. But before considering them we should notice the claim the counsel make in respect to the rule of procedure and the duty of the court to give peremptory instructions when the evidence is such that no reasonable man could doubt as to the proper conclusion to be drawn from it. We assent to the proposition thus implied, and agree that the court is so bound. The rule is so well settled that it is not to be questioned. We come then to the summary of questions to be determined as stated by counsel as follows:

"First. The defendant owed the plaintiffs no legal duty to cut off the gas flowing from its service pipes into the house pipes of the premises, No. 218 Washington avenue, and, being under no legal duty so to do, the plaintiffs cannot recover on a cause of action solely based upon a negligent failure to cut off said gas.

"Second. The admitted proof is to the effect that the explosion and resultant injury to the plaintiff, Mrs. Lawrence Creighton, would not have occurred but for the act of Mrs. B. C. Bramhall, the owner and proprietor of the house, in applying a lighted match to the escaping gas, and therefore the proximate cause of the explosion was not the alleged negligence of the defendant in failing to cut off the gas, but was brought about by an independent, intervening, wholly unlooked for and unexpected cause which superseded any negligence upon the part of the defendant, and therefore there was no natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect.

"Third. The plaintiffs failed to show by a preponderance of evidence that the negligence of the defendant was the proximate cause of the injury or proximately contributed thereto, in that the undisputed evidence clearly showed that, even if the defendant company had cut off the gas within

a reasonable time after it was notified so to do, still in this event the gas which had escaped prior to the notification of the defendant company, and, after the lapse of a reasonable time to cut off the gas, would have exploded upon the application of a lighted match just as it did explode when the match was applied.

"Fourth. The undisputed evidence clearly shows that the explosion would not have occurred but for the act of Mrs. Bramhall, the owner of the premises, and who alone was within contractual relations with the defendant, and the plaintiffs cannot charge the legal responsibility for the result of the explosion upon the alleged original negligent act or omission of the defendant, since the intervening act of Mrs. Bramhall produced the explosion."

With respect to the first, we might have no difficulty in adopting the conclusion if the premises were true. But we cannot assent to the proposition that the defendant owed no duty to the plaintiff. On the contrary, we think that in the circumstances stated, when the defendant was informed of the danger to the inmates from its continuing to force the gas into the house, it owed a duty to every one in the sphere of danger to cut it off. It had the control of the apparatus by which the gas was let into the house. It is not material that Mrs. Bramhall owned that part of it where the gas escaped. It was by the defendant's sole agency that the gas was sent to the place in circumstances which made it dangerous to everybody near it.

Second. It is claimed that the proximate cause of the injury was the act of Mrs. Bramhall in bringing the lighted match into contact with the gas. This might be so if it had been a supervening cause which rendered the first cause inoperative. The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. The effect of the former had not ceased, but co-operated with that of the other in effecting the injury. In such case an inquiry about the proximate cause is not pertinent, for both are liable. *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Gila Valley, etc., Ry. Co. v. Lyon*, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276; *Deserant v. Cerillos, etc., Ry. Co.*, 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; *Kreigh v. Westinghouse, etc., Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; and our own decision in *Great Lakes Towing Co. v. Kelly Island, etc., Co.*, 176 Fed. 492, 497, 100 C. C. A. 108. If the act of one be not negligent when tested by rules of law, a priori, must that one be liable whose culpable negligence has led directly to the injury without the intervention of any unlawful act. Whether Mrs. Bramhall was guilty of an inexcusable negligence in her use of the lighted match would be a question of fact with which we do not propose to deal. For the present purpose it is immaterial. It would be a profitless task if we should undertake to expound the general doctrines of proximate causes, or to canvass the great number of cases which the industry of counsel has collected in their brief. One point, however, we think it proper to notice. It is contended that it could not have been foreseen as probable that a lighted match would be put near the gas, and that therefore the defendant would not be liable for an accident caused thereby. There are many cases in which such language has been employed, but incorrectly as we think. If the thing

done produces immediate danger of injury, it is not necessary that the author of it should have in mind all the particular results which might happen from the presence of the danger. *Doyle v. Chicago, St. P. & K. Ry. Co.*, 77 Iowa, 607, 42 N. W. 555, 4 L. R. A. 420; *Texas & Pac. Ry. Co. v. Carlin*, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462, affirmed 189 U. S. 354, 23 Sup. Ct. 585, 47 L. Ed. 849.

The third proposition is, in substance, that the result would have been the same if a lighted match had been applied, as was done by Mrs. Bramhall, before the time when the defendant became negligent. Perhaps, but only perhaps. The accumulation of gas was constantly increasing, and an explosion at an earlier time might not have been so serious as to have caused the injury complained of. The proposition itself is a matter of speculation, and without value in determining the result of the actual conditions in which the injury happened.

The fourth proposition is in substance only a repetition of the second, couched in different phraseology. The fact that the defendant was in contractual relations with Mrs. Bramhall only does not relieve the defendant from the consequence of its wrongful conduct suffered by an inmate of the house rightfully there and within the range of the danger which the defendant produced.

The instructions given to the jury were in conformity with the principles which we think were applicable to the facts which the jury might properly find, and they were clear and ample. They were quite as favorable to the defendant as the law would justify. Several exceptions to the charge were saved, and errors are assigned thereon. But these exceptions were all directed to instructions which were based upon principles which we think sound, and it is unnecessary to repeat what we have already said.

Likewise certain requests of counsel for defendant to instruct the jury were refused. These requests, when not allowed by the court, were in substance for instructions that the rules of law applicable to the case were such as upon argument of counsel here are sought to be maintained and have been already considered and disapproved.

We find no error, and the judgment should be affirmed with costs.

BLANCHARD et al. v. AMMONS et al.

In re AMERICAN COPPER CO.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1910.)

No. 1,722.

BANKRUPTCY (§ 444*)—PETITION FOR REVISION—TIME FOR FILING.

Petitioners presented two petitions to the District Court to set aside an adjudication of bankruptcy against a corporation containing the same allegations, but one signed as stockholders and the other as creditors. Demurrers to both petitions were argued and sustained, but the order entered referred to but one of the petitions. From such order petitioners appealed to the Supreme Court of the territory, where their appeal was dismissed. Three years after the order was entered, petitioners called the attention of the court to the fact that one petition had not been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

passed on, and thereupon it entered an order dismissing the same, reciting that the issues presented had in fact been determined on the former hearing, and that the order then made was intended to cover both petitions. Petitioners then presented a petition to revise the latter order to the Circuit Court of Appeals. In the meantime the property of the corporation had been sold, and its assets distributed in bankruptcy. *Held* that, under the rule that petitions for revision must be filed within a reasonable time, such petition was too late, the matter sought to be reviewed having been disposed of three years before, and the omission of the order to so state being one to which the petitioners should have promptly called the court's attention if they desired to review it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 444.*

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Petition for Revision of Proceedings of the District Court of the Fourth Judicial District of the Territory of Arizona.

In the matter of the American Copper Company, bankrupt. Petition to revise an order of the District Court. Petition dismissed.

On June 7, 1909, the petitioners presented in this court their petition to revise in matter of law proceedings of the territorial district court of Arizona in bankruptcy. They alleged that on January 25, 1905, a petition in involuntary bankruptcy was filed against the American Copper Company, a corporation, by creditors thereof, in which it was alleged that the said corporation was insolvent, and that within four months prior thereto it had committed an act of bankruptcy by making a general assignment of all its property in trust for the benefit of its creditors; that service of said creditors' petition was made on the secretary of the corporation who suppressed knowledge of the institution of such proceedings from the stockholders; that the officers and directors of the corporation made no defense to the petition, and that an adjudication of bankruptcy was made on February 7, 1905; that the petitioners herein were then, and are now, the owners of the majority of the stock of the said corporation, and that they first obtained knowledge of the adjudication in bankruptcy on February 11, 1905; that on March 23, 1905, they applied to the District Court for an order setting aside the adjudication on the grounds: First, that the corporation was solvent; second, that the petition of the creditors alleged no act of bankruptcy, and that the instrument alleged to be an act of bankruptcy was not a general assignment for the benefit of creditors, but was a trust deed giving preference to certain creditors; third, that the trust deed was made, the filing of the petition in bankruptcy was induced, the adjudication of bankruptcy was obtained, and an order of sale of the property of the corporation was procured, all in pursuance of a fraudulent conspiracy between the president, the secretary, and certain of the directors of the corporation; that a demurrer was filed to the petition of said stockholders, and thereupon, on April 27, 1909, the demurrer was sustained, and the petition was denied and dismissed. And the petition for revision alleges that the District Court erred in so ruling, and it prays that the order of said court be set aside and held for naught, and that the averments so presented by the petitioners as stockholders to the court below be heard and determined.

The transcript of the record in the court below shows that on the date when the petitioners herein as stockholders presented their petition to the court below they also, as creditors, presented a petition containing the same allegations as were contained in their petition as stockholders, and that both petitions came on for hearing in the District Court, and that on December 19, 1905, the court entered an order denying the application presented by the petitioners as creditors. From that order the petitioners took an appeal to the Supreme Court of the territory of Arizona, and on March 22, 1907, that court dismissed their appeal. *In re American Copper Company*, 11 Ariz. 36, 89 Pac. 516. The fact that the application and petition in the court below,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which petitioners herein made as stockholders was not in terms adjudicated in the order of December 19, 1905, was not brought to the attention of the court below until April 25, 1909. Two days later the court passed upon the petition and denied the same, but the judgment entry recited "that the decision of the court rendered on the 19th day of December, 1905, was intended by the court, and did determine all issues of law presented to it by both of said petitions on behalf of Ben Blanchard and Howell Mining Company to the demurrers thereto, and said petition as stockholders has not been under advisement by this court since that time, and was wholly decided by this court at that time; that from the date of said decision, to the present time, no suggestion has ever been made to this court by counsel on either side that anything remained in dispute in connection with said petitions, or either of them; that it was intended by the court in its said decision to dispose of all the issues and matters theretofore submitted and pending arising under said petitions and the demurrers thereto, and that if the minute entry of December 19, 1905, appertaining thereto does not in form and effect dispose of the application to set aside the adjudication of bankruptcy heretofore made in these proceedings as prayed for in both said petitions, then such failure and omission to dispose of both said petitions were the result of inadvertence and mistake; that inasmuch as a nunc pro tunc order might result to the disadvantage of petitioners in denying them the full benefit and right of appeal."

E. S. Clark and Robt. E. Morrison, for petitioners.

Jno. J. Hawkins and John Mason Ross, for respondents.

Willard P. Smith, John W. Griggs, and Martin Conboy (Griggs, Baldwin & Pierce, of counsel), amici curiæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The petitioners on March 25, 1905, presented to the District Court two petitions and applications to set aside the adjudication of bankruptcy, both applications presenting the same allegations of fact, and seeking the same relief, one of which they signed as stockholders, the other as creditors of the bankrupt. On December 19, 1905, upon a hearing had on both petitions, the court denied the same, but entered an order to that effect only as to the latter petition. From that order the petitioners took their appeal to the Supreme Court of the Territory of Arizona, and on March 22, 1907, their appeal was dismissed (11 Ariz. 36, 89 Pac. 516). More than two years later, and more than three years after the District Court had passed upon their petitions, they suggested to the court for the first time that they considered that their petition as stockholders had not been ruled upon, whereupon the order of the court of April 27, 1909, was made, denying their petition, but reciting that the decision of the court of December 19, 1905, had been intended to determine all the issues of law presented by both petitions, and that since that time the matter had not been under advisement by the court, but had been wholly decided at that time, and that in the meantime no suggestion had been made to the court that anything remained in dispute in connection with said petitions. It appears clearly from the record that the order which the court made on April 27, 1909, should have been nunc pro tunc as of December 19, 1905, and that the matters presented on both petitions were at that time considered and determined by the court. There is no time fixed in the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) within which a petition for revision shall

be presented, but it is the acknowledged rule that it must be presented within a reasonable time. An appeal from the adjudication of bankruptcy is required to be taken within 10 days, and by analogy it would seem that a petition for revision of the adjudication of bankruptcy ought to be taken within a similar time, unless there are circumstances excusing delay. But the courts have generally held that a petition for revision must be presented within six months. Loveland on Bankruptcy, § 313, and cases there cited. There are no circumstances which excuse the delay in this case. All the rights of the petitioners were determined on December 19, 1905. If the petitioners were aware that their petition as stockholders had not been specifically mentioned in the order of the court then made, it was their duty to bring the matter to the attention of the court. They waited more than three years before suggesting that on the record one of the petitions remained undetermined. In the meantime the property of the bankrupt was sold, and distributed among creditors. The petitioners' position as stockholders to attack the adjudication of bankruptcy upon the facts alleged in their petition was no stronger than their position as creditors upon the facts alleged in their creditors' petition. The order which they seek here to revise must be deemed to have been made at the time when both petitions were heard and determined, December 19, 1905. The bankruptcy law contemplates that the bankrupt's estate shall be administered with all convenient dispatch, so that the property may be distributed among the creditors, and the bankrupt discharged from his debts, and that to that end parties litigant shall be alert and active to protect their rights, and to proceed with promptness in asserting the same.

The petition will be dismissed.

HORAN v. BOSTON & M. R. R.†

(Circuit Court of Appeals, First Circuit. December 12, 1910.)

No. 902.

RAILROADS (§ 327*)—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where a plaintiff, who was struck and injured by a railway train while walking diagonally across the track in the daytime at a place with which he was fully acquainted, by his own statement did not look for a train after he reached a point 15 feet from the track, he was chargeable with negligence which precludes his recovery from the company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action at law by David Horan against the Boston & Maine Railroad. Judgment for defendant, and plaintiff brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

† Rehearing denied January 19, 1911.

John T. Hughes (John F. McGrath, on the brief), for plaintiff in error.

Archibald R. Tisdale, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. In this case the Circuit Court directed the jury to return a verdict for the defendant. It is apparent that this course was pursued solely on the ground that the plaintiff was not in the exercise of due care. We think the court was unquestionably right, because it is clear, upon the plaintiff's own testimony, that he was indifferent to the dangerous situation in which he voluntarily placed himself.

It appears from the record that he was acquainted with the locality in question and had been for years. There is no contention that he was not in full possession of his faculties, and there is nothing in the circumstances, as explained, tending to show that he was deceived into thinking trains were not likely to be passing at the particular time when he walked upon the railroad track. It is not a case which turns upon the naked question whether the injured party looked and listened, or upon the question whether, if he had looked and listened once, he should have looked and listened again.

If the cut and the highway crossing, some distance to his left as he approached the railway crossing, at all obstructed the view, or if the running water deadened the sound of approaching trains, he was acquainted with that situation and should have acted with reference to it, but, instead of that, he at most, upon his own statement, looked and listened when about 15 feet from the track in question, and discovered a train going toward Portland, which was passing over the nearby trestle of another division of the defendant's railroad. At the same time he looked up the track over which he was to cross and discovered no train. He was then 15 feet from the track, and he did not look again, but walked diagonally across part of the street toward the track, and then, still without looking, diagonally across the track with his back toward the approaching train, and under such circumstances was struck and injured.

It was in July, and at about 8 o'clock in the evening, and it is not contended that the plaintiff could not see.

Such indifference in a dangerous situation constitutes want of due care and is inexcusable, and will prevent recovery on the ground of contributory negligence, unless there is something in the alleged negligence of the railroad which misled the injured party or threw him off his guard in respect to the approaching dangers. We cannot see that there was anything in the alleged negligence of the railroad, that of unwarrantable speed, the lack of gate and flagman, which misled the plaintiff or would relieve him from the ordinary caution of giving heed to approaching trains while crossing or walking diagonally across its tracks.

The recent case of *Boston & Maine Railroad v. McGrath*, 179 Fed. 323, 102 C. C. A. 507, is to the point that, when an injured party gives no reasonable explanation of his failure to do what it is well

known that prudent men ordinarily do in situations of danger, he, in effect, admits his want of due care. See, also, *Allen v. New York, New Haven & Hartford Co.*, 174 Fed. 779, 98 C. C. A. 253, which was a case not decided under the look and listen rule, but upon the theory that the plaintiff, upon his own statement, was indifferent and heedless with respect to the dangerous surroundings.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

THE O. H. VESSELS.

(Circuit Court of Appeals, Third Circuit. November 29, 1910.)

No. 1,401.

1. MARITIME LIENS (§ 11*)—"REPAIRS"—"CONSTRUCTION"—WHAT CONSTITUTE. Inclosing the deck of a barge to protect her cargo from the weather to fit her for a particular business constitutes repairs, and not construction.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 15; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1465-1468; vol. 7, pp. 6096-6101; vol. 8, p. 7785.]

2. MARITIME LIENS (§ 23*)—REPAIRS.

Repairs made on a vessel in a foreign port under a contract with a charterer, but confirmed by the master and with the knowledge of the managing owner, entitle the repairer to a lien, although the charter party contained a provision, not known to him and of which he was not notified, that they should be made at the expense of the charterers.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 46, 47; Dec. Dig. § 28.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Suit in admiralty by John Kramer and Lewis Kramer, copartners as John Kramer & Sons, against the steam barge O. H. Vessels. Decree (177 Fed. 589) for libelants, and respondent appeals. Affirmed.

Willard M. Harris, for appellant.

Henry R. Edmunds, for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. A libel was filed in admiralty by John Kramer & Sons against the steam barge O. H. Vessels, registered at the port of Wilmington, Del., to recover the sum of \$426.53 for carpenter work done on the vessel and materials furnished therefor at Philadelphia in March, 1909. The vessel had previously been engaged in carrying coal, hay, and other materials of that character, at which time her sides were open to the weather, and, as it was desired to put her in a condition to carry perishable freight, it became necessary that her deck should be inclosed. The libelants, who were house carpenters, performed the work and furnished the necessary materials. Luther R. Vessels, the managing owner of the steam barge, on Febru-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ary 19, 1909, entered into a charter party with H. J. Shock and Frank W. Litchfield, in which, among other things, it was stipulated as follows:

"That said steam barge shall be delivered by the party of the first part at his own expense at such wharf in Philadelphia or Camden, as may be designated by the parties of the second part, within five days after the signing of this charter party, for the purpose of having such improvements made at their own expense as will enable said steam barge to properly carry perishable freight. That said improvements shall become part of said steam barge without any allowance therefor to the parties of the second part at the conclusion of this charter party."

We think that the work done upon the barge by the libelants may fairly be termed repairs, and not construction. No alterations were made which essentially changed the character of the barge. After their completion she remained a freight boat, but one better adapted to carry freight requiring protection from the weather. The *Iris*, 100 Fed. 104, 40 C. C. A. 301 and *The Ella* (D. C.) 84 Fed. 471, support our conclusion that the work in question was in the nature of repairs rather than of construction. Indeed, the contrary was not strongly urged at the argument. Coming to the merits of the controversy, it should be remarked that, if the clause of the charter party above quoted was known by the libelants before they entered upon the work in question, they were bound thereby, and the vessel cannot be held liable therefor, unless, indeed, there was a contract to that effect between the libelants and the managing owner. Whether the libelants had knowledge of the charter party, and, if they had, whether there was a contract between them and the managing owner that the vessel should be bound for the repairs, are disputed points in the case. The testimony is conflicting, and cannot be reconciled. It appears that the contract as originally made was between Litchfield, one of the charterers, and the libelants. At least a letter was written by libelants under date of March 1, 1909, to Litchfield, in which they proposed to do certain of the work in question for the sum of \$253. Extra work was subsequently performed increasing the charge to \$426.53. Litchfield was the captain of the boat when the repairs were made. One Kelly was its master, and Luther R. Vessels, its managing owner, acted as engineer. Prior to the date of the above letter, John Kramer, one of the libelants, upon request visited the O. H. Vessels while she was lying at a wharf in Philadelphia, and while there was introduced to Litchfield, who he supposed was master of the barge. Litchfield pointed out the work he desired done, which Kramer agreed to do for \$258, and which apparently was the same work that was referred to in the above-mentioned letter. Litchfield thereupon called Capt. Kelly and introduced him to Kramer as master of the vessel, and at the same time said to him, "whatever this man (Kelly) wants you to do, go ahead and do it." Subsequently, but at the same interview, Kramer swears that Kelly said: "Everything is all right, everything is safe, and for all the work that is done on the barge the boat is responsible for." Kelly, the master of the barge, while denying this conversation, admits that he took charge of the repairs, and that, using his language, "there was nothing about the labor on the boat

that I did not order. There could not have been anything done without my knowledge." Vessels, the managing owner, in his verified answer denies that either he or the master of the barge ordered any repairs to be done to the barge, while according to the master's testimony, as just shown, Kelly ordered everything done that was done. Furthermore, Vessels himself upon cross-examination admits that Capt. Kelly gave orders concerning at least two or three of the items of repairs. Kelly's testimony and Vessels' admissions are corroborated by several other witnesses to an extent that permits of no doubt that the allegations of the answer above referred to are untrue, thereby measurably impairing the credibility of Vessels' testimony. Again, Kramer swears that Vessels said to him that he knew the boat was liable for the work which he did upon her. In this connection Kramer also swears that Vessels told him to try and get the money from Litchfield, but that, if he did not pay, he, Vessels, knew that the boat was liable, and that he would hold it at the wharf until they got the money, which was due them. Kramer furthermore denies that Vessels ever told him that the boat was chartered, and would not be liable for the repairs. Eissler, one of the libelants' witnesses, swears that he heard Vessels say to Kramer, "You can hold the boat if you don't get paid," and from the evidence of Capt. Kelly it may fairly be inferred that, even he did not know that the vessel was chartered, while Kramer positively denies that he knew anything about the charter party. Vessels swears, however, and he is corroborated in this by his nephew, Clarence W. Vessels, and one James C. Moffitt, a deckman, that he told Kramer that the vessel was chartered and would not be liable for the repairs. Both of the corroborating witnesses were careful to say, however, and to say repeatedly, as did Vessels, that this conversation took place about 8 or 9 o'clock in the morning of the day that the lumber for the repairs was brought on the vessel. The foregoing conversation is positively denied by Kramer, who, in turn, is indirectly corroborated by two witnesses who swear, as does Kramer, that he was not on the vessel the morning when the lumber was taken on the barge, and the corroborating witnesses further testify that because of that fact, and after search had been made for Kramer, both on the boat and wharf, the lumber was receipted for by Eissler, a carpenter, and a receipt therefor signed by him was offered in evidence and marked as an exhibit in the case. The other witness who testifies that Kramer was not present when the lumber was delivered was the man who delivered it at the boat. The case is a close one, but we find as a fact, after careful consideration of all the evidence, that the libelants had no knowledge of the existence of the charter party, much less of its terms, and, furthermore, as Judge McPherson well says, the master of the boat in effect became a party to the original contract, and the managing owner of the boat, being on board and having full knowledge of everything that was done, allowed the repairmen to believe that they would have a lien for the cost of their work. Indeed, it is not going too far to say that there appears throughout the case an understanding between the managing owner and master and the libelants that the boat should be liable for the repairs.

Our conclusion is in accord with that of the learned judge of the District Court, and the decree of that court is accordingly affirmed, with costs.

REBER v. SHULMAN et al.

(Circuit Court of Appeals, Third Circuit. November 23, 1910.)

No. 1,390.

BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—KNOWLEDGE OF INTENTION BY CREDITOR.

A preferential payment of notes by bankrupts cannot be recovered from an accommodation indorser of such notes under Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), where there is no evidence to show that such indorser advised, or procured the payment, or even that he had knowledge of it until after it had been made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-259; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Action by J. Howard Reber, trustee of J. Stern & Sons, bankrupts, against Louis Shulman and Harry Shulman, partners, etc. Judgment (179 Fed. 574) for defendants, and plaintiff appeals. Affirmed.

Henry N. Wessel and Clinton O. Mayer, for appellant.

Samuel J. Gottesfeld, for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The firm of J. Stern & Sons were engaged in the manufacture of shirt waists in the city of Philadelphia, in the summer of 1908, and in the spring of 1909. While engaged in this business, they, between August 29, 1908, and January 18, 1909, borrowed from one Charles Nemcoff \$7,400, upon 13 promissory notes made by them and indorsed for their accommodation by Louis Shulman & Bro., the appellees herein. A petition in bankruptcy was filed against the said firm of J. Stern & Sons, March 30, 1909, after which, an adjudication having been had, J. Howard Reber, the petitioner and appellant herein, was elected trustee of the estate of the said bankrupts. At the maturity of the above notes, and within four months of the bankruptcy of J. Stern & Sons, the notes were paid by J. Stern & Sons to Nemcoff, the holder thereof. Subsequently suit was brought by said trustee in bankruptcy to recover from Louis Shulman & Bro. the said sum of \$7,400, with interest.

Among the allegations of the trustee's statement of claim are the following:

"That the payment of said moneys, and each of them, was in release and discharge of the obligations of the said J. Stern & Sons to the said Louis Shulman & Bro., who thereby became released as indorsers or makers of promissory notes or other obligations to the said amounts.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

"That at the time said payments were made the said J. Stern & Sons were largely indebted to other creditors, and knew at the time that they were so indebted and unable to pay their creditors in full, and that said payments were made with the intent to prefer said defendants in violation of the act of Congress in such case made and provided, and said payments enabled the said defendants to obtain a greater percentage of their debt or obligation than any other creditors of the same class.

"Plaintiff avers that the said Louis Shulman & Bro. knew at that time, or had reasonable cause to believe and know, that the said J. Stern & Sons were insolvent, and that the payment of said money by them, the said J. Stern & Sons, was for the purpose of preferring said defendants as creditors of said bankrupt."

A trial of the matters in issue was subsequently on March 24, 1910, held. At the conclusion of the case the learned trial judge submitted the case to the jury, reserving, however, the question as to "whether there is any evidence to go to the jury in support of the plaintiff's claim." The jury found a verdict for the plaintiff; but the trial judge, upon motion after argument, entered judgment for the respondents non obstante veredicto on the point reserved.

Section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) provides that:

"A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class."

Section 60b provides that:

"If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby * * * shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

It was admitted at the trial "that at the time the petition in bankruptcy was filed, and for four months prior thereto, the bankrupts, as a firm were insolvent." The questions remaining for consideration, therefore, are: First, whether the bankrupts intended to prefer the defendants; and, second, whether the defendants knew, or had reasonable cause to believe, that a preference was intended. These are vital points, and the determination of either of them against the trustee will result in upholding the judgment below. The record, notwithstanding it is somewhat voluminous, has been carefully examined for the purpose of ascertaining whether the proofs offered in behalf of the trustee, upon whom the burden of proof rested, were sufficient to support the verdict. Without referring to the evidence in detail, it is enough to say that we think that there was evidence sufficient to support the first point, but that we fail to find any in support of the second, to the effect that Shulman & Bro. knew, or had reasonable cause to believe, that it was intended by the bankrupts to prefer them when they paid Nemcoff the notes upon which Shulman & Bro. were contingently liable as indorsers. If we were to admit that Shulman & Bro. knew, or had reasonable cause to believe, that J. Stern & Sons were insolvent, of which, however, there is no satisfactory or suffi-

cient evidence—indeed, the evidence is rather to the contrary—we would still be confronted by the fact that there is a total absence of any evidence showing, or tending to show, that Shulman & Bro. had any knowledge whatever of the payment of the notes by J. Stern & Sons to Nemcoff until after they had been paid. Furthermore, we have not been pointed to, nor have we been able to discover, any evidence to show that Shulman & Bro. ever advised, counseled, or procured the payments in question, or that they had any authority or control over the bankrupts' affairs. Under these circumstances, how can it be argued with the slightest degree of plausibility that Shulman & Bro. had reasonable cause to believe that the payments made by the bankrupts to Nemcoff were intended to give the respondents a preference? It is impossible to argue such a proposition; once stated, it answers itself.

In *Kobusch v. Hand*, 156 Fed. 660, 84 C. C. A. 372, in *Re Sanderson* (D. C.) 149 Fed. 273, and in *Brown v. Streicher* (D. C.) 177 Fed. 473, the party benefited by the payment made by the bankrupt either had control of the bankrupt or requested him to make the payment, so that in every instance the party benefited by the payment not only had knowledge thereof, but actively participated therein. Possibly there might be found under this branch of this case some circumstances which might engender a suspicion; but we fail to find any upon which the verdict of the jury could satisfactorily be rested. It was therefore the plain duty of the judge to enter judgment for the respondents non obstante veredicto.

The judgment of the court below is affirmed, with costs.

CHARLES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 6, 1910.)

No. 2,092.

APPEAL AND ERROR (§ 19*)—DETERMINATION—DECISION INOPERATIVE.

Where a decree in favor of the United States condemning certain food products as in violation of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), and ordering their destruction by the marshal, has been fully executed, and the costs taxed against the claimant have been voluntarily paid, there is nothing on which the decision of an appellate court can operate, and it will not review the case on appeal or writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

In Error to the District Court of the United States for the Northern District of Texas.

Proceeding by the United States for the condemnation of food products as adulterated; R. G. Charles, claimant. Decree of condemnation, and claimant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

S. A. Williams, M. A. Spoons, Geo. Thompson, and J. H. Barwise, Jr., for plaintiff in error.

Wm. H. Atwell, for the United States.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case the lower court found and decreed on evidence supporting the same, as follows:

"On this day came on to be heard the above entitled and numbered cause, and R. G. Charles appeared as claimant to the property therein libeled, after having given cost bond as required by the statute, and thereupon came the United States of America, libelants, by their district attorney, William H. Atwell, and the claimant in person and by his attorneys, and each and all announced ready for trial.

"The matters of law, as well as of fact, being submitted to the court without a jury, the court is of the opinion, after having heard the pleadings and testimony, and being advised as to the law, and having heard the argument of counsel, that the allegations of the libel are true, and that the tomatoes libeled are interstate commerce, from the state of Maryland to the state of Texas, intended for food, and that a portion of the 2,000 cases of canned tomatoes is unfit for food, in that the same is decomposed and contains putrid matter, and further that the same contains salts of tin, an ingredient deleterious to health; and it further appearing to the court that there are in said 2,000 cases of canned tomatoes some good cans and some bad cans, as hereinbefore described; and it further appearing to the court that the said 2,000 cases of canned tomatoes were seized by the United States marshal under the said libel, and from the return of the said officer it appears that the same said 2,000 cases of canned tomatoes are still in his possession:

"Now, therefore, it is ordered, adjudged, and decreed that the said United States marshal for the Northern district of Texas shall separate the good cans from the bad cans, which said bad cans are herein and hereby condemned, and that after such separation the said marshal shall deliver to the claimant, R. G. Charles, such cans as are good, and shall destroy such cans as are bad. It is further ordered, adjudged, and decreed that the costs of this proceeding shall be taxed against the claimant, the said R. G. Charles, and that the marshal shall be reimbursed for such expenses in carrying out this judgment as under the law he is entitled to, to be charged and taxed as other costs."

This decree was executed by the marshal and acquiesced in by the claimant, who received the good cans and paid the costs.

Now, whether we consider the case here to be on writ of error or in the nature of an appeal and all of the assignments of error to be well taken, the only actual relief lies in the matter of costs, which, in the court below, have been voluntarily paid by plaintiff in error, and in no case can be adjudged against the United States (*Stanley v. Schwalby*, 162 U. S. 255-272, 16 Sup. Ct. 754, 40 L. Ed. 960); and which in admiralty practice are within the discretion of the court, from which no appeal lies (*Dubois v. Kirk*, 158 U. S. 58-67, 15 Sup. Ct. 729, 39 L. Ed. 895, and cases cited), unless perhaps in case of gross abuse of discretion.

We therefore decline to consider the questions argued as to the constitutionality of Pure Food and Drugs Act June 6, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), and as to the construction of that act in regard to whether manufacturers can ex-

empt their goods from seizure thereunder by contract and surety from consignees not to violate the act, and other questions that seem to be academic.

The decree of the District Court is affirmed.

FIDELITY & DEPOSIT CO. OF MARYLAND v. EXPANDED METAL CO. et al.

(Circuit Court of Appeals, Third Circuit. November 26, 1910.)

No. 1,381.

1. APPEAL AND ERROR (§ 1234*)—SURETY ON APPEAL BOND—EXTENT OF LIABILITY—COSTS.

The surety on a bond given on appeal from a Circuit Court to the Circuit Court of Appeals, conditioned in effect as required by Rev. St. §§ 1000, 1012 (U. S. Comp. St. 1901, pp. 712, 716), and rule 13 of the Circuit Court of Appeals (150 Fed. xxviii, 79 C. C. A. xxviii), that the appellant should prosecute his appeal to effect and to answer all costs if he should fail to make his plea good, is liable not only for the costs in the appellate court, but also for those in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4773; Dec. Dig. § 1234.*]

2. APPEAL AND ERROR (§ 1194*)—COSTS OF APPELLATE COURT—OBJECTIONS IN LOWER COURT.

Costs taxed in the Circuit Court of Appeals without objection cannot be objected to for the first time in the Circuit Court after remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4655; Dec. Dig. § 1194.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by the Expanded Metal Company and others against Eugene S. Bradford and others. Appeal by the Fidelity & Deposit Company of Maryland from a judgment (177 Fed. 604) against it for costs. Affirmed.

Stanley Williamson, for appellant.

Ernest Howard Hunter, for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The main question presented in this case is whether the appellant, who became surety on a bond given upon an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania to this court, is liable on such bond for the costs incurred in the Circuit Court as well as in this court.

The Circuit Court, on a bill filed by the Expanded Metal Company and others, against Eugene S. Bradford and others, granted a decree enjoining the defendant from infringing certain letters patent. The defendants appealed therefrom to this court, and entered into a bond with the appellant as surety in the penal sum of \$500 conditioned that, if the defendants "shall prosecute the appeal to effect and answer all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & R. & I. Indexes

damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue." The question must be decided by the terms of sections 1000 and 1012 of the Revised Statutes (U. S. Comp. St. 1901, pp. 712, 716), and rule 13 of this court (150 Fed. xxviii, 79 C. C. A. xxviii), which, however, merely follows the statute.

Section 1000 of the Revised Statute provides that:

"Every justice or judge signing a citation on any writ of error shall * * * take good and sufficient security that the plaintiff in error, or the appellant, shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Section 1012 provides that:

"Appeals from the Circuit Courts and District Courts, acting as Circuit Courts, * * * shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."

It is obvious that section 1012 applies the same rules, regulations, and restrictions to appeals as section 1000 applies to writs of error. The bond in question herein was not strictly in form, since, although not a supersedeas bond, it in term covers both damages and costs; whereas, it should admittedly have covered all costs only. This irregularity, however, is not pressed, and was treated as waived on the argument.

Turning to a consideration of section 1000, it provides, in brief, that, where a bond is to act as a supersedeas, the condition shall be that the obligor, if he fails to make his plea good, shall answer "all damages and costs," but, where it does not act as a supersedeas, he shall answer "all costs only." It seems clear that the phrase "all costs," as used in the two clauses of this section, refer to and include identically the same costs, so that, if the costs of the lower court are covered by a bond which acts as a supersedeas, they are likewise covered by a bond which does not act as a supersedeas. That the costs of the lower court are secured when a supersedeas bond is given has uniformly been held. The bond is given for "damages and costs"; that is, for such damages and costs as the appellate court may award for the delay and for the amount of the original judgment, if it be a money judgment, with all of the costs in the court below.

Section 1 of rule 13 of this court is of the same form as rule 29 of the United States Supreme Court (29 Sup. Ct. xxi), and obviously requires a bond to secure the costs below, for it provides for two classes of indemnity, first, "where the judgment or decree is for the recovery of money not otherwise secured," in which case indemnity must be given for the whole amount of the judgment or decree including just damages for delay and costs and interest on the appeal; while, in the other class, where the property in controversy necessarily follows the suit as in real actions, replevin, suits on mortgages, and other like cases, indemnity is required only "in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and

interest on the appeal." This was the view taken by the Circuit Court of Appeals for the First Circuit, in *American Surety Co. v. North Packing and Provision Co.*, 178 Fed. 810, 102 C. C. A. 258.

There seems to be no reasonable doubt, therefore, that section 1 of rule 13 requires that the bond on appeal or writ of error shall cover the costs of both the upper and lower courts except in cases where from the nature and character of the suit they are otherwise secured. Of this latter character are the federal cases cited in the brief of the counsel for the appellant, such as *Kountze v. Omaha Co.*, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609, which was a suit for the foreclosure of a mortgage, and *Dexter, Horton & Co. v. Sayward* (C. C.) 79 Fed. 237, which was a suit instituted by an attachment against certain property. The reasoning of those cases is therefore inapplicable to the case in hand. They come within the qualification or exception mentioned in the rule. It is not deemed necessary to consider specifically certain other authorities from the state reports, cited by appellant's counsel, for the reason that we are at present dealing with the construction of a federal statute, and with the rules and practice of federal courts. Decisions of the kind just referred to, therefore, no matter how well considered or how greatly entitled they may be to respect in a general way, cannot, since they relate to state statutes, court rules, and practice, be given controlling weight in the decision of this case.

Paragraph 2 of rule 13, as already intimated, follows the second clause of section 1000 of the Revised Statutes and provides for a bond in such sum as the court shall direct "to answer all costs if he shall fail to sustain his appeal." We have already said that we can perceive no distinction between the term "all costs" as used in the statute in connection with supersedeas bonds, and its use in connection with bonds which do not operate as a supersedeas. Such a distinction, if made, would be forced and unnatural and a mere juggling with words. The same is true of rule 13 of this court, which, while somewhat amplifying the statute, after the manner of rule 29 of the United States Supreme Court, nevertheless closely adheres to it. But not only do we find no distinction between the clauses of the statute and of the rule, as to what costs are to be secured by the bonds thereby provided to be given, but after careful consideration we are unable to discern why there should be any such distinction. The clear intent of the statute, as it appears to us, was to provide that in every case of appeal all costs should be secured, and since, as we have seen, the first clause of the statute covers costs both above and below, and the same term in amplest form is carried into the second clause, we feel constrained to give it the same construction there. Furthermore, we have not been referred to any adjudicated case which in terms requires any such distinction to be made; on the contrary, Judge McPherson of this circuit, in *The Joseph B. Thomas* (D. C.) 158 Fed. 559, held, in a case where a libellant sued in forma pauperis, that the surety on the bond given on appeal was liable for the costs of the lower court.

A single minor point remains for consideration. The judgment was entered in the Circuit Court for the amount of \$442.61, included in which were \$257.61 of costs in the court below and \$185 of costs in the Circuit Court of Appeals. In the item of \$185 was included one

of \$65.45 for furnishing and certifying a copy of the record to the Supreme Court. Objection is made to this item for the reason that it was not one of the charges necessary to obtain a decision of the case in the Circuit Court of Appeals. Whether that item, however, was properly taxed as a part of the costs, cannot be considered on this appeal. As a matter of fact, it was taxed as a part of the costs in this court, and was permitted to stand unchallenged. If improperly taxed, application should promptly have been made for a retaxation of the costs. Failing this, or otherwise to except to the costs as taxed, the appellant herein was not entitled to raise the objection for the first time in the court below. That court was bound, if it gave judgment at all, to give judgment for the costs as taxed in this court.

The judgment below will be affirmed, with costs.

THE GEORGE W. PEAVEY.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 76.

1. COLLISION (§ 22*)—INEVITABLE ACCIDENT.

A collision is not due to inevitable accident, when it could have been avoided by the exercise of skill and care.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 19; Dec. Dig. § 22.*]

2. COLLISION (§ 125*)—ACTION FOR DAMAGES—EVIDENCE.

The testimony of persons on a vessel on a dark night as to the speed of a meeting vessel is not entitled to weight as against that of the persons navigating the meeting vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 270; Dec. Dig. § 125.*]

3. COLLISION (§ 105*)—STEAMER AND TOW MEETING—SHEER OF TOW.

A collision at night in the canal through the St. Clair Flats between a barge in tow passing down and a steamer going up *held* on the evidence to have been due solely to the sheering of the barge to the east side of the channel and against the steamer, which was without fault.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Western District of New York.

Suit in admiralty by W. S. Brainard, as owner of the schooner barge Chippewa, against the steamer George W. Peavey. Decree for respondent (173 Fed. 715), and libellant appeals. Affirmed.

Harvey D. Goulder and Frank S. Masten, for appellant.

Herman A. Kelley and Hoyt, Dustin, Kelley, McKeehan & Andrews, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COXE, Circuit Judge. The ship canal where the collision occurred is approximately a mile and one-third in length and 292 feet wide. The Peavey is a steel steamer 430 feet long, keel measurement, and 50 feet beam. She was bound up without cargo. The Cherokee, towing the barge Chippewa on a 700-foot hawser, was bound down for Cleveland. The steamer and the barge are wooden vessels and were both loaded with iron ore. The Cherokee is 308 feet keel and 35 feet beam. The Chippewa is 220 feet keel and 36 feet beam. The collision occurred at about 10:40 on a calm, clear night when there was no wind and nothing in the elements to render navigation difficult. It was asserted at the argument that the decree of the District Judge exonerating the Peavey was equivalent to a finding that the collision was the result of inevitable accident. A mere statement of the salient facts demonstrates the inaccuracy of this assertion. An accident is not inevitable when it can be avoided by the exercise of skill and care. The *Jumna*, 149 Fed. 171, 79 C. C. A. 119. We are convinced that this accident could have been avoided. It is not, however, necessary to designate the particular act, or acts, of negligence which caused the collision. The burden is upon the libellant to prove the negligence of the Peavey and unless he succeeds in so doing he cannot recover.

The faults charged against the Peavey are as follows: First, that she was proceeding at an excessive and illegal speed; second, that she failed to have and maintain a sufficient lookout; third, that she was in control of incompetent and reckless officers and crew; fourth, that she failed to navigate in accordance with exchanged signals; fifth, that she failed to keep on the right side of the channel. The charge of excessive speed is based upon speculation and presumption. It is hardly necessary to point out that on a dark night witnesses on meeting vessels are in no position to state with anything approaching accuracy the speed of the other vessel. Whether she is approaching at five or ten miles an hour, is, under such conditions, the merest guesswork. The witnesses on the Cherokee and Chippewa had no accurate criteria with which to gauge the speed of the Peavey. When opposed to their opinion we have the positive statement of those in charge of the Peavey that she was proceeding at a speed not over five miles past the land, we are compelled to the belief that she was well within the legal rule which permits a speed of eight miles an hour through the canal. The Peavey was following the Britannic across Lake St. Clair and through the canal. She was a somewhat faster boat than the Britannic and, in order that she might keep a safe distance behind, she checked to slow speed about a mile and a half before reaching the canal. The proof shows that she entered the canal at about the center and continued in this position until the exchange of port to port signals with the Cherokee, when she ported her helm and was well on the easterly side of the canal when she passed the Cherokee not less than 40 or more than 100 feet away.

When it is remembered that the channel is less than 300 feet wide and that the Peavey is 50 feet beam, it is manifest that the space in which to maneuver east of the center line of the canal was exceedingly limited. Navigation nearer than 50 feet to the east pier would

present many elements of danger and the testimony shows that the starboard side of the Peavey was about this distance from the east pier when she passed the Cherokee and her port side was about 50 feet east of a line drawn through the center of the river. A safer course for passing down-bound vessels could hardly be suggested. To have hugged the east pier would not only have been faulty navigation, but it would have been in direct violation of the statute governing the navigation of the canal. The two steamers passed at a safe distance, even if the testimony of the libellant be accepted, and if the Chippewa had followed her steamer, she would also have passed in safety. As the bow of the Peavey was passing the Cherokee's stern the Chippewa suddenly showed her green light, indicating a strong sheer to port. There was then less than a minute before the collision occurred and whatever took place thereafter may be considered as in extremis. However, there is no doubt that everything was done on both vessels to avert the collision which could have been done after the sheer began. We have no doubt that it was this unexpected sheer of the barge when she was about 700 feet from the Peavey's bow which caused the collision and we are unable to find that this sheer can be attributed to any act of omission or commission on the part of the Peavey. The fact that the force of the blow on her port bow threw the Peavey almost immediately on the east pier indicates that the collision must have occurred well to the eastward of the center of the canal. It is unnecessary to indulge in conjecture as to what caused the sheer. It is enough that it was not caused by the Peavey.

The captain of the Cherokee says that he met the Britannic when he was entering the canal and that the Cherokee was then 30 or 35 feet off the west pier and that the Britannic passed him about 50 feet off. If this be true it is clear that the Britannic must have been either in, or west of, the center of the canal and yet the Cherokee and her tow passed her in perfect safety. If the Cherokee and her tow were 35 feet off the west pier it is difficult to perceive how a collision could have occurred at a point east of the center of the channel unless the barge took a decided sheer to port.

The Peavey had a competent lookout who was on duty at the fore-castlehead and saw all that it was possible to see. Indeed, there can be no doubt that the Peavey was properly manned by competent officers and crew. The libellant admits that as the Britannic "passed the Chippewa the latter sheered slightly" and no one disputes that she sheered at this time. We agree with the District Judge in thinking that this sheer was not a slight one and was not overcome, but continued until the Chippewa struck the Peavey in the eastern half of the canal, forcing the bow of the latter upon the eastern pier. Such a condition cannot be accounted for upon the theory that the Chippewa was coming down on the westerly side of the canal and would have passed in safety had not the Peavey, in the language of the libel, come on "at a great and unlawful speed in excess of the government regulations for passing in the canal; that she did not navigate in accordance with signals, but, notwithstanding she had an abundance of room, as above stated, and could have passed with entire safety and without

risk to any of the vessels, she came over into the water of the Chippewa and into the course of the Chippewa and, still running at great speed, struck the Chippewa on the port bow with her own bow and then for the first time sheered over to the westward." Such is not, in our judgment, a rational version of the collision nor is it in accordance with the proof.

The decree is affirmed with costs.

TEXAS & P. RY. CO. v. PRATER.

(Circuit Court of Appeals, Fifth Circuit. December 6, 1910.)

No. 2,084.

MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence considered, in an action by a locomotive engineer against the railroad company to recover for an injury received in a collision between his engine and a caboose standing on the track without carrying a rear light, and held sufficient to warrant the submission of the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Action at law by C. C. Prater against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. Thompson, for plaintiff in error.

C. R. Bowlin, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After analyzing the evidence and citing adjudged cases, counsel for plaintiff in error submits his contention on this writ as follows:

"We place our prayer for reversal of this cause upon the broad principle that, admitting the servants of the railroad company were negligent with reference to failing to have the light from the rear end of the standing caboose, yet, taking the undisputed evidence and in connection with the physical facts, the court should have instructed or held that Prater was guilty of contributory negligence in permitting his engine to come in contact with said standing caboose, and instructed the jury that on account of such contributory negligence and acts he was not entitled to recover; and, having failed in this respect, a new trial should have been granted as a matter of law upon the evidence."

From our examination of the record, we fail to find "the undisputed evidence" which "in connection with the physical facts" shows that Prater was guilty of contributory negligence. Certain it is that Prater and his witnesses testify that, on passing the western yard-limit board at Thurber station, he put his train under control, as "putting under control" is defined by the witnesses; that Prater expected, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had some right to expect, that any car or engine standing, at dark or after, on the main track within the yard limits, would show a red light; that the time was after sundown and the skyline dark and cloudy; that there were hills along the track, and curves in the track, particularly one near the collision, which hindered Prater from seeing the unlighted caboose until within colliding distance.

As to the physical facts proved, mainly relating to distances and directions at which other parties could see what Prater says he did not see at the time of the collision, they may throw doubt upon Prater's evidence, but do not overthrow it as a matter of law. It may be that the result in this case is to award damages to a negligent engineer, whose carelessness contributed to his injury, and that such result is against the interest of the railroads, their employes, and the general traveling public; but this was a matter for the trial judge and jury, and is outside of our cognizance on this writ.

On the record it is our duty to affirm the judgment; and it is so ordered.

TEXAS & P. RY. CO. v. MAYER et al.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1910.)

No. 2,039.

1. CARRIERS (§ 320*)—ACTION FOR INJURY TO PASSENGER AT STATION—QUESTIONS FOR JURY.

In an action against a railroad company for an injury to a passenger at a station, the principal question at issue, as to whether the station was properly lighted, *held* properly submitted to the jury under the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1149; Dec. Dig. § 320.*]

Injuries to persons at stations, see note to New England R. Co. v. Hyde, 41 C. C. A. 550.]

2. CARRIERS (§ 333*)—INSTRUCTIONS.

An instruction based on the assumption that a passenger in a car standing at a station has no right to leave the car except in case of necessity, or when assisted by an agent of the company, *held* rightly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.*]

In Error to the Circuit Court of the United States for the Eastern District of Texas.

At Law. Action by Mrs. Dora E. Mayer and others against the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

F. H. Prendergast and W. L. Hall, for plaintiff in error.

S. P. Jones, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. Under the evidence, the issues of negligence on the part of the defendant below, and of contributory negligence on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

part of Mrs. Dora E. Mayer, were necessarily submitted to the jury. The trial judge in charging the jury covered all the issues in the case, and no exceptions were taken by either party. It follows that the first, second, and third assignments of error, which relate to special charges refused, which, if granted, would have substantially taken the case from the jury, are not well taken.

The remaining assignments of error complain of special charges refused by the court which seem to be based upon the assumption that a passenger in a car standing at a station and inviting the ingress and egress of passengers has no right to leave the car except in case of necessity or when assisted by the railway company's agents, and therefore none of these assignments are well taken.

The real question at issue was whether the car station and surroundings were properly lighted, and under the accepted charge of the trial judge the verdict of the jury cannot be disturbed.

The judgment of the circuit court is affirmed.

TEXAS & P. RY. CO. v. WILLIAMS.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1910.)

No. 2,042.

RAILROADS (§ 484*)—ACTION FOR INJURY BY FIRE—QUESTIONS FOR JURY.

In an action against a railroad company to recover for loss by a fire alleged to have been caused by an engine on defendant's road, proof that the appliances of the engine which passed the premises just before the fire were in good condition does not entitle defendant to an instructed verdict.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.*]

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action at law by J. S. Williams against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cecil H. Smith, for plaintiff in error.

E. S. Conner and S. B. M. Long, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The assignments of error which question the jurisdiction at law of the court below and the sufficiency of parties in interest are not well taken. See *Chicago, St. Louis & New Orleans R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; *Southern Bell Telephone & Telegraph Co. v. Watts*, 66 Fed. 460, 13 C. C. A. 579; *Railway v. Hall*, 64 Tex. 615.

The evidence of George Polk, complained of in the fifth assignment of error, seems to have been, not only relevant, but material. While the undisputed evidence in the case may show that the appli-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ances of defendant's engine that passed plaintiff's premises just before the fire were in good condition, that did not, under the proof, entitle the defendant to an instructed verdict.

As to defendant's negligence, the evidence required a submission to the jury.

The judgment of the Circuit Court is affirmed.

WINTERS et al. v. CHILDRESS.†

(Circuit Court of Appeals, Fifth Circuit. November 29, 1910.)

No. 2,024.

APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR.

Rulings of a trial court in excluding evidence *held* harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1058.*]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Action at law by B. F. Childress against J. N. Winters and another. Judgment for plaintiff, and defendants bring error. Affirmed.

I. W. Stephens and Geo. E. Miller, for plaintiffs in error.

J. H. Barwise, Jr., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The second amended original petition, a trial amendment permitted by the court, although alleging for the first time that the contract of agency to be procured by Childress for Winters & Daniel was to be exclusive, was not a material departure from the cause of action as originally brought. We gather from the evidence of William Hurt that he was aware of and favored the interest of Childress in the agency and commissions to be given to Winters & Daniel for the successful sale of the land in question, and therefore that Childress' conduct in the premises was not open to the suspicions urged in the case.

From the evidence in the record it is reasonably clear that Winters & Daniel obtained the agency from Hurt through the efforts of Childress, and that if the latter had understood that to obtain a share of the commissions he would have to find an acceptable purchaser the services of Winters & Daniel would not have been required.

Some of the rulings of the trial judge may have tended to restrict the full development of defendant's case, particularly the rejection of the letter of Daniel to William Hurt, the contents of which letter were somewhat brought out in cross-examination of defendant Daniel; but, after reading the letter in full, we are not prepared to say that the rejection thereof constituted reversible error, in materially prejudicing the defendants in the exclusion of evidence not otherwise in the case.

On the whole, the case seems to have been fairly ruled and sub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mitted, and, notwithstanding the ingenious and forcible argument of counsel for the plaintiff in error, we conclude that the verdict and judgment of the Circuit Court should be affirmed.

And it is so ordered.

IMPERIAL WOOLEN CO. v. MILLER et al.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 1,398 (23).

MASTER AND SERVANT (§ 284*)—ACTION FOR INJURY TO SERVANT—EVIDENCE.

Evidence in an action for an injury to a servant *held* sufficient to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action at law by George Miller, by his father and next friend, Adam Miller, and Adam Miller, against the Imperial Woolen Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Joseph H. Taulane, Charles S. Schofield, and White, White & Taulane, for plaintiff in error.

James H. Simms, for defendants in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

PER CURIAM. The plaintiff in error says that three questions are presented by the assignments of error: (1) Whether the minor, George Miller, was directed to oil the machinery while it was in motion; (2) whether he was adequately instructed; and (3) whether he was furnished with unsafe tools and appliances. This is a fair statement of the questions involved. There was abundant evidence on each of them to oblige the court to submit the case to the jury.

The judgment is accordingly affirmed, with costs.

FIRST NAT. BANK OF CANYON, TEX., v. CROWLEY.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1910.)

No. 2,044.

COURTS (§ 322*)—JURISDICTION OF FEDERAL COURT—CITIZENSHIP—DEFECTIVE AVERMENTS CURED BY RECORD.

Where the right of a plaintiff to maintain an action in a federal court on an assigned claim, which depended on the citizenship of his assignor, was not questioned in the trial court, it is sufficient to sustain the jurisdiction that it appears in the record that the assignor had a domicile and resided in a state other than that of which the defendant was a citizen.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 879; Dec. Dig. § 322.*]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Action at law by Samuel Crowley against the First National Bank of Canyon, Tex. Judgment for plaintiff, and defendant brings error. Affirmed.

C. B. Reeder and Jas. A. Graham, for plaintiff in error.

Samuel S. Shull and Warren Rogers, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. We find no reversible error in any of the rulings of the trial court on the sufficiency of the pleadings or the admissibility of evidence. While plaintiff in error was a quasi trustee and perhaps could have been held accountable to plaintiff below in an equity suit calling for an accounting, yet as the case was made there was a complete and adequate remedy at law.

The serious question presented by the record is the objection, not made in the court below, that the jurisdiction of the court does not appear of record so far as the suit is based on an assigned claim of Thomas Crowley to Samuel Crowley, because it is not shown that the said assignor, Thomas Crowley, could have maintained an action to recover in the Circuit Court if an assignment had not been made. We find that the record does show that Thomas Crowley of Buchanan county, Mo., resided—i. e., had a domicile—in Buchanan county, Mo., and that he lived there. We think that this brings the case within the ruling in *Sun Printing & Publishing Ass'n v. Edwards*, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027, and therefore we may hold that the jurisdiction in question sufficiently appears. The evidence in the case warranted the directed verdict.

The judgment of the Circuit Court is affirmed.

GALVESTON, H. & S. A. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1910.)

No. 1,949.

RAILROADS (§ 254*)—SAFETY APPLIANCE STATUTES—ACTIONS FOR VIOLATION—DEFENSES.

The duty of railroads engaged in interstate commerce to comply with the statutes in regard to safety appliances is absolute, and in suits by the United States for penalties thereunder, where the failure to comply with the statutory requirements is clearly proved, no excuses are sufficient to constitute a defense, and it is not error for the court to direct a verdict for the plaintiff.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

In Error to the District Court of the United States for the Western District of Texas.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the United States against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for the United States, and defendant brings error. Affirmed.

T. J. Beall, for plaintiff in error.

Chas. A. Boynton and P. J. Doherty, for the United States.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The question is whether, on the evidence admitted in the case without objection, the trial judge erred in directing a verdict for the United States, thus taking away from the jury the right to pass upon the sufficiency of the excuses proved in the case.

That the duty of railroads engaged in interstate commerce to comply with statutes in regard to safety appliances is absolute, and in suits by the United States for penalties thereunder no excuses are sufficient, is held in *Atlantic Coast Line R. Co. v. United States*, 168 Fed. 175, 94 C. C. A. 35; *United States v. Wabash R. Co.* (7th Circuit) 182 Fed. 802; *United States v. Denver & Rio Grande R. Co.*, 163 Fed. 519, 90 C. C. A. 329; *United States v. Atchison, Topeka & Santa Fé R. Co.*, 163 Fed. 517, 90 C. C. A. 327; *Chicago, Milwaukee & St. Paul R. Co. v. United States*, 165 Fed. 423, 91 C. C. A. 373, 20 L. R. A. (N. S.) 473; *United States v. Southern Pacific R. Co.*, 169 Fed. 407, 94 C. C. A. 629; *Chicago, Burlington & Quincy R. Co. v. United States*, 170 Fed. 556, 95 C. C. A. 642. And that was evidently the view of the learned trial judge.

On these adjudged cases, and in view of the construction given by Congress in the act of April 14, 1910, the judgment of the District Court is affirmed.

AMERICAN GRAPHOPHONE CO. v. VICTOR TALKING MACH. CO. et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 87.

PATENTS (§ 326*)—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT—LICENSE TO "OPERATE UNDER A PATENT."

Where defendant, which had been enjoined from infringing a patent owned by complainant, covering a sound-producing apparatus for talking machines, including the sound record, under a subsequent contract with complainant was given the right to "operate" under such patent, in return for the granting of a like right under a patent of its own, it had the right to sell records made by another, as well as those of its own make, and was not chargeable with violation of the injunction because it sold records made by another, who had been held as a contributory infringer of complainant's patent; such records, however, not being a direct infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 326.*

For other definitions, see Words and Phrases, vol. 6, pp. 4989-4992.]

In Error to the Circuit Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Victor Talking Machine Company and the United States Gramophone Company against the American Graphophone Company. From an order (178 Fed. 577) imposing a fine for contempt, defendant appeals. Reversed.

Writ of error to an order of the Circuit Court fining the defendant in the sum of \$1,000 payable to the United States for contempt in violating an injunction restraining it from infringing claims 5 and 35 of United States letters patent No. 534,543 to Emil Berliner.

Ralph L. Scott (R. N. Dyer and C. A. L. Massie, of counsel), for plaintiff in error.

Stimson & Williams (Horace Pettit, of counsel), for defendants in error.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The complainant the Victor Talking Machine Company is licensee under the Berliner patent for a talking machine called the "gramophone." It obtained an injunction in a suit against the defendant, the American Graphophone Company ([C. C.] 140 Fed. 860, affirmed 145 Fed. 350, 76 C. C. A. 180), which the court below has held to have been violated. Claims 5 and 35 of the patent were sustained for the process of reproducing sounds and the apparatus for doing so, being a combination of the Berliner reproducing stylus with sound records which were old.

"5. The method of reproducing sounds from a record of the same which consists in vibrating a stylus and propelling the same along the record by and in accordance with the said record substantially as described."

"35. In a sound reproducing apparatus consisting of a traveling tablet having a sound record formed thereon and a reproducing stylus shaped for engagement with said record and free to be vibrated and propelled by the same, substantially as described."

The Graphophone Company is the owner of United States letters patent to Jones, No. 688,739, for the production of the sound records now in universal use. It obtained an injunction in a suit against the Universal Talking Machine Company, one of the Victor Company's subsidiary companies. 151 Fed. 595, 81 C. C. A. 139.

June 3, 1907, the Victor Company and the Graphophone Company, with a view to composing differences and of conferring mutual licenses, entered into an agreement which recites that the Victor Company has a license "to manufacture, sell, and deal in gramophones and gramophone goods" under the Berliner patent, and the Graphophone Company is desirous of operating under the said patent, also that the Graphophone Company is owner of the Jones patent and the Victor Company is desirous of operating thereunder, and then confers by implication upon each the right to "operate" under the patent of the other with three reservations, viz.: First, that neither party shall counterfeit nor copy any record owned or controlled or first produced by the other nor deal in nor handle such copies if made by others; second, no right is conferred upon the Graphophone Company to use the word "gramophone," nor upon the Victor Company to use the

word "graphophone"; third, the rights conferred are nonassignable. The agreement further provided:

"13. It is further agreed, as to all patents adjudicated or to be adjudicated as valid, that the party owning or controlling such patent or patents will with due diligence actively proceed against all infringers of said patent or patents, to enjoin such infringing parties from said infringements, and for an accounting, when requested in writing to proceed against any such alleged infringers by the other party hereto.

"14. Each of the parties hereto shall, through their counsel, when requested by the other party, assist such other party in prosecuting infringements of said patents, sustained or to be sustained, after the same has been sustained, when so requested in writing, each party bearing the expense of its own counsel; it being understood that the direction and control of said suits shall be entirely in the hands of the party bringing the suit and controlling the patent."

The Graphophone Company obtained an injunction on final hearing against the Leeds & Catlin Company for direct infringement of its Jones patent for sound records. 170 Fed. 327. The Victor Company obtained and maintained a preliminary injunction against the Leeds & Catlin Company as contributory infringers of the Berliner patent, because they sold sound records knowing and intending that they were to be used in and for the reconstruction of the Gramophone Talking Machine. (C. C.) 150 Fed. 147; 154 Fed. 58, 83 C. C. A. 170, 23 L. R. A. (N. S.) 1027; 213 U. S. 326, 29 Sup. Ct. 503, 53 L. Ed. 816.

Before this injunction was finally affirmed, Leeds & Catlin sold a large quantity of these records to various jobbers, which the Graphophone Company took off the hands of the jobbers in exchange for their own records, made under the Jones patent. Some of these records it subsequently sold, and it was for this the Circuit Court held it to be a contributory infringer.

The order is sought to be sustained on the ground that selling these records was a violation of articles 13 and 14 of the agreement of June 3, 1907. Conceding, without admitting, this to be so, the act would not be a contempt, but a breach of contract, to be remedied in an action at law. Washburn & Moen Mfg. Co. v. Southern Wire Co. (C. C.) 37 Fed. 428. Indeed the act of buying the Leeds & Catlin records would seem to be in direct suppression of contributory infringement of the Berliner patent. It remains to inquire whether the Graphophone Company, having bought the records, was within its rights in selling them. The Victor Company contends that the "right to operate under the Berliner patent gives the Graphophone Company only the right to manufacture and sell products manufactured by it." But clause 35 of the patent covers the apparatus, and presumably the Graphophone Company has the right to make and assist others to make the combination of stylus and record which constitutes the apparatus. Why is it confined in so doing to records manufactured by itself? There is no express limitation of the license, other than the three reservations above mentioned. And it is fair to infer, from the reservation that neither party shall deal in nor handle counterfeit records made by others, that they may deal in records made by others which are not counterfeit nor direct infringements. The Leeds & Cat-

lin records are not counterfeits of the Victor record, nor direct infringements of the Berliner patent. Furthermore, we cannot see that the Victor Company's business is any more or any differently injured by the Graphophone Company's selling Leeds & Catlin records than it is by that company's selling its own records. On this point it is suggested that the Leeds & Catlin record is an inferior one. If so, not being sold as the Victor Company's, the business of that company is less likely to be injured by the sale than is the Graphophone Company's business.

The order is reversed, with costs.

GREENWALD BROS., Inc., v. ENOCHS et al.

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 36.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SKIRT.

The Feuchtwanger patent, No. 662,714, for a skirt consisting of three parts, the lower part being of nonelastic material, the hip portion of a material having some elasticity, and the waist-band of still more elastic material, discloses patentable novelty and invention, and the garment is one of utility; also *held* infringed.

2. PATENTS (§ 42*)—INVENTION.

In a long-developed art, in which there is a meager sphere for invention, a marked improvement in product evidences corresponding originality in making such product.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 42.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by Greenwald Bros., Incorporated, against William S. Enochs and Lawrence W. Marks, trading as Paul, Enochs & Co. Decree (180 Fed. 478) for defendants, and complainant appeals. Reversed.

Fraley & Paul, for appellant.

Stanley Folz (Horace Pettit, of counsel), for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below Greenwald Bros., Incorporated, owners by mesne assignments of patent No. 662,714, granted November 27, 1900, to Henry J. Feuchtwanger, for a skirt, filed a bill against William S. Enochs and others, charging infringement thereof. After proof and hearing the court below, in an opinion reported at 180 Fed. 478, held the patent was invalid. From a decree dismissing the bill, the complainant appealed to this court.

In his specification the patentee says:

"My invention relates to improvement in skirts; and the object of the same is to produce an underskirt which will fit neatly over the hips without wrinkling and be secured snugly about the waist. To accomplish this object I con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

struct my skirt of three parts, each of a different kind of material. The first part or lower skirt portion is of nonelastic material, the second or hip portion is of material with a medium modulus of elasticity, and the third portion or waist-band is of material having a large modulus of elasticity. * * *

"The numeral 1 designates the skirt portion of my garment, which is made of nonflexible material and uniformly tapered from the bottom up, as is usual. This skirt is secured to a hip portion, 2, made of elastic material, such as jersey or other kind of goods of moderate elasticity. This portion is wider at the bottom than at the top, and is designed to fit smoothly and snugly the hips. With this end in view the sides, 3, may be slightly rounded; but in general the elasticity of the material is sufficient to insure a perfect fit. * * *

"The third portion of my skirt is the waist-band, 5, which is constructed of some material having a large modulus of elasticity, such as silk elastic ribbon. This band is cut to correspond with the opening in the hip member, 2, the ends being united by a clasp or fastener, 6, of any suitable kind; but it may be made integral, as in the modified form shown in Fig. 2. This band fits tightly the waist."

Upon it two claims were granted, the first of which alone is involved, viz.:

"In a skirt, the combination, substantially as described, of a hip portion of elastic material, a skirt portion secured to the bottom edge of said hip portion, and a band of greater elasticity than said hip portion, said band being secured to said hip portion at a point near the upper edge thereof."

Proof was taken by the complainant, but none by the respondents, although by their answer they had specified by name and place 60 prior uses of Feuchtwanger's device, and in addition cited 70 patents as anticipations. In the absence of proof on the respondents' part, the case is therefore before us as if on demurrer. It is not free from difficulty, but after full and careful consideration we have reached the conclusion the patent should be sustained and the respondents held to infringe.

In the first place, we have the prima facies of the patent, manufacture thereunder, and an absence of challenge of its validity for nine years after its issue. Secondly, the device, so far as we are shown, is novel, and in that regard the absence of testimony to substantiate any of the prior uses set up in the answer suggests that on closer investigation no pertinent prior use could be established or patent shown to anticipate. Thirdly, the device in its sphere is useful, and its commercial value is shown by its infringement and this suit.

This leaves its patentability to be considered. That question the court below disposed of as follows:

"The patent should be declared void for want of patentable novelty. To my mind this is so clear that it is not easy to give the reasons for it. I am well aware that patentable novelty is a subject upon which minds may readily differ, but it seems to me that a brief inspection must produce the conviction that the patentee displayed no more than the skill of the dressmaker's calling. In my opinion the so-called combination is a mere aggregation of old elements. If there is anything novel about the invention, it consists in the 'hip portion'; but even that seems to be an obvious device. It can hardly be said to require invention to take advantage of the well-known fact that elastic material will cling closely to the lines of the figure."

In this conclusion we cannot join. In the eyes of the patent law, the real device in this case is not the skill of the dressmaker in making

the skirt after she is once told how, but in the original thought that discovered and originated the device without being told. For, as was said of invention in *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586, it consists "rather in the idea that such change could be made, than in the making of the necessary alterations."

Nor can we agree that Feuchtwanger's skirt was a mere aggregation. In the first place, the use of an elastic hip section in an underskirt was new, and the union of the three elements—viz., the lower skirt of nonelastic material, which gave the skirt its distinctive character as a silk or other garment; the intermediate, moderately expansible portion, which, in the words of the specification, "will fit neatly over the hips without wrinkling"; and the third, in the waist-band of greater elasticity, whereby the intermediate section can "be secured snugly about the waist"—all unitedly combine and co-operate in producing, and in the after use of, the garment in question.

Moreover, it must not be overlooked that the improvement was made in a long-developed art, in which there was meager sphere for invention. Where a field is barren, a marked improvement in product evidences corresponding originality in making such improvement. While jersey had been used in jackets and sweaters, it did not occur to any one before Feuchtwanger to use it, or any expansible material, as a section of a skirt. And it is clear that such use makes the combination of value, for thereby a ready-made skirt may be manufactured in large quantities over a single pattern, and yet their expansible capacity makes them not only in a manner self-fitting, but adapts each skirt to fit women of different waist and hip measure. This avoids the expense of special making of skirts for individual purchasers, reduces cost by making in quantities from a single pattern, and enables a merchant to supply different sized customers from a small stock.

Moreover, it must not be overlooked that the claim element of "a waist-band of greater elasticity than said hip portion" exerts a material function, in that its greater elasticity not only serves to keep the garment in place when worn, but when not worn its contraction draws to a nonstretched condition the intermediate portion which had been stretched in wearing. This prolongs the elasticity of the latter. On the whole, this device seems to us a distinct improvement in its sphere, and has provided for women serviceable, well-fitting, ready-made skirts.

That infringement is shown is clear. The respondents' skirt has all three elements of the claim; but it is contended it does not infringe, because the intermediate section of their skirt is longer than the patent drawings seem to show. But such difference is immaterial. No such limitation is carried into the claim.

In accordance with these views, the decree below is reversed, and the case remanded, with instructions to decree the patent valid and its first claim infringed.

STILLWELL v. McPHERSON.

(Circuit Court of Appeals, Second Circuit. November 7, 1910.)

No. 39.

PATENTS (§ 328*)—INVENTION—CORRUGATED SHEET METAL CULVERT—DEMURRER.

The Watson patent, No. 559,642, for a corrugated sheet metal culvert, is not so clearly void on its face for lack of invention as to warrant its being so declared on demurrer to a bill for its infringement.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit in equity by McClellan Stillwell, doing business as the Economy Culvert Company, against Frank McPherson, as Highway Commissioner, etc. Decree (172 Fed. 151) for defendant, and complainant appeals. Reversed.

Wallace R. Lane and George Mankle, for appellant.

Risley & Love (Bond & Miller, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The patent is No. 559,642, issued May 5, 1896, to James H. Watson, on a corrugated metal culvert. The Circuit Court held the patent void for want of patentable invention. The opinion will be found in 172 Fed. 151.

The inventor states that his invention has for its object to provide a corrugated sheet metal pipe, adapted for use as a culvert and as well curbing to take the place of vitrified tiles. He refers to the difficulties attending the use of such tile, particularly for culverts—namely, the weight of material, the necessity for making it in short lengths, the liability of the cement used to connect sections to be washed out, and the careful preparation of the bed to relieve strain. He states that his metal tiles may be laid on an uneven bed without injurious results, the improved culvert being strengthened against transverse as well as against crushing and other destructive strains, the joints being formed without the use of cement, and that by reason of its weight there is a saving in expense of transportation. The specifications further state that:

"The improved culvert may be constructed in sections of any desired length and diameter to suit the purpose for which it is designed, the same consisting of sheet metal rolled to a cylindrical form and being provided with circumferential corrugations, preferably arranged in transverse planes, in contradistinction to the corrugations which are formed spirally. The corrugations are extended uniformly to the extremities of the sections, whereby when two sections are connected the terminal corrugations of the connected ends interlock. Preferably each section terminates at one end in a flared portion of a corrugation, as shown at 1, and at the other end in a contracted portion of a corrugation, as shown at 2, whereby the flared end of one section is adapted to receive the contracted end of the adjoining section. These telescoping and interlocking extremities of contiguous sections are permanently joined by means of bolts, 3. The fit of the extremities of the sections is sufficiently close to form a practically water-tight joint when secured by means of bolts or rivets.

"By extending the corrugations to the extremities of the sections and interlocking the terminal corrugations the culvert is strengthened at its joints

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as well as at intermediate points, and the increased thickness has the effect of making the device stronger at the joints than elsewhere. Hence a roughly formed trench or ditch is sufficient for the reception of a culvert constructed in accordance with my invention, and the injury to a roadway through which the culvert extends is prevented by the fact that the undermining of an end or intermediate portion of the culvert will not cause displacement of the conductor, and therefore will not result in the inoperativeness thereof."

The claim is for:

"A culvert constructed of sheet metal and comprising connected cylindrical sections provided with circumferential corrugations extending to the extremities of the sections, each section terminating at one end in a flared and at the other end in a contracted portion of a corrugation, whereby the contracted extremity of one section is adapted to fit into the flared extremity of the adjoining section to interlock the terminal corrugations, and the means, as bolts, engaging the overlapping extremities of the corrugations for securing the sections together, substantially as specified."

The judge who heard the cause in the Circuit Court suggests that there is no patentable novelty in conceiving the idea that a sheet metal pipe is less liable to breakage than a tile pipe and that it may be transported in greater lengths, that it is common knowledge that corrugated pipe is stronger than plain pipe, and that metal pipe has been used to carry water underground for very many years. He also points out that the method of connecting sections by inserting a contracted end into a flared end is common with stovepipes. It is not surprising that he reached the conclusion that no patentable novelty was disclosed. Nevertheless two other judges sitting at circuit have reached the conclusion that the point is not sufficiently free from doubt to warrant a decision against the patent when the question is presented on demurrer. Judge McPherson, in *Doherty v. Harry*, 183 Fed. 426, a cause decided before Judge Ray's opinion was rendered, says:

"My views are that the question is doubtful, my first impression having been that the patent was not valid; but upon reflection I cannot say but what the matter is involved in doubt."

Judge Kohlsaat, sitting in the Northern District of Illinois, subsequent to Judge Ray's decision, has also overruled a demurrer to a bill on the same patent.

There seems to be sufficient doubt about the question of patentability to call for a disposition of the case similar to that made in *Beer v. Walbridge*, 100 Fed. 465, 40 C. C. A. 496, *National Casket Co. v. Stoltz*, 174 Fed. 413, 98 C. C. A. 617, and *Lyons v. Drucker*, 106 Fed. 416, 45 C. C. A. 368, where we reversed decisions sustaining demurrers. In patent causes, moreover, there is always the chance that evidence as to conditions prior and subsequent to the patentee's publication of his improved device may be introduced which would induce the reversal even of a very strong impression formed merely from a perusal of the patent itself in the light of common knowledge. Such instances are within the experience of this court. See *Schenck v. Singer Mfg. Co.*, 77 Fed. 841, 23 C. C. A. 494; *Brunswick-Balke-Collender Co. v. Thum*, 111 Fed. 904, 50 C. C. A. 61.

We think the bill avers title sufficiently.

The decree of the Circuit Court is reversed, with costs.

JEFFERSON FIRE INS. CO. v. BIERCE & SAGE, Inc.

(Circuit Court, E. D. Michigan, S. D. December 7, 1910.)

1. EQUITY (§ 39*)—INJUNCTION—DISSOLUTION—JURISDICTION.

Where in a suit by an insurance company against its general agent, after cancellation of the agency contract, to compel an accounting of premiums and construction of the contract, an injunction against any proceedings under the arbitration clause of the contract, was dissolved, and an ex parte arbitration resulted in an award to the agent of damages for wrongful cancellation, whereupon a suit was brought at law to recover the award, the dissolution of the injunction did not divest the equity court of its right to state an account and construe the contract.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

2. CONTRACTS (§ 127*)—OUSTING JURISDICTION OF COURT—VALIDITY.

A provision in an insurance agency contract that in the event of misunderstanding as to the meaning of its terms, or operations thereunder, the same should be settled in an equitable manner, and all differences should be referred to arbitration, the parties waiving a right of appeal to a court of law or equity from the decision of the arbitrators, was void as an attempt to oust the courts from all jurisdiction over any controversy that might arise under the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 608-615; Dec. Dig. § 127.*]

3. ARBITRATION AND AWARD (§ 8*)—PROVISION FOR ARBITRATION—VALIDITY—LIMITATIONS.

The limitations to the rule that an arbitration agreement ousting the courts of all jurisdiction over controversies that might arise thereunder is void, do not go beyond cases where the advance agreement is to submit to general arbitration specific questions of fact, the determination of which is a condition precedent to legal action, or to submit to a supervising umpire or technical expert questions of fact arising under his supervision, or pertaining to his specialty, and such questions of construction, or of law as are incidental to any controversy that may arise on such subject.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 29; Dec. Dig. § 8.*]

4. ARBITRATION AND AWARD (§ 8*)—AGREEMENT TO ARBITRATE—CONSTRUCTION.

An agreement in an agency contract to submit all matters of difference to arbitration without right of appeal from the award, could not be construed as limited to a means of fixing damages in connection with a possible judicial holding that a cancellation of the contract by the insurance company was unlawful and sustained as so construed.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 29; Dec. Dig. § 8.*]

5. COURTS (§ 372*)—FEDERAL COURTS—MATTERS OF GENERAL LAW—VALIDITY OF ARBITRATION AGREEMENT.

The invalidity of an arbitration agreement to oust the courts of all jurisdiction over the subject of a controversy, under the contract, is a matter of general law, as to which federal courts are not bound by state decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. INSURANCE (§ 79*)—AGENCY CONTRACT—TERMINATION.

An insurance agency contract provided that it should become effective on January 1, 1908, and continue in force until December 31, 1918, and from year to year thereafter "unless previously canceled as hereinafter provided." "This agreement may be canceled at any time by giving 30 days' notice in writing, by either party to this agreement of such intention to terminate the same." *Held*, that the term of the contract was limited by the condition "unless previously canceled as hereinafter provided," and that the contract was therefore subject to cancellation by either party without liability for damages by giving 30 days' notice to the other, in the absence of bad faith or fraud.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 104; Dec. Dig. § 79.*]

7. INSURANCE (§ 82*)—AGENCY—TERMINATION—GUARANTY OF COLLECTIONS—WAIVER.

Where after complainant insurance company had canceled an agency contract, it sued for an accounting and by the appointment of a receiver deprived defendant of the power to collect further premiums under the contract, such proceedings operated as a waiver of defendant's guaranty of premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 107, 108; Dec. Dig. § 82.*]

8. INSURANCE (§ 82*)—AGENTS—ACCOUNTING—RECEIVERS—FEES AND DISBURSEMENTS.

Where in a suit for the cancellation of an insurance agency contract, and for an accounting defendant's unlawful refusal to pay over premiums collected led to the appointment of a receiver, defendant was liable for the receiver's fees and disbursements, though it offered to give bond to secure the premiums collected; complainant not being required to accept security which might require a suit to enforce.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 82.*]

Action by the Jefferson Fire Insurance Company against Bierce & Sage, Incorporated. Decree for complainant.

Miller, Smith, Paddock & Perry (George Quintard Horwitz, of counsel), for complainant.

Stevenson, Carpenter & Butzel, for defendant.

DENISON, District Judge (sitting by designation). Defendant was general agent for complainant in four states. The Insurance Company, by notice, undertook to terminate the agency. The agent denied the rightfulness of the termination, and refused to account for or pay over premiums in its hands, claiming the right to accumulate them and apply them against its damages for the unlawful cancellation. The Insurance Company filed this bill to obtain (1) an accounting of premiums and delivery of these trust moneys, (2) a construction of the contract, and (3) an injunction against any proceedings under the arbitration clause of the contract. A receiver for the premiums was appointed and an injunction issued. Later, the injunction was dissolved, the arbitration (ex parte) resulted in an award to the agent of \$32,000 damages for the wrongful cancellation, and a suit at law to recover this award is pending.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is first urged that Judge Swan's dissolution of the injunction leaves nothing in this case, except the accounting. The matter being one of complicated accounts between principal and agent involving trust funds, and the defendant claiming, by its letters and by its answer, the right to withhold premiums under its construction of its contract rights, the court had undoubted jurisdiction, not only to state an account, but to construe the contract so as to determine the very controversy out of which the failure to account arose; but there was no necessary reason why defendant should be enjoined from proceeding with the steps preliminary to the trial of its claim at law. It may well have been thought that these proceedings might be allowed in order that the entire matter might be so far along towards a final disposition upon either result of this present cause. I do not think it was intended to transfer the main question to the law court so that this court could not decide that question, if, in regular course, it should first be reached for decision in this court; as it has been now reached.

The right of this or of any court to determine whether the Insurance Company could cancel the contract without special cause, depends upon the arbitration clause which is:

"In the event of any misunderstanding as to the meaning of these presents or as to the operations thereunder, the same shall be settled in an equitable manner (sic) than a legal manner, and all differences shall be referred to arbitration * * * whose decision shall be final. The parties to this agreement hereby waive the right of appeal to a court of law or equity from the decision of the arbitrators."

A more complete ouster of courts from all jurisdiction could not well be formulated; and it is void under the familiar rule declared by the English courts in *Scott v. Avery*, 5 H. of L. Cases, 827, and by the United States Supreme Court in *Home Insurance Company v. Morse*, 20 Wall. 445, 22 L. Ed. 365. The well-considered exceptions to and limitations of this rule do not go beyond the cases where the advance agreement was (1) to submit to general arbitration specific questions of fact, the determination of which is a condition precedent to any legal action, or (2) to submit to a supervising umpire or a technical expert or one man who is both, questions of fact arising under his supervision or pertaining to his specialty, and such questions of construction or of law as are incidental to the controversy which may arise upon such subject. *Munson v. Straits, etc., Co.* (D. C.) 99 Fed. 787, affirmed 100 Fed. 1005, 41 C. C. A. 156; *R. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Connors v. U. S.* (C. C.) 130 Fed. 614, affirmed on this point 141 Fed. 16, 72 C. C. A. 272; *Memphis Trust Co. v. Brown & Ketchum Co.* (6th Circuit) 166 Fed. 398, 93 C. C. A. 162; *Spurrier v. La Cloche*, Appeal Cases H. of L., 1902, p. 446. The circumstances of the present case do not bring it within any of these exceptions or limitations. The basic controversy here is wholly one of meaning and construction, and does not involve any application of the contract to facts arising during its execution, but existed to its full extent the moment the contract was signed.

Defendant's counsel suggests that the agreement may stand as a means of fixing damages in connection with a possible judicial holding that the cancellation was unlawful. The agreement cannot be saved by reading into it any such limitation not found in its language. There was no lawful foundation upon which the arbitration proceedings could be commenced; and being, as they were in this case, repudiated as soon as proposed and never accepted or acquiesced in to any extent, they had no legal force whatever.

It is further urged that the contract was a Pennsylvania contract, and that, under Pennsylvania decisions, the arbitration agreement is valid. The premise that this should be considered a Pennsylvania contract may be assumed; but I do not think the decisions in that state justify the conclusion. The two latest cited (*McCune v. Lytle*, 197 Pa. 404, 47 Atl. 190, and *Zehner v. Lehigh Co.*, 187 Pa. 487, 41 Atl. 464, 67 Am. St. Rep. 586), may be considered typical. Each announces only the rule that an independent, complete submission, made upon a complete consideration, cannot be revoked. The general rule of invalidity is fully recognized in Pennsylvania (*Mentz v. Armenia*, 79 Pa. 478, 21 Am. Rep. 80, and see review of Pennsylvania cases in *Mitchell v. Dougherty*, 90 Fed. 639, 33 C. C. A. 205).

Further, it has been held that this very question of validity is a matter of general law as to which federal, and not Pennsylvania, decisions should be followed:

"The question is not as to the enforcement of the contract according to the law of the place where it was made, but is as to whether a court of the United States should * * * refuse to enforce the contract at all. Upon this question, the decisions of the Supreme Court of the United States are controlling, and they admit of but one conclusion." *Dallas, C. J.*, in *Mitchell v. Dougherty* (3d Circuit) 90 Fed. 643, 33 C. C. A. 211.

This brings us to the question of the right to cancel the contract, as was done, upon the 30-day notice given in January, 1910. The governing clause is as follows:

"18. This agreement becomes effective on the first day of January, 1908, and shall continue in force until December 31st, 1918, and from year to year thereafter unless previously canceled as hereinafter provided. This agreement may be canceled * * * at any time by giving thirty days' notice, in writing, by either party to this agreement of such intention to terminate the same."

I think this language is free from doubt. The agency would unquestionably be revocable at will, except for the statement of a fixed term, but this statement is, itself, subject to the condition "unless previously canceled as hereinafter provided." The absence of a comma after "thereafter" cannot operate to tie the condition to the next preceding clause only, rather than to all preceding clauses of the sentence to which it is appropriate. The next section says the agreement may be canceled "at any time." To say that "at any time" does not mean what it says, but means "at any time after the first ten years" is, to me, a strained and unnatural construction. The

argument of probability is insufficient to vary the plain words. There would be reasons why a general agent would hesitate to devote his time and money to building up a business unless the agency was assured to him for a fixed period; but this consideration applies with varying force to all commission agencies, and it is common knowledge that such agencies very often, if not usually, are not for a fixed period, but are revocable. The improbability that an agent would knowingly enter into such a contract revocable at the will of the company, is not so great as the improbability that the company would knowingly tie itself to an agent by a bond that, for 10 years, it could not break, unless by legal evidence it could prove that there was misconduct serious enough for a jury to consider to be "good cause."

It is to be noted that this contract does not provide at all for revocation for cause, and the absence of any specification of what cause is to be sufficient ground for canceling pending the stated period, is additional reason for thinking that the 30-day clause, operative without cause, could be resorted to "at any time." This right of cancellation was not one-sided. It belonged to the agent also. It is more or less improbable that general agents would intend to bind themselves to use their best efforts to push the business of one company for 10 years, no matter how undesirable and unpopular that company might become. Nor is the general agent's loss of time and effort, when such an agency is canceled, as total as might be thought. A general agent's main efforts, when he represents several companies, are devoted to building up a force of active and able sub-agents who can get the business, which business will then be divided among the general agent's various companies. Manifestly, when an agency loses one company, it can save for itself a part, perhaps the larger part, of the business which has been carried in that company. These considerations all confirm me in the conclusion that this agency was lawfully revoked, without liability for damages therefor, by notice taking effect on February 10, 1910. I do not think any parol evidence is admissible bearing on the meaning of this clause, and I have not considered the evidence of the sayings or doings of the parties, except far enough to be assured that the company was, in fact, dissatisfied with the agency, and did not give defendant notice in bad faith or fraudulently.

Defendant's counsel, relying upon the pendency of the suit at law, did not take any evidence in this cause. If he desires so to do to perfect the record, he may take further evidence within 20 days from this date, and complainant may reply within 10 days.

The formal decree filed herewith may be entered on January 10, 1911, unless counsel think that any additional evidence taken would affect the result in view of what I have said above; in which case, they may call such new evidence to my attention.

As to the uncollected accounts, it is not equitable that complainant should insist upon the defendant's guaranty, found in the contract, and at the same time deprive defendant of the power to collect, as was done by procuring the appointment of a receiver. The resort to

these proceedings operated as a waiver of the guaranty. The accounts belong to the complainant.

Defendant should pay the receiver's fees and disbursements allowed. Its refusal to pay over the premiums led to the appointment of a receiver, and this refusal has been found unlawful. True, it offered to give a bond, but complainant was not obliged to accept security which might require another suit to enforce.

TYDEN v. ROSENBAUM et al.

(Circuit Court, N. D. Illinois, E. D. December 10, 1910.)

No. 28,739.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LOCKING DEVICE FOR PED-
ESTAL TABLES.

The Tyden patent, No. 675,577, for a locking device for pedestal tables, although for a combination of old elements, covers an improvement of merit and utility, and discloses patentable invention, although the claims are of narrow scope. Claims 1, 2, 3, 4, 14, 15, and 16 held infringed by the device of the Arnold patent, No. 852,011.

In Equity. Suit by Emil Tyden against Sam Rosenbaum and David Birkenstein, copartners as S. Rosenbaum & Co., and John L. Arnold, doing business under the name and style of the Arnold Specialty Company. On final hearing. Decree for complainant.

James Whittemore (Charles S. Burton, Sol., of counsel), for complainant.

Harry Frease, Sol., for defendants.

KOHLSTAAT, Circuit Judge. This suit involves claims 1, 2, 3, 4, 14, 15, and 16, of patent No. 675,577, granted to complainant June 4, 1901, for improvements in locking devices for pedestal tables, which read as follows, viz.:

"1. In a pedestal extension-table, in combination with a vertically-divided pedestal and the two separable parts of the table-top attached to the respective parts of the pedestal, means for binding the pedestal parts together, comprising an element on each part at a substantial distance below the top of the pedestal, and means whereby they are adapted to be connected when the pedestal parts approach; means for operating on said elements after they are connected to cause them to bind the pedestal parts together, extending from said elements upward and thence under the table-top toward the margin thereof.

"2. In a pedestal extension-table, in combination with a vertically-divided pedestal, the two separable parts of the table-top rigid with the parts of the pedestal respectively; a locking device for connecting the two parts of the pedestal together, comprising two mutually-engaging elements, one on each part of the divided pedestal, said elements being adapted to become engaged before the pedestal parts are fully closed together; one of said locking elements being movable on the part of the pedestal to which it pertains, and operating connections by which it may be moved in direction to draw the parts of the pedestal together.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

"3. In a pedestal extension-table, in combination with a vertically-divided pedestal, the two separable parts of the table-top rigid with the parts respectively of the pedestal; a locking device for connecting the two parts of the pedestal together, comprising two mutually-engaging elements, one on each part of the divided pedestal; a lever connected to one of said elements, and adapted to be operated to draw the parts of the divided pedestal together.

"4. In a pedestal extension-table, in combination with a vertically-divided pedestal, the two separable parts of the table-top rigid with the parts respectively of the pedestal; a locking device for connecting the two parts of the pedestal together, comprising two mutually-engaging elements, one on each part of the divided pedestal, said elements being adapted to become engaged before the pedestal parts are fully closed together; operating connections from one of said elements, adapted to move it to draw the parts of the pedestal together after their said parts are engaged; and means for locking the element thus moved at the position at which the pedestal parts are closed together."

"14. In a pedestal extension-table, in combination with a vertically-divided pedestal and the two separable parts of the table-top attached to the respective parts of the pedestal, means for securing the two parts of the pedestal together, comprising elements on the respective parts of the pedestal at a substantial distance below the upper end of the pedestal adapted to be connected, and connections for operating on said elements to close up the pedestal parts, such connections extending upwardly from the points of operation on the elements and thence under the table toward the edge thereof.

"15. In a pedestal extension-table, means for uniting the two separable parts, comprising two co-operating elements, one on each part of the pedestal, at a substantial distance below the upper end thereof, adapted to be connected when the pedestal parts approach; and means on one of said parts for moving the element on that part after they are connected, to draw and bind the pedestal parts tightly together.

"16. In a pedestal extension-table, a hollow pedestal comprising two separable parts, one on each of the separable parts of the table; means for uniting the two separable parts, comprising two co-operating elements, one mounted on each part of the hollow pedestal within the cavity thereof, at a substantial distance below the upper end of the pedestal, adapted to be connected when the pedestal parts approach; means mounted on one of said pedestal parts within the cavity thereof for moving the element on that part after the elements are connected to draw and bind the pedestal parts tightly together, extending up within the cavity of the pedestal and thence under the table-top horizontally toward the margin of the table."

The gist of the invention consists in a device whereby the sections of a table pedestal can be drawn up closely together, more particularly at the bottom, after they are brought into contact with each other, and held firmly in place by means of an actuating mechanism extending upward to the top of the table within the pedestal, and operated from just under the table top, thus doing away with the necessity of stooping down under the table and manually tightening the parts by means of sash or other drawing and holding devices.

The Circuit Court of Appeals for the Sixth Circuit in *Tyden v. Ohio Table Co.*, 152 Fed. 183, 81 C. C. A. 425, held claim 1 void as "too broad and substantially for a function," and then held the other claims valid, but of "narrower scope and limited to the specific device shown." No reason is perceived why claim 1 should not be read in the light of the drawings and specification. So read, it would be limited by the latter and necessarily entitled to only a narrow construction, and perhaps be deemed a substantial duplication of some one of the other claims. I do not deem it important to deal with it

specifically on this hearing. It appears from the record that, by reason of a tendency to sag at the center, it has been difficult to obtain a close contact of the pedestal parts at their base. Pushing the two table-top sections together carried the rigidly attached pedestal sections together at their upper ends, but left their base more or less open. To remedy this, it was deemed necessary to get under the table and manually draw the sections together at their base by means of cam, lever, or other drawing devices.

The Briggs patent of September 1, 1843, numbered 3,249, and Thorn patent, No. 7,997, granted March 25, 1851, are fairly representative of the prior art. The former locks the parts at their top, and makes no attempt to bring them in close locked contact at the base. The latter is not a true pedestal, but discloses two center legs and two or three pedestals inclosing them. The locking device is a substantial distance below the table top, but lacks any drawing or other contracting or tightening means following the contacting of the pedestal halves. It is this that constitutes the distinguishing feature of the patent in suit. The elements employed are very old. The prior art covers the bringing of the two parts into locked contact with each other and leaves them there. Tyden brings the locking parts into contact, and then adds the drawing influence, whereby there is produced a drawing of the parts of the pedestal close together, all through the operation of the lever just under the table top. The record makes a strong case of public approval. That the utility of the Tyden contribution to the art was considerable is evidenced by the avidity with which his device was adopted by the trade. Nor can its utility be gainsaid by defendant. Taking the whole locking device together, it is apparent that its application to table pedestals was new, as was also the table pedestal so arranged. So far as the record shows, a new result was obtained in that art. Considering all the facts in evidence, I am of the opinion that the claims are valid, though narrow.

The uncertainty alleged by defendant to be disclosed in them as to the location of the locking devices "at a considerable distance below the top of the table" is more seeming than real. The specification sets out the fact that this requirement is for the purpose of affording the necessary leverage for forcing the pedestal parts together. Manifestly no one point or location should be named. The general principles governing the means for giving efficiency to a lever are well known, and need not be more specifically stated. Nor is it of consequence that the claims in suit do not call for a releasing device. What is called for is complete in itself.

Defendant claims to be operating substantially under patent No. 852,011, granted to J. L. Arnold April 30, 1907. In the above-named cause before the Circuit Court of Appeals for the Sixth Circuit, it was held that the defendant, who was operating under patents No. 772,019 and 778,471, granted to J. F. Arnold in 1904, did not infringe. The device now in suit is to all intents and purposes the same as that of Tyden. The principle is the same, and the only difference consists in the substitution of one well-known form of lever for another. The Tyden claims can be read upon the Arnold device. To construe Tyden so narrowly as to exclude the Arnold arrangement of elements is to

destroy its value entirely—a result which under the circumstances in evidence does not commend itself to the mind of the court.

Tyden was the first to effect the complete closing of the pedestal sections by the movement of a lever. The table constructed under his patent held the market for several years and became an extensive feature in the table market. This is not conclusive evidence of invention, but it is very persuasive. It is difficult to conceive of any valid invention, however narrow, which would contain so many elements of self-destruction as Tyden's would, were defendant's construction thereof to prevail.

The relief prayed for is granted.

STANDARD TYPEWRITER CO. v. STANDARD FOLDING TYPE-
WRITER SALES CO. et al.

(Circuit Court, S. D. New York. December 7, 1910.)

PATENTS (§ 326*)—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT—PUNISHMENT FOR CONTEMPT—SUFFICIENCY OF EVIDENCE.

Evidence which merely establishes a probability that defendant has violated an injunction against infringement of a patent is not sufficient to warrant his punishment for contempt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. Suit by the Standard Typewriter Company against the Standard Folding Typewriter Sales Company and others. On motion to punish defendants for contempt. Denied.

Wm. R. Davis, for complainant.

Edwards, Sager & Wooster, for defendants.

LACOMBE, Circuit Judge. Although there was testimony as to unfair trading on the part of defendants when application for injunction was originally made, and although it was considered by this court and subsequently by the Court of Appeals, the fact remains that the suit was one for infringement of a patent, and the injunction was granted to prevent the continuance of such infringement. The evidence showed that defendants had made and were offering for sale typewriters which infringed the patent; but the affidavits now submitted by defendants show that since injunction was served they have made no infringing machines, and have sold no machines as Standard folding typewriters except such as were made by complainant. Nothing in complainant's affidavits contradicts this statement.

It is suggested that, in view of the price at which complainant sells its machines and the price at which defendants offer to furnish, it is probable that, while selling some genuine machines, they are also disposing of infringing machines; but this court cannot punish defendants on any such mere suggestion. When an infringing machine sold by defendants subsequent to injunction is produced, an appropri-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ate penalty of violation of its terms may be inflicted; but on the present papers such relief cannot be granted.

If defendants' methods constitute unfair trading and if their representations as to the business relations of the two companies are false and misleading, relief must be sought in some other proceeding than this.

Violation of the injunction is not found, and the motion to punish for contempt is denied.

HOFFMAN et al. v. B. KUPPENHEIMER & CO.

(Circuit Court, N. D. Illinois, E. D. December 10, 1910.)

No. 29,351.

TRADE-MARKS AND TRADE-NAMES (§ 39*)—USE TO DESIGNATE PATENTED ARTICLES—ASSIGNMENT AS INCIDENT TO LICENSE UNDER PATENT—REVERSION.

A patentee, who has adopted and registered a trade-mark, which he uses to designate the patented article, may assign the right to use such trade-mark as an incident to a license to make and sell the patented article, without losing his rights therein, and, on termination of the license, is reinvested with full title to the trade-mark, with the right to protection against its continued use by the licensee.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 44; Dec. Dig. § 39.*]

In Equity. Suit by Henry Hoffman and Charles A. Murphy against B. Kuppenheimer & Co. On demurrer to bill. Overruled.

Frank D. Thomason, for complainants.

Dyrenforth, Lee, Chritton & Wiles, for defendant.

KOHLSAAT, Circuit Judge. This cause is now before the court on demurrer to bill for injunction to restrain infringement of patent and registered trade-mark. It is conceded by the parties to the suit that the only question now involved is the validity of the trade-mark.

From the bill it appears that complainants, being the grantees of patent No. 759,371, granted May 10, 1904, for an improvement in coat collars, and of a certain registered trade-mark in the word "Protector," accompanied with certain characters applied to the product of said patent, licensed the defendants and others to manufacture and sell overcoats, using the collar of said patent, and to employ in connection therewith said trade-mark; that in pursuance of such license defendants made use of said collar and trade-mark, and paid to complainants the prescribed royalty or license fee; that said collar was and is of great value; that said license and right under said license to use said trade-mark terminated on or about January 6, 1906; and that, notwithstanding the same has terminated, the defendants are continuing the use of said collar and trade-mark, although notified not to do so, in willful disregard of complainants' rights, as well as of the rights of the public.

The record seems somewhat indefinite as to the question involved

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the demurrer. Since, however, the counsel for both sides limit their briefs to the question as to whether the granting of the right to use the trade-mark, as incident to the grant of a license to use the device of the patent, did not in and of itself destroy complainants' rights in and to the exclusive use of the trade-mark, this ruling will be limited to that question.

In *Adam v. Folger*, 120 Fed. 260, 56 C. C. A. 540, the Court of Appeals for this circuit, speaking through Judge Baker, held that a patentee who had adopted a name to denote and identify the patented article might license the use of the name in connection with the right to manufacture and sell the article for a limited territory, and that the licensee had no right to continue to use the same in connection with a different and competing article after the expiration of the license, and sustained the right of the licensor to injunctive relief as to the patented product and the use of the name "Victor." "As used," says the court, "the word did not represent to the public that they were getting any skill or excellence of workmanship which Folger alone possessed, but that the beater was the kind covered by the patent. As Folger had the right to license Adam to use the thing, he had the right as a part of the same transaction, to license him to use the name of the thing." Justice Brewer, in *Centaur Co. v. Heinsfurter*, 84 Fed. 955, 28 C. C. A. 581, and Judge Shipman, in *Gally v. Colts Pat. Fire Arms Mfg. Co.* (C. C.) 30 Fed. 118, have both held that a trade-mark or trade-name indicated in such cases that the article was manufactured in accordance with the patent, rather than the skill and workmanship of the maker.

No reason is perceived why the same rule should not obtain with reference to registered trade-marks, as to which the federal courts are given jurisdiction without regard to the amount in controversy. If, then, the right to use the trade-name may be assigned as incident to a license to manufacture and sell under a patent, without prejudice to the interest of the assignor in the trade-name, except as affected by the terms of the assignment, manifestly defendants, having lost all rights under the assignment, may not longer use the trade name or mark, and complainants have become reinvested with full title in and to the same so far as defendants are concerned, and may bring suit to enforce their rights.

The demurrer is overruled.

UNITED STATES v. PRESIDENT, ETC., OF JAMAICA & R. TURNPIKE
ROAD et al.

(Circuit Court, E. D. New York. September 16, 1910.)

1. NAVIGABLE WATERS (§ 2*)—WATERS SUBJECT TO JURISDICTION OF UNITED STATES—REMOVAL OF OBSTRUCTIONS.

The constitutional jurisdiction of the United States to legislate over navigable waters applies to the entire body of water where the tide ebbs and flows, over which water, or through the channels of which, interstate or foreign commerce might ordinarily or reasonably be transacted, or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which is subject to the admiralty jurisdiction; and the power of the War Department over obstructions to such waters, conferred by Act March 3, 1899, c. 425, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3540), is coextensive with such general jurisdiction.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63; Dec. Dig. § 2.*]

Obstruction—jurisdiction of federal courts, see note to 11 C. C. A. 318.]

2. NAVIGABLE WATERS (§ 1*)—"NAVIGABLE WATER" OF UNITED STATES DEFINED.

A stream running into the sea, and in which the tide ebbs and flows, is "navigable water," and subject to the jurisdiction of the United States as far up as it is actually navigable for the purposes of interstate and foreign commerce.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, p. 4684.]

3. CANALS (§ 23*)—WATERS SUBJECT TO JURISDICTION OF UNITED STATES.

A canal built and operated by private persons for commercial purposes, or used for the passage of boats, for which a fee is charged, is subject to the admiralty jurisdiction of the United States so long as its navigable character is maintained, and, under the statute, cannot be obstructed except by consent of the United States.

[Ed. Note.—For other cases, see Canals, Dec. Dig. § 23.*]

4. NAVIGABLE WATERS (§ 20*)—OBSTRUCTION BY BRIDGE—SUIT FOR INJUNCTION.

Where a private canal constructed and used as a cut-off to take the place commercially of the tortuous channel of a navigable stream has been abandoned, and its uses for such purpose entirely destroyed by the owner of the rights therein, the rights of the public revert to the original channel of the stream, and under Act March 3, 1899, c. 425, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3540), the United States may maintain a suit to enjoin the obstruction of such channel by a bridge.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 20.*]

In Equity. Suit by the United States against the President, Directors, and Company of the Jamaica & Rockaway Turnpike Road, the Long Island Electric Railway Company, the Long Island Railroad Company, and Charles A. Porter. Decree for complainant.

William J. Youngs, U. S. Atty. (Louis R. Bick, Asst. U. S. Atty., of counsel).

William E. Stewart (Arthur G. Peacock, of counsel), for defendant the President, Directors and Company of the Jamaica & Rockaway Turnpike Road.

James L. Quackenbush (Ralph Norton, of counsel), for defendant Long Island Electric Ry. Co.

Joseph F. Keany, for defendant Long Island R. Co.

CHATFIELD, District Judge. The present case arises from an application on the part of the United States, under chapter 907 of the Laws of 1890 (26 Stat. 453), as amended by chapter 158 of the Laws of 1892 (27 Stat. 88) and chapter 425 of the Laws of 1899 (30 Stat. 1151) and chapter 23 of the Laws of 1900 (31 Stat. 31), to compel the removal of a bridge used exclusively by the Long Island Electric Rail-

way Company for the maintenance of a trolley track over a stream known as "Hook Creek" in the county of Queens, in this district.

Prior to 1859, Hook creek was a winding tide-water stream, up and down which pleasure boats, small scows carrying fertilizer and coal and fishing craft of various sizes were wont to pass, from Jamaica Bay to the farms or landings a short distance up the creek. In the year 1806 a turnpike company was incorporated under the laws of the state of New York to operate a turnpike or toll road over the spot in question, and the validity of its franchises for the building and maintenance of the turnpike are not disputed. A corporation was also formed, known as the Foster's Meadow Canal & Dock Company, in the year 1859, to construct and navigate a line of canal and water communication from the mouth of Hook creek to the farm of Stephen Carman. This company constructed a canal, of which portions of the old creek formed a part; and the present bridge crosses a short straight section at the upper end of this canal. Thus some mile and a half of winding channel around the turns of the old creek was reduced to a straight channel of less than one-half mile. This canal was partially closed by one John Hirst, who purchased the rights of the canal company on foreclosure in 1871. One Charles Hirst is the heir at law of John Hirst, who died prior to the commencement of this action. The filling in by Mr. Hirst, which was completed by the turnpike company in subsequent years, consisted of building a solid bank under the turnpike bridge at that point, while above and below this bridge the depth of water in the canal was not interfered with. This condition continued until the year 1898, when the Long Island Electric Railway Company, which under a contract or lease of the turnpike road operated tracks over the turnpike in question, partially removed the filling, and constructed a trestle or bridge, upon which its cars have since been running. The turnpike company is interested in this action because it is the lessor of the highway of which the bridge forms a part, and is under agreement with the Long Island Electric Railway Company for the use of this highway. The Long Island Electric Railway Company is interested in the action because of its use of the tracks and the effect of any interruption in the passage of its trolley cars. The defendant the Long Island Railroad Company has no direct interest in the situation. The defendant Charles A. Porter died before the action was brought to trial, and neither his estate nor his heirs and representatives appear to be affected by the results of the action.

The defendants who have answered or offered testimony have shown their right to use the structures so far as their relations with each other and with the state are concerned. They contend that the United States has no jurisdiction over the canal both on the ground that it is said not to be navigable water of the United States, and also because they contend that a private canal connected with navigable water may be closed by the owners and operators without respect to the laws of navigation of the United States, and that this canal was so closed by Mr. Hirst after a considerable period of substantially small use by the public.

The question of jurisdiction over such waters as Hook creek, in which the tide ebbs and flows, and which at the point in question would be plainly navigable to such an extent as to be capable of some degree of foreign or interstate commerce as well as the passage of pleasure boats, need not be considered at length. The same question has been disposed of, so far as this district is concerned, and discussed at some length in the case of the Bannister Realty Co. (C. C.) 155 Fed. 583. That case and various decisions therein cited establish the proposition that the jurisdiction of the United States under the Constitution applies to the entire body of water where the tide ebbs and flows, over which water or through the channels of which interstate commerce or foreign commerce might ordinarily or reasonably be transacted, or which is subject to the admiralty jurisdiction of the United States. Under the statute in question, the jurisdiction of the War Department over obstructions to such waters is coextensive with the jurisdiction of the government in such localities.

The defendants in the present case contend, further, that because Hook creek is not a means of communication with any other body of water it comes within the doctrine of the Leovy Case (177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914), and that no body of water, actually navigable, can be considered legally navigable for the purposes mentioned and under United States jurisdiction if it merely forms the end of a route of transportation or access. The Leovy Case uses the language which is relied upon by these defendants with respect to the last stretch of a small stream in a roundabout passage from the sea, where the purposes of commerce could never be fulfilled by pursuing the devious course necessary to reach the point in question. But there is nothing in the Leovy Case to indicate that the term "navigable waters" was limited to a body of water that connected with some other body of water, rather than with a wharf or place of transfer to other methods of transportation. It would therefore seem to follow that Hook creek was a navigable stream, and much of the old channel of the stream, even in its present condition, is shown by the testimony to be navigable water of the United States.

The particular difficulty shown in this case viz., the great interference with trolley lines and other constant means of communication between thickly populated points, which would be occasioned by the operation of a drawbridge for unimportant or trivial uses, has been recognized, and the necessity for suits like the present largely done away with by the act of Congress of June 25, 1910, c. 436, 36 Stat. 866. This statute makes it possible for the defendants even now to apply to the United States for authority to retain the structure complained of; but it does not relieve the court of the necessity of a decision upon the issues as they are presented. But the very fact that discretion is now vested in the War Department for approving such necessary obstructions indicates that, in the absence of such legislation, the water must be considered navigable waters of the United States, and that it would be the duty of the War Department and the other branches of the government to prevent the obstruction of these waters in any way. The carrying of coal, which, to the court's knowledge, must be brought from without the state of New York, shows

the existence and possibility of interstate commerce, and further establishes the jurisdiction of the United States.

A more serious question arises when we come to consider the particular bridge as to which this action is brought. As has been said, the old channel of the creek has not been much used since the canal was built, for passage up and down. Since the canal was filled in and the bridge over which the trolley operated built, a great part of the water has flowed through the canal, and it has been impossible to pass up and down either the canal or the old stream, except at low tide, with anything larger than a rowboat. At high tide, even a rowboat cannot go under the turnpike bridge over which the trolley road runs.

The defendants are shown by the record to have been ordered to construct a draw, and upon their failure so to do the present application has been brought, in which the relief asked is a removal of the solid bridge over the canal and the restoration of a navigable channel at this place. We must therefore consider when a private canal or a canal built and operated by private individuals and used for the passage of boats for which a fee is charged is subject to the jurisdiction of the United States, under the statutes above referred to.

In the case of *Malony v. City of Milwaukee* (D. C.) 1 Fed. 611, it was held that the Erie Canal, in the state of New York, was navigable water of the United States; and the cases therein cited show that the canal, if built by private individuals, for commercial purposes, and offered or allowed to be used by the public for such use as would be considered within the commerce clause of the Constitution, becomes subject to the admiralty jurisdiction of the United States, so long as its navigable character is maintained. It necessarily follows that obstructions to the navigable character of these artificial channels cannot be created except as it is done with the consent of the United States government, or unless the private waterway be entirely discontinued, so that the purposes and rights of the franchises to operate that waterway are given up. So long as the franchise is in existence, or as the canal is maintained as a canal, the public has a right to have its navigability preserved so that the public use shall not be interfered with.

Even if the present bridge over the canal be allowed to remain, upon the theory that the canal itself has been abandoned and its uses entirely destroyed by the owner of the rights to the canal, then the navigable character of Hook creek would immediately compel the construction of a drawbridge over the creek by the turnpike company and the trolley road, for the original uses of the creek would revert to the old channel, and the canal would cease to exist. The diversion of water and interference with the navigation of the old channel would have to be terminated. On the other hand, so long as the canal is maintained as a body of water upon which boats are to any extent allowed to pass up and down, and is thus proffered to the public as a substitute for the roundabout course through the older channel, then just so long will the navigable character of that canal and the rights of the public under the statutes referred to attach to the canal; and any obstruction, whether by the owner or by the turnpike company or by the trolley

road, which prevents the passage of boats up one channel or the other, is a violation of the statute and must be removed. Any possibility of continued or regular navigation from the ocean confers jurisdiction upon the federal government, and the laws of Congress then apply thereto. The question of whether the War Department, under the new statute, will consider it proper to allow the channel to be closed is something with which we have nothing to do. Assuming that the channels are navigable, the government is entitled to a decree, ordering the removal of the obstruction, and a restoration of the unobstructed channel. In the present action the government may have a decree, directing the defendants to remove the obstructions.

In re TIMES PUB. CO.

(District Court, E. D. Pennsylvania. December 9, 1910.)

No. 3,364.

BANKRUPTCY (§ 345*)—CORPORATION—RIGHTS OF BONDHOLDERS—ESTOPPEL.

A corporation, which had made an issue of \$12,500 of bonds secured by a first mortgage on its real estate, desiring to increase its working capital, executed and recorded a new mortgage securing an issue of \$25,000, reciting that it was a first lien on the same property; the intention being to retire the first issue. Certain holders of first bonds delivered them to the managing officer of the corporation, signing a paper in which they agreed to exchange the same "for a like amount in a new issue for \$25,000 to be secured in the same manner and conditions as our present bonds." The corporation became bankrupt; the other holders of first bonds not having agreed to an exchange, but some of the new bonds having been sold to other purchasers. The first mortgage had not been released in whole or in part. *Held*, that the assenting holders of first bonds were not estopped by their agreement to claim their rights under the first mortgage as against purchasers of the new bonds, whether or not such purchasers were shown or told of the agreement to exchange, since such agreement was to exchange only for new bonds "secured in the same manner and conditions" as the old bonds, which implied a first lien, and the record was constructive notice that as yet the new mortgage was not a first lien.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

In the matter of the Times Publishing Company, bankrupt. On review of decision of referee. Reversed.

William T. Fulton, for first mortgage bondholders.

William F. Beyer, for second mortgage bondholders.

J. B. McPHERSON, District Judge. The Times Publishing Company carried on a printing and publishing business in Oxford, Chester county, Pa., and was adjudged bankrupt in January, 1909. Its real estate was afterwards sold discharged of liens, and the distribu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of this fund gives rise to the present dispute. Certain relevant facts appear in the referee's report:

"On December 31, 1904, the company executed a mortgage covering the said real estate to R. A. Walker, as trustee, to secure the payment of a bond issue amounting to the sum of \$12,500. This mortgage was duly recorded in the recorder's office of Chester county in Mortgage Book N 5, vol. 119, p. 368, and bonds to the amount indicated were issued, and the mortgage remains unsatisfied of record.

"Of these bonds the following are outstanding in the hands of their owners, and are unpaid:

Ellen L. Thomas, Anna B. Thomas, and Pauline L. Thomas.....	\$1,900
Kate Smith.....	1,200
Knights of Golden Eagle, Lodge No. 232.....	1,000
Roland Flaherty.....	600
Eri H. Poley.....	1,000
Isaac Wood, trustee.....	700
C. P. Swisher.....	500

\$6,900

"Some time prior to April 1, 1907, the corporation, desiring to increase its plant, decided to and did on that date create a new mortgage to secure a bond issue of \$25,000, naming the Kennett Trust Company as trustee.

"This mortgage covers the same real estate as the first mortgage and remains of record in the recorder's office of Chester county in Mortgage Book K 6, vol. 134, p. 144, and remains unsatisfied. The secretary and treasurer of the Times Publishing Company, and the person in its active management at the time of the creation of both mortgages, was C. E. Morrison.

"In due course in the proceedings in bankruptcy, Francis G. Andrews was elected trustee, and upon taking possession of the books, papers, and assets of the company he found in a private box owned and kept by the said C. E. Morrison in the National Bank of Oxford a bundle of bonds, which had been issued by the company under the mortgage for \$12,500 above referred to, amounting to the sum of \$5,600. With these bonds was a paper in the handwriting of C. E. Morrison in the following language:

"These bonds are part of first issue, and the holders exchanged them for a like amount in the new issue. They are not an indebtedness against the company. C. E. Morrison."

"With these bonds and the paper just quoted was a paper of which the following is a copy:

"We the undersigned bondholders of the Times Publishing Company under the issue in existence March 1, 1907, do hereby agree to exchange our present holdings for a like amount in a new issue for twenty-five thousand dollars to be secured in the same manner and conditions as our present bonds.

Eri H. Poley.	C. P. Morris.
"Jeanette S. McCullough.	Chas. Swisher.
"Rebecca J. Runner.	S. E. Nivin.
"R. H. Ferguson.	Stewart Badgett.
"W. Anderson."	

"In order to raise additional funds for the business purposes of the company, it doubtless was Morrison's plan to secure the surrender by the holders of the bonds then outstanding under the first mortgage, and with this in view he secured possession of the bonds found in his private box under the agreement above quoted, and probably under an additional verbal stipulation that before the plan would be carried to completion there would be a surrender of all the bonds.

"With this understanding the holders whose names appear above, except Chas. Swisher, surrendered their bonds amounting to \$5,100, and received bonds in exchange therefor of like amount secured by the second mortgage."

Further facts are stated in the course of this opinion. After the second mortgage was executed and recorded, the following persons

became the owners and are now the holders for value of the new issue, either as purchasers for cash or as pledgees for money loaned:

Eri H. Poley.....	\$ 500	L. Mary Frame.....	\$ 300
J. H. Yarnall.....	300	P. F. Hamilton.....	500
National Bank of Oxford.....	1,000	Farmers' Nat. Bank of Oxford	1,000
Christiana Nat. Bank.....	1,500	H. R. Montgomery.....	2,100
W. F. Beyer.....	2,000	H. W. Chalfant.....	500
Abram Ferguson.....	600	Mahlon Ironsides.....	400
Anna J. Ferguson.....	100	Sarah Jackson.....	500
Jacob Shook.....	1,000	Eva Bowden.....	1,000

The signers of the foregoing agreement will be called the "assenting bondholders." They held \$5,600 of the first issue, and if they have lost their rights under that mortgage the fund for distribution is large enough to pay in full the nonassenting bonds, and leave a balance to be apportioned among all the bonds (including those now in the hands of the assenting bondholders) that were issued under the second mortgage. But if all the bonds under the first mortgage, both assenting and nonassenting, are entitled to priority, the whole fund will be thus absorbed, leaving nothing for bonds under the second mortgage. The vital question therefore is whether the assenting bondholders must claim under the second mortgage only, or whether they are still entitled to insist upon their legal rights under the first mortgage. The referee decided that they had lost these rights, basing his ruling upon the following ground:

"The rule is a familiar one that he who puts it in the power of another to commit a fraud must bear the consequence; when one of two parties who are equally innocent of actual fraud must lose, the one who by misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. *Xander v. Commonwealth*, 102 Pa. 439."

The rule is undoubted, and if the facts require its application the assenting bondholders must bear the loss, which in that event would be due to misplaced confidence in a faithless agent. But in my opinion the evidence does not establish a case in which the rule should be applied, as I think can be made clear in a short discussion.

A word may be said at the outset concerning Morrison's memorandum found with the assenting bonds. It is plainly a self-serving declaration and should be disregarded. He could not draw his own conclusions about the legal effect of the transaction, and bind the assenting bondholders by an ex parte statement. Unquestionably these bondholders gave Morrison the power to make misleading statements to intending buyers of the second mortgage bonds, but (laying aside for the moment one instance of which I shall speak hereafter) it is not proved that any one was actually deceived. He may perhaps have deceived some buyers. There is room to suspect such conduct; but the witnesses do not establish the fact. It should not be overlooked that the first mortgage has not been satisfied either in whole or in part. The official record has always been constructive notice that the full amount of this mortgage was still a first lien on the property. In spite of such notice, however, it may be true that if Morrison had represented to intending buyers of the second mortgage bonds that the assenting bondholders (without regard to what

the nonassenting bondholders might do) had agreed to exchange their prior securities for second mortgage bonds; and if these buyers had bought in reliance upon his statements, the assenting bondholders might be estopped to deny the accuracy of these representations. I do not so decide—for other questions might then need decision, e. g., the extent of Morrison's agency, and his power to bind his principals by statements which they had not authorized—but for the purpose in hand the concession may be made. It is clear that the situation differs essentially from certain cases that have been cited, where one who has signed an agreement to subscribe for stock seeks to set up an undisclosed arrangement that modifies his apparent contract. There, in favor of other subscribers who have acquired rights with knowledge of his apparent contract and in reliance thereon, he is not allowed to repudiate or modify it to their loss. Here, however, so far as appears, the written agreement of the assenting bondholders was not exhibited to intending buyers of the second mortgage bonds, nor was its tenor accurately stated. At the best the testimony only shows that Morrison probably made some general declarations on the subject, but he did not exhibit the agreement or state its contents correctly. This will appear by a brief reference to what the witnesses said on this subject. Seven of the sixteen buyers or pledgees of the second mortgage bonds were examined:

E. H. Poley testified that he did not know that \$5,600 had been exchanged; he never asked, but was told by Morrison that all of the first issue must be exchanged. Mahlon Ironsides said nothing about the assenting bonds; he supposed his purchase was all right, that his bond was a first mortgage, one of the first issue. H. R. Montgomery merely supposed that his bonds were secured by a first mortgage; he relied on the face of the bonds themselves. (They all contain a statement that they are first mortgage bonds.) Abram Ferguson did not buy his bond from Morrison at all, and relied on the face of the bond. The president of the Farmers' National Bank testified that Morrison told him that all the exchanges had not been made, but that they would be made; he had no definite knowledge on the subject except that two bonds had been exchanged, one for \$500 and one for \$1,000. Sarah Jackson's husband testified that Morrison said the first bonds were all retired, but he has nothing to say about the agreement of the assenting bondholders. Leaving the testimony of the seventh witness, W. F. Beyer, for consideration presently, it is clear I think that the legal rights of the assenting bondholders—which have always been supported by the unchanged record of the first mortgage—cannot be affected by such slight testimony as this. They were no doubt imprudent in putting their bonds into Morrison's own hands instead of depositing them in escrow with a third person. Evidently he might have done them serious injury, but the testimony does not prove that he actually did the harm which he may perhaps have intended. Surely the second mortgage bondholders cannot successfully claim to have been deceived by an agreement of which (so far as appears) they had no knowledge—especially in the face of the record notice which appeared to show that no such

agreement had ever been made. If a man has known nothing about the acts or declarations by which he nevertheless asserts that another person is estopped, it is elementary that the estoppel does not exist.

Moreover, suppose that Morrison had shown the agreement and the assenting bonds to intending buyers of the second mortgage bonds. The decision of the referee impliedly, but as I think inaccurately, assumes that these buyers had knowledge of the agreement. But, even if this were true, I do not think his conclusion would follow. What does the agreement say? Only that the signers will exchange their prior holdings for a like amount in the new issue "in the same manner and conditions as our present bonds." Clearly one of the "conditions" was that the new issue should also be a first mortgage, and it could not be a first mortgage until all the old bonds had been surrendered for exchange. At the best, therefore, intending buyers could only have been truthfully informed that some of the bonds were already in Morrison's hands to be exchanged for similar securities, namely, first mortgage bonds, whenever the mortgage for \$25,000 should be qualified to take that position; and the record showed definitely that this time had not yet come. Even in the most favorable aspect of the testimony I am unable to find the necessary elements of estoppel; and of course, if, as the second mortgage bondholders themselves say, they knew nothing about the agreement, it could have had no effect upon their conduct.

It remains to consider the bonds of W. F. Beyer. This is his testimony in full:

"Q. You reside in the city of Lancaster?

"A. Yes, sir.

"Q. You are the owner of bonds to the amount of \$2,000 issued by the Times Publishing Company on April 1, 1907. From whom did you purchase them?

"A. They were handed to me by C. E. Morrison. I came down here to look over his books, and he told me of the steady increase of the business he was doing; that there was a first mortgage of \$12,500 on the property, and they needed more money for working capital and to redeem the old bonds. He said they would exchange the first mortgage bonds for the second ones. He then took out of his desk that paper that has been produced this morning, 'Exhibit 2,' signed by several holders of the first mortgage bonds, and said that he had the promise of the others to surrender, and on the strength of that I bought \$2,000 and paid him cash for it, and at the same time I bought \$1,000 worth of stock and paid a thousand dollars in cash for that."

This goes further than the testimony of any other witness, for Mr. Beyer saw the agreement, but in my opinion it still falls short of establishing an estoppel. The agreement itself was notice to him that the signers would only exchange for new first mortgage bonds, and the record was notice that a new first mortgage was not yet in existence, and could not occupy that position until all the bondholders under the mortgage for \$12,500 should surrender their bonds. Mr. Beyer was evidently content to rely upon Morrison's promise that such surrender would be made, but so far as appears Morrison had no authority whatever to make any promise for the nonassenting bondholders, and the assenting bondholders coupled their promise to exchange with a condition (which Beyer knew) that was never carried out.

In a word, nearly everybody concerned in this transaction seems to have relied upon Morrison's statements without taking the trouble to verify them, and they relied on his word in the face of the official record and of the plain language of the written agreement. In my opinion the assenting bondholders have not lost their legal rights under the first mortgage.

The order of the referee is reversed, and he is directed to permit these bondholders to prove their claims under the mortgage of \$12,500, and in the distribution of the fund to allow priority to all the claimants under that mortgage.

In re LINDAU.

Ex parte BROZEN.

(District Court, S. D. New York. December 15, 1910.)

1. BAILMENT (§ 18*)—ARTISAN'S LIEN—EXTENT.

Where an artisan received skins from a bankrupt to be worked up into garments, he was entitled to hold the residue of any given lot of skins for the whole sum due for work on all of that particular lot, but had no general lien.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-84; Dec. Dig. § 18.*]

2. PAYMENT (§ 39*)—APPLICATION OF PAYMENTS—DEDUCTION.

The rule for applying payments to earliest debts is merely one of presumption; and, in the absence of agreement to the contrary, the creditor may apply the payment as he desires.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

3. BAILMENT (§ 18*)—ARTISAN'S LIENS—SCOPE.

Petitioner had received several allotments of skins from a bankrupt at different times to work into garments. The custom was to pay him on Tuesday for all work done the preceding week, and he to make delivery of finished garments. On bankruptcy there was owing him on general account less than \$1,000, which sum was also less than the value of the work done on the last lot of skins sent him 9 days before the petition was filed. On that day he held garments made of 105 skins, of which not half were from the last lot delivered him, and the rest he had withheld from former lots. *Held* that, since the balance due did not in any case extend beyond the balance due on the lot retained, the lien was good to the extent of the whole balance.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-84; Dec. Dig. § 18.*]

In the matter of bankruptcy proceedings against Simon Lindau, trading as S. Lindau & Co. Proceeding to establish the extent of the lien of one Moe Brozen on property of the bankrupt. Order for petitioner.

Robert P. Levis, for Receiver.

John Bogart, for witness.

HAND, District Judge. In this case an artisan had received several allotments of skins from the bankrupt at different times to work

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

up into garments. There is no evidence of any particular agreement except such as arises by implication. The custom was for the artisan to be paid on Tuesday for all work of the preceding week and to make deliveries of finished garments, as he thought he might securely, or as the bankrupt succeeded in pressing them from him. At the time of the bankruptcy there was owing the artisan on general account less than the sum of \$1,000, which sum also was less than the value of the work done upon the last lot of skins sent him nine days before petition filed. On that day he held garments made of 105 skins, of which about half were of the last lot delivered to him, and the rest he had withheld from former lots, though just what he cannot now say. The question is of the extent of his lien.

The artisan is entitled to hold the residue of any given lot for the whole sum due for work on all that lot. In short, the release of a part of a lot throws the lien upon the balance. *Morgan v. Congdon*, 4 N. Y. 552. On the other hand, there was no general lien under well-established law. The usual attribution of payments in an account like this would be against the first indebtedness. That would make the unpaid balance arise wholly from work done of the last lot. For that sum all of the skins which remain in the artisan's hands of the last lot he might hold on his lien. This would, however, release to the estate the skins withheld from earlier lots. However, the rule of attributing payments to earlier debts is merely one of presumption, and, in the absence of agreement to the contrary, the creditor has the right to apply payments as he pleases. What must be the presumption then arising from the retention of parts of the preceding lots? Obviously, that the artisan was withholding some of those skins for a balance due for work upon the lot of which they formed a part. Subsequent payments he must have meant to apply to other lots, else why keep back any part of the lots paid in full?

The result is this: Suppose there be parts of lots A, B, C, and D retained by the artisan, and a balance due him of \$1,000. He must be supposed originally to have held the skins out of lot A for as much of that balance as they would safely cover. Similarly with lots B and C. As to lot D, he has, of course, a lien upon that equal to the balance of the indebtedness. The result is just the same as though all the skins retained came from lot D, and that is the disposition I make of the motion. This is quite different from giving the artisan a general lien because that means that the goods of one shipment may be held for advances upon another. This would arise even upon open account when the general balance was greater than the sums advanced upon the merchandise retained. For example, if the total balance due here was \$2,000, of which one-half was due on the last lot and if the skins all came from the last lot, the lien would be for \$1,000 only.

As the balance due does not in any case extend beyond the balance due on the lot retained, the lien is good to the extent of the whole balance.

Let an order pass for the petitioner; no costs.

BOALER et al. v. JONES et al.

(Circuit Court, E. D. Pennsylvania. December 12, 1910.)

No. 1,116.

STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—QUESTION FOR JURY.

In an action for injuries to a boy while riding along a trolley car track by being struck by a car approaching him from the rear, whether the motorman approached without warning, or whether plaintiff was racing beside the car and was accidentally thrown under the car wheels by his bicycle striking something in the road, *held* a question of fact for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

At Law. Action by James W. Boaler, by his next friend and father, James M. Boaler, and by James M. Boaler, against Charles Henry Jones and another, as receivers of the Southwestern Street Railway Company. Verdict for defendants, and plaintiffs move for a new trial. Denied.

Gain & Cameron, for plaintiffs.

Paxson Deeter and John C. Bell, for defendants.

HOLLAND, District Judge. This was a suit instituted by the parents to recover damages for a personal injury to their minor child. The accident happened on June 19, 1910, while the boy was riding his bicycle down the Tinicum road, alongside of a trolley car belonging to the defendant company. It appeared that he was run over by the car going in the same direction, and the question was submitted to the jury as to whether or not the motorman driving the car came up behind the boy and struck him, without ringing his bell and giving him warning of the approach of the trolley car, as claimed by the boy and the plaintiffs' other witnesses, or whether the boy was racing and was alongside of the trolley car at the time the injury occurred, and accidentally struck something in the road, or the wheel of his companion, and was thrown under the hind wheels of the car, as testified to by the motorman and some disinterested passengers. This was the sole question in the case, and it was left to the jury to find the facts, and to render a verdict accordingly. The jury concluded from the evidence that the defendant had established its contention as the verdict was for the defendant. It was purely and simply a question of fact to be passed upon by the jury, and it was the province of the jury to say upon which of the witnesses it would rely.

Motion and reasons for a new trial are overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WHITE v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. December 9, 1910.)

No. 782.

MASTER AND SERVANT (§ 284*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

The evidence in an action against a railroad company for injury to an employé *held* sufficient to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1000; Dec. Dig. § 284.*]

At Law. Action by William C. White against the Pennsylvania Railroad Company. On motion by plaintiff for new trial. Motion granted.

Franklin S. Edmonds, for plaintiff.

John Hampton Barnes, for defendant.

J. B. McPHERSON, District Judge. This is a close case, but I am not wholly satisfied that the plaintiff received the full benefit of his legal rights. I lay aside the defense based upon his membership in the relief association, as the company evidently does not rely upon it; but I incline to think that the testimony, slight as it was, had weight enough to require the duty and the fact of reasonable inspection to be submitted to the jury. At all events, the question is doubtful, and I am unwilling to deprive the plaintiff of a possible right.

Moreover—although the plaintiff naturally does not dwell upon this consideration—it may be that another question did not receive proper attention, namely, whether the admitted lengthening of the rod was due to the plaintiff's own use of the brake when he was hurt, or had previously existed. This has an obvious importance, and (as far as I can now see) is necessarily a question of fact.

Equitably the plaintiff's case may present a less favorable aspect, but the equities may perhaps be adjusted without another trial.

The motion is granted.

GEARLDS et al. v. JOHNSON et al.

(Circuit Court, D. Minnesota, Fourth Division. January 9, 1911.)

No. 1,007.

1. INDIANS (§ 35*)—INDIAN RESERVATION—INTOXICATING LIQUORS—PROHIBITION BY CONGRESS.

Congress has power, not only to prohibit the introduction of liquor into an Indian reservation, or into what is in fact Indian country, but also to prohibit the introduction of liquor into adjoining country, not in the Indian country, within the limits of an organized state.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 61; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INDIANS (§ 3*)—INDIAN LAND—CEDED LANDS—INTOXICATING LIQUORS—TREATY PROVISION—REPEAL.

The Minnesota enabling act (Act Cong. Feb. 26, 1857, c. 60, § 5, subd. 5, 11 Stat. 167), provided that the constitutional convention should provide by clauses in the Constitution, or an ordinance irrevocable without the consent of the United States, that the state should never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress might find necessary to make to secure the title in the soil to bona fide purchasers thereof, and that no tax should be imposed on land belonging to the United States, and in no case should nonresident proprietors be taxed higher than residents. The act admitting the state into the Union (Act Cong. May 11, 1858, c. 31, 11 Stat. 285), provided in section 1 that the state should be one of the United States of America, admitted into the Union on an equal footing with the original states in all respects, and (section 3) that from and after admission all the laws of the United States which were not locally inapplicable should have the same force and effect within the state as in other states of the Union. No reservation in favor of the Indians was made either in the enabling act, the Constitution of Minnesota, or the act admitting it into the Union. *Held*, that such act operated to repeal so much of Chippewa Indian Treaty Feb. 22, 1855, art. 7, 10 Stat. 1165, as prohibited the introduction of liquor into ceded lands within the boundaries of the state; the introduction and sale of liquor within such territory being exclusively within the police power of the state.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5-7; Dec. Dig. § 3.*]

3. COURTS (§ 276*)—FEDERAL COURTS—DISTRICT IN WHICH SUIT TO BE BROUGHT—WAIVER OF OBJECTIONS.

An objection that defendants were sued in the wrong district was waived by their general appearance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

In Equity. Suit by Edwin Gearlds and others against W. E. Johnson and others to restrain the enforcement of Chippewa Indian Treaty Feb. 22, 1855, art. 7, 10 Stat. 1165, prohibiting the introduction of intoxicating liquors into the Indian country within the entire boundaries of the country ceded by the treaty to the United States until otherwise provided by Congress. On demurrer to the bill. Overruled, and temporary injunction granted.

Spooner & Brown and E. E. McDonald, for complainants.
C. C. Houpt, U. S. Dist. Atty., for defendants.

WILLARD, District Judge (orally). Congress from time to time has passed various laws prohibiting the introduction of liquor into the Indian country. Among these are the act of 1834 (Act June 30, 1834, c. 161, 4 Stat. 729), the act of 1864 (Act March 15, 1864, c. 33, 13 Stat. 29), the act of 1892 (Act July 23, 1892, c. 234, 27 Stat. 260), and the act of 1897 (Act Jan. 30, 1897, c. 109, 29 Stat. 506), and the question at the bottom of this case is, of course, whether the United States government can prohibit the introduction of intoxicating liquors into land covered by the treaty of 1855. If the case depended alone upon these various acts of Congress, and particularly upon the last act, then no power could be found in the government for the purpose of prohibiting such introduction.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the case of *Dick v. U. S.*, 208 U. S. 340, the court said on page 352 (page 402 of 28 Sup. Ct. [52 L. Ed. 520]):

"If this case depended alone upon the federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of *Culdesac*) the jurisdiction of the state, for all purposes of government, was full and complete."

The situation at Bemidji is the same as it was at *Culdesac*. It is not within the Indian country, and consequently the statute alone would not justify any prosecution for the introduction of liquor into that country. The power of the government must rest, as it rested in the case of *Dick v. U. S.*, upon a treaty; and the treaty invoked is the treaty with the Chippewa Indians of February 22, 1855, which is in 10 Statutes at Large, p. 1165. Article 7 of that treaty is as follows:

"Art. 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

The first and most important case to be considered is *U. S. v. 43 Gallons of Whisky*, 93 U. S. 188, 23 L. Ed. 846. That case involved a treaty made with the Chippewa Indians in 1863, by which they ceded certain lands in Minnesota to the United States. It contained a clause similar to article 7 of the treaty of 1855. The court said there at page 194 of 93 U. S. (23 L. Ed. 846):

"It was contended, among other things, that the sale of liquor to an Indian, or any other person within the county, was a matter of state regulation, with which Congress had nothing to do. But this court held that the power to regulate commerce with the Indian tribes was, in its nature, general, and not confined to any locality; that its existence necessarily implied the right to exercise it, whenever there was a subject to act upon, although within the limits of a state, and that it extended to the regulation of commerce with the individual members of such tribes."

The court further said at page 195 of 93 U. S. (23 L. Ed. 846):

"As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it; and why cannot Congress forbid its introduction into a place near by, which they would be likely to frequent?"

And at page 196 of 93 U. S. (23 L. Ed. 846):

"The power to define originally the 'Indian country' within which the unlicensed introduction and sale of liquors were prohibited necessarily includes that of enlarging the prohibited boundaries, whenever in the opinion of Congress the interests of Indian intercourse and trade will be best subserved."

And finally, at page 198 of 93 U. S. (23 L. Ed. 846):

"If this result can be thus obtained, surely the federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce."

This case has been referred to in subsequent decisions. In the case of *Dick v. U. S.*, before mentioned, there was under consideration a treaty with the Indians which prohibited for the period of 25 years the introduction of intoxicating liquor into lands then ceded by them. The court in delivering the opinion repeatedly referred to that circumstance, and seemed to indicate that the period of prohibition was important. In speaking of the case of *U. S. v. 43 Gallons of Whisky*, the court said at page 359 of 208 U. S., page 403 of 28 Sup. Ct. (52 L. Ed. 520):

"In view of some contentions of counsel and of certain general observations in the case of *Forty-Three Gallons of Whisky*, above cited, not necessary to the decision of that case, but upon which some stress has been laid, it is well to add that we do not mean by anything now said to indicate what in our judgment is the full scope of the treaty-making power of Congress, nor how far, if at all, a treaty may permanently displace valid state laws or regulations."

The latest case to which my attention has been called is *U. S. v. Sutton*, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200. There a prosecution for the introduction of liquor into Indian country was upheld; but it appeared that the "Indian country" there in question was a tract of land which had been allotted to an Indian, the title to which was still held in trust for him by the United States. It may be argued that the authority of the case of *U. S. v. 43 Gallons of Whisky* has been somewhat qualified by what was said in the case of *Dick v. U. S.*, and by the fact that the case of *U. S. v. Sutton*, supra, was put upon somewhat different grounds. It was nevertheless in the first case distinctly held that Congress had the power, not only to prohibit the introduction of liquor into an Indian reservation, into what was in fact Indian country, but also to prohibit the introduction of liquor into adjoining country, not Indian country, but within the limits of an organized state. So far as this court is concerned, that statement must be considered as binding upon it. The law must be considered as settled that Congress has the power to prohibit the introduction of liquor into lands not Indian country, but adjoining it, within the limits of a state.

But, when this is admitted and conceded, the present case is not yet in my judgment resolved. The question here presented is not a question as to the power of Congress. As I have already said, it is within the power of Congress, after a state has been admitted to the Union, to prohibit the introduction of liquor into not only Indian country, but into the adjoining country. That it had that power before the state was admitted and while the land was within the limits of a territory is unquestioned. At the time when the treaty of 1855 was negotiated the government had undoubtedly the power to insert in that treaty the provisions therein contained. So it is not at all a question of power, but it is a question whether that provision in the

treaty of 1855 is still in force, or whether any subsequent act of Congress has modified or repealed it. Such questions are decided neither by *U. S. v. 43 Gallons of Whisky* nor by *Dick v. U. S.* In each of those cases the treaty under consideration was made after the state had been admitted to the Union. These questions can only be answered by reference to the proceedings which took place when the state of Minnesota was admitted to the Union, and by reference to the authorities.

The enabling act was passed on the 26th of February, 1857 (chapter 60, 11 Stat. 166). It provided in section 5, subd. 5, as follows:

"Provided, the foregoing propositions herein offered are on the condition, that the said convention which shall form the Constitution of said state shall provide, by a clause in said Constitution, or an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that in no case shall nonresident proprietors be taxed higher than residents."

These were the only agreements which Congress imposed as a condition for the entrance of Minnesota into the Union. There is nothing whatever said in the enabling act with reference to Indians. There is nothing said in it with reference to this treaty of 1855, or with reference to any other treaty. Nothing was inserted therein requiring the state in its Constitution to recognize the treaty of 1855, or any other treaty, or as to the rights of the Indians to any lands within the boundaries of the state. When the Constitution was adopted it contained no such recognition, and Indians are mentioned in only two places therein. By article 7, § 1, they are given the right to vote under certain circumstances. By article 15, § 2, it is provided as follows:

"Residents on Indian Lands. Persons residing on Indian lands within the state shall enjoy all the rights and privileges of citizens, as though they lived in any other portion of the state, and shall be subject to taxation."

It will be noticed that that section uses the word "persons." It does not say white persons or Indians, and just what effect should be given to it I shall not take time to consider. It is sufficient to say that it certainly in no way limits the rights of the state. The act admitting the state of Minnesota into the Union was passed May 11, 1858 (Act May 11, 1858, c. 31, 11 Stat. 285). That act provided in its first section:

"That the state of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever."

Section 3 provided in part:

"That from and after the admission of the state of Minnesota, as hereinbefore provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within that state as in other states of the Union."

The act contained nothing which in any way limited the powers of the state.

As I said before, the question is: What effect, if any, did the act admitting the state into the Union have upon the treaty of 1855? Did it repeal it, or did it modify it? When I say repeal, I do not mean did it repeal all of the treaty, but did it repeal that part of article 7 which prohibited the introduction of liquor into ceded lands? I do not understand that it is claimed that the act had the effect of repealing that part of article 7 which related to the lands reserved and set apart by that treaty for the Indians. I do not understand that it is claimed that the provisions of the treaty were not in full force with regard to what was Indian country after the treaty; and no such claim can be successfully maintained, because the United States had the same jurisdiction over the reservations set apart in that treaty as it had over reservations in any other state of the Union. Whether that jurisdiction is based upon the commerce clause in the Constitution, whether it is based upon the peculiar relations of the United States to the Indians, or whether it is based upon that provision of the Constitution which gives to the United States the power to make all needful rules and regulations respecting the territories and other property of the United States, it is not necessary to determine. That such power exists is unquestioned. *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. The question in the case is whether the act admitting Minnesota into the Union repealed that part of article 7 of the treaty of 1855 which prohibited the introduction of ardent spirits into the ceded lands. That question must be determined by the authorities.

Upon the power of Congress with reference to existing treaties the Cherokee Tobacco Case, 11 Wall. 616, is important. The court said on page 617 (20 L. Ed. 227):

"The proceeding was instituted by the defendants in error to procure the condemnation and forfeiture of the tobacco in question, and of the other property described in the libel of information, for alleged violations, which are fully set forth, of the revenue laws of the United States."

The court said at page 618 of 11 Wall. (20 L. Ed. 227):

"The only question argued in this court, and upon which our decision must depend, is the effect to be given, respectively, to the 107th section of the act of 1868, and the 10th article of the treaty of 1866, between the United States and the Cherokee nation of Indians. They are as follows:

"Sec. 107. That the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not."

"Art. 10. Every Cherokee Indian and freed person residing in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."

"On behalf of the claimants, it is contended that the 107th section was not intended to apply, and does not apply, to the country of the Cherokees, and that the immunities secured by the treaty are in full force there. The United States insist that the section applies with the same effect to the territory in question as to any state or other territory of the United States, and that to the extent of the provisions of the section the treaty is annulled."

And further at page 620 of 11 Wall. (20 L. Ed. 227) :

"But, conceding these views to be correct, it is insisted that the section cannot apply to the Cherokee Nation because it is in conflict with the treaty. Undoubtedly one or the other must yield. The repugnancy is clear, and they cannot stand together. The second section of the fourth article of the Constitution of the United States declares that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land.' It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed will promptly give the proper relief."

Going back to the case of the United States v. 43 Gallons of Whisky, it was there declared to be the law, and is now the law, that Congress can prevent the introduction of intoxicating liquor onto lands adjacent to either one of these reservations. If it is held by the courts that the act admitting Minnesota into the Union repealed this provision of the treaty of 1855, it is within the power of Congress to re-enact it. If it is believed by Congress that that provision has always been in force and is still in force, it will be very easy for it to correct any judicial decision to the contrary.

In the case of U. S. v. McBratney, 104 U. S. 621, 26 L. Ed. 869, the question certified to the Supreme Court of the United States was "whether the Circuit Court of the United States sitting in and for the District of Colorado has jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute reservation in said district, and within the geographical limits of the state of Colorado." The court said at page 623 of 104 U. S. (26 L. Ed. 869):

"By the first section of the Act of Congress of February 28, 1861 (chapter 59), to provide a temporary government for the territory of Colorado, all territory which, by treaty with any Indian tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any state or territory, was excepted out of the boundaries, and constituted no part of the territory of Colorado; and by the sixteenth section 'the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of Colorado as elsewhere within the United States.' 12 Stat. 172, 176. If this provision of the section had remained in force after Colorado became a state, this indictment might doubtless have been maintained in the Circuit Court of the United States. United States v. Rogers, 4 How. 567 (11 L. Ed. 1105); Bates v. Clark, 95 U. S. 204 (24 L. Ed. 471); United States v. Ward, 1 Woolw. 17, 21 (Fed. Cas.

No. 16,639). But Act Cong. March 3, 1875, c. 139, for the admission of Colorado into the Union, authorized the inhabitants of the territory 'to form for themselves out of said territory a state government, with the name of the state of Colorado; which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever,' and the act contains no exception of the Ute Reservation, or of jurisdiction over it. 18 Stat. pt. 3, p. 474. The provision of section 1 of the subsequent act of June 26, 1876 (chapter 147, 19 Stat. 61), that upon the admission of the state of Colorado into the Union 'the laws of the United States, not locally inapplicable, shall have the same force and effect within the state as elsewhere within the United States,' does not create any such exception. Such a provision has a less extensive effect within the limits of one of the states of the Union than in one of the territories of which the United States have sole and exclusive jurisdiction. The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. The Cherokee Tobacco, 11 Wall. 616 (20 L. Ed. 227). Whenever upon the admission of a state into the Union Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. The Kansas Indians, 5 Wall. 737 (18 L. Ed. 667); *United States v. Ward*, supra. The state of Colorado by its admission into the Union by Congress upon an equal footing with the original states in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States."

So in the case of Minnesota the United States government when it was admitted into the Union did not see fit to make any exception or reservation with regard to lands occupied by Indians, or lands which the Indians had previously ceded.

In the case of *Draper v. U. S.*, 164 U. S. 240, the court said at page 242, 17 Sup. Ct. 107, 41 L. Ed. 419:

"The territory of Montana was organized by Act May 26, 1864, c. 95, 13 Stat. 85. Subsequently, in 1868, the Crow Indian Reservation was created (15 Stat. 649), the land of which it was composed being wholly situated within the geographical boundaries of the territory of Montana. The treaty creating this reservation contained no stipulation restricting the power of the United States to include the land embraced within the reservation in any state or territory then existing or which might thereafter be created. The law to enable Montana and other states to be admitted into the Union was passed February 22, 1889 (25 Stat. 676, c. 180). This act embraced the usual provisions for a convention to frame a Constitution, for the adoption of an ordinance directed to contain certain specified agreements, and provided that upon the compliance with the ordained requirements, and the proclamation of the president so announcing, the state should be admitted on an equal footing with the original states. The question then is: Has the state of Montana jurisdiction over offenses committed within its geographical boundaries by persons not Indians or against Indians, or did the enabling act deprive the courts of the state of such jurisdiction of all offenses committed on the Crow Indian Reservation, thereby divesting the state pro tanto of equal authority and jurisdiction over its citizens, usually enjoyed by the other states of the Union?"

After a statement of the case of *U. S. v. McBratney*, the court said on page 243 of 164 U. S., page 108 of 17 Sup. Ct. (41 L. Ed. 419):

"*United States v. McBratney* is therefore decisive of the question now before us, unless the enabling act of the state of Montana contained provisions

taking that state out of the general rule, and depriving its courts of the jurisdiction to them belonging and resulting from the very nature of the equality conferred on the state by virtue of its admission into the Union. Such exception is sought here to be evolved from certain provisions of the enabling act of Montana which were ratified by an ordinance of the convention which framed the Constitution of that state."

The section relied upon provided, in substance, that the Indian lands within the state should remain under the absolute jurisdiction and control of the United States. Notwithstanding that provision, the court held that the courts of the state had jurisdiction over the offense which was being prosecuted.

In the case of *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244, article 4 of the treaty made on the 24th of February, 1869, with the Bannock Tribe of Indians, provided as follows:

"The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

The case says at page 505 of 163 U. S., page 1076 of 16 Sup. Ct. (41 L. Ed. 244):

"In July, 1868, an act had been passed erecting a temporary government for the territory of Wyoming (15 Stat. 178, c. 235), and in this act it was provided as follows: 'That nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty, between the United States and such Indians.' Wyoming was admitted into the Union on July 10, 1890. 26 Stat. 222, c. 604. Section 1 of that act provides as follows: 'That the state of Wyoming is hereby declared to be a state of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Wyoming have formed for themselves be, and the same is hereby accepted, ratified and confirmed.' The act contains no exception or reservation in favor of or for the benefit of Indians. The Legislature of Wyoming on July 20, 1895 (Laws Wyo. 1895, c. 98, p. 225), passed an act regulating the killing of game within the state. In October, 1895, the district attorney of Uinta county, state of Wyoming, filed an information against the appellee (*Race Horse*) for having killed in that county seven elk, in violation of the law of the state. He was taken into custody by the sheriff, and it was to obtain a release from imprisonment authorized by a commitment issued under these proceedings that the writ of habeas corpus was sued out. The following facts are unquestioned: (1) That the elk were killed in Uinta county, Wyo., at a point about 100 miles from the Ft. Hall Indian Reservation, which is situated in the state of Idaho; (2) that the killing was in violation of the laws of the state of Wyoming; (3) that the place where the killing took place was unoccupied public land of the United States, in the sense that the United States was the owner of the fee of the land; (4) that the place where the elk were killed was in a mountainous region some distance removed from settlements, but was used by the settlers as a range for cattle, and was within election and school districts of the state of Wyoming."

The opinion of the court was delivered by Chief Justice, then Justice, White, who said at page 510 of 163 U. S., page 1078 of 16 Sup. Ct. (41 L. Ed. 244):

"The argument now advanced in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the hunting district, and the assertion of the power to continue the exercise of the privilege in question in the state of Wyoming in defiance of its laws. That 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,' is elementary. *Fong Yue Ting v. United States*, 149 U. S. 698 [13 Sup. Ct. 1016, 37 L. Ed. 905]; *The Cherokee Tobacco*, 11 Wall. 616 [20 L. Ed. 227]. In the last case it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. Of course, the settled rule undoubtedly is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. *Cope v. Cope*, 137 U. S. 682 [11 Sup. Ct. 222, 34 L. Ed. 832], and authorities there cited. But, in ascertaining whether both statutes can be maintained, it is not to be considered that any possible theory by which both can be enforced must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction by which both laws can coexist consistently with the intention of Congress. *United States v. Sixty-Seven Packages Dry Goods*, 17 How. 85 [15 L. Ed. 54]; *District of Columbia v. Hutton*, 143 U. S. 18 [12 Sup. Ct. 369, 36 L. Ed. 60]; *Frost v. Wenie*, 157 U. S. 46 [15 Sup. Ct. 532, 39 L. Ed. 614]. The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule. In *Pollard v. Hagan*, 3 How. 212 [11 L. Ed. 565 (1845)], the controversy was as to the validity of a patent from the United States to lands situate in Alabama, which at the date of the formation of that state were part of the shore of the Mobile river between high and low water mark. It was held that the shores of navigable waters and the soil under them were not granted by the Constitution to the United States, and hence the jurisdiction exercised thereover by the federal government, before the formation of the new state, was held temporarily in trust for the new state, to be thereafter created, and that such state when created, by virtue of its being, possessed the same rights and jurisdiction as had the original states. And, replying to an argument based upon the assumption that the United States had acquired the whole of Alabama from Spain, the court observed that the United States would then have held it subject to the Constitution and laws of its own government. The court declared (page 229) that to refuse to concede to Alabama sovereignty and jurisdiction over all the territory within her limits would be to 'deny that Alabama has been admitted into the Union on an equal footing with the original states.' The same principles were applied in *Permoli v. First Municipality*, 3 How. 589 [11 L. Ed. 739]. In *Withers v. Buckley*, 20 How. 84 [15 L. Ed. 816 (1857)], it was held that a statute of Mississippi creating commissioners for a river within the state, and prescribing their powers and duties, was within the legitimate and essential powers of the state. In answer to the contention that the statute conflicted with the act of Congress which authorized the people of Mississippi Territory to form a Constitution, in that it was inconsistent with the provision in the act that 'the navigable rivers and waters leading into the same shall be common highways, and forever free, as well to the inhabitants of the state of Mississippi as to other citizens of the United States,' the court

said (page 92 of 20 How. [15 L. Ed. 816]): 'In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new state in any of its necessary attributes as an independent sovereign government, not to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the constitution adopted by the states, and from the rule of interpretation pronounced by this court in the case of *Pollard's Lessee v. Hagan*, 3 How. 223 [11 L. Ed. 565].' A like ruling was made in *Escanaba Company v. Chicago*, 107 U. S. 678 [2 Sup. Ct. 185, 27 L. Ed. 442 (1882)], where provisions of the ordinance of 1787 were claimed to operate to deprive the state of Illinois of the power to authorize the construction of bridges over navigable rivers within the state. The court, through Mr. Justice Field, said (page 683 of 107 U. S., page 189 of 2 Sup. Ct. [27 L. Ed. 442]): 'But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people.' And it was further added (page 688 of 107 U. S., page 193 of 2 Sup. Ct. [27 L. Ed. 442]): 'Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. * * * Equality of the constitutional right and power is the condition of all the states of the Union, old and new.' In *Cardwell v. American Bridge Company*, 113 U. S. 205 [5 Sup. Ct. 423, 28 L. Ed. 959 (1884)], *Escanaba Company v. Chicago*, supra, was followed, and it was held that a clause in the act admitting California into the Union, which provided that the navigable waters within the state shall be free to citizens of the United States, in no way impaired the power which the state could exercise over the subject if the clause in question had no existence. Mr. Justice Field concluded the opinion of the court as follows (page 212 of 113 U. S., page 426 of 5 Sup. Ct. [28 L. Ed. 959]): 'The act admitting California declares that she is "admitted into the Union on an equal footing, with the original states in all respects whatever." She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original states possessed over such waters within their limits.' A like conclusion was applied in the case of *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1 [8 Sup. Ct. 811, 31 L. Ed. 629], where the act admitting the state of Oregon into the Union was construed. Determining by the light of these principles the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed in so far as the lands in such districts are now embraced within the limits of the state of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that state into the Union. The two facts, the privilege conferred, and the act of admission are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting. The power of all the states to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applied to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with

that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land owned by it in private ownership within a state, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted, repels any presumption that in this particular case Congress intended to admit the state of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union as to the reservation of rights in favor of the Indians is given increased significance by the fact that Congress in creating the territory expressly reserved such rights. Nor would this be affected by conceding that Congress during the existence of the territory had full authority in the exercise of its treaty making power to charge the territory, or the land therein, with such contractual burdens as were deemed best, and that, when they were imposed on a territory, it would be also within the power of Congress to continue them in the state on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the state, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

The fact that Mr. Justice Brown dissented in that case shows that the opinion of the court was announced only after full and careful deliberation.

In the case against Sutton, to which I have referred, the opinion was apparently based upon the act admitting Washington into the Union. In that the court said:

"If the Yakima Reservation were within the limits of a territory, there would be no question of the validity of the statute under which this indictment was found, but the contention is that the offense charged is of a police nature, and that the full police power is lodged in the state, and by it alone can such offenses be punished. By the second paragraph of section 4 of the enabling act with respect to the state of Washington (chapter 180, 25 Stat. 677), the people of that state disclaimed all right and title 'to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.' Construing this in connection with other provisions of the enabling act, it was held in *Draper v. United States*, 164 U. S. 240 [17 Sup. Ct. 107, 41 L. Ed. 419], that it did not deprive the state of jurisdiction over crimes committed within a reservation by others than Indians or against Indians, following in this *United States v. McBratney*, 104 U. S. 621 [26 L. Ed. 869]. But in terms 'jurisdiction and control' over Indian lands remain in the United States, and, there being nothing in the section withdrawing any other jurisdiction than that named in *Draper v. United States*, undoubtedly Congress has the right to forbid the introduction of liquor, and to provide punishment for any violation thereof."

Congress has understood that in order to prohibit the manufacture and sale of intoxicating liquors in ceded Indian lands, not reservations, after the Territory is admitted as a state, it is necessary that some provision relating thereto be inserted in the enabling act. This is shown by its treatment of Oklahoma. The enabling act for that territory (Act June 16, 1906, c. 3335, 34 Stat. 267 [U. S. Comp. St. Supp. 1909, p. 154]) expressly provided on page 869:

"And said convention shall provide in said Constitution: * * * Second. That the manufacture, sale, barter, giving away or otherwise furnishing,

except as hereinafter provided, of intoxicating liquors within those parts of said state now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said state which existed as Indian reservations on the 1st day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union, and thereafter until the people of said state shall otherwise provide by amendment of said Constitution and proper state legislation."

Other provisions were required to be inserted relating to the establishment of public agencies where alcohol for the industrial arts might be sold, and where intoxicating liquors might be sold to druggists. This act came before the Circuit Court of the United States for the Western District of Arkansas in the case of *United States ex rel. Friedman v. United States Express Company* (D. C.) 180 Fed. 1006, decided last July. This was a mandamus brought by Friedman against the express company to compel it to receive and ship intoxicating liquors to its customers in that part of Oklahoma formerly the Indian Territory. The court held that the act admitting Oklahoma into the Union had repealed the act of 1897, relating to the introduction of liquors into the Indian country, so far as the Indian Territory was concerned, and granted the mandamus.

In view of these decisions, and particularly *Ward v. Race Horse*, what becomes of this provision of the treaty of 1855? I can see no difference whatsoever in principle between this case and that case. There is, to be sure, this difference: That in the *Race Horse* Case the act prohibiting was a state act, and the act permitting was a federal act; while here the act prohibiting is a federal act, and the act permitting is a state act. When I say "permitting," I mean that under the laws of Minnesota intoxicating liquors can be sold under certain circumstances in this district. Notwithstanding this difference in form, I see no difference in principle between the two cases. The question is: Where is the power to regulate? Does the United States government have the power to regulate the sale of intoxicating liquors in this district, or does the state of Minnesota have that power? It was said in the *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, that there could be no divided authority. If the United States government has the power to regulate it, that power must come in conflict with the power of the state to regulate it. Moreover, a condition of things might arise where the two cases would be identical. The act of 1897 provides, as other acts have provided, that intoxicating liquors might be introduced into the Indian country by the consent of the War Department. The laws of Minnesota provide that a town may vote that no license shall be granted and no liquor shall be sold therein. If the War Department should undertake to give permission to some person to establish a dispensary within the limits of a town which had voted not to have any license, there would be immediately a conflict between the two jurisdictions and the identical case would be presented which was presented in the *Race Horse* Case. That case is conclusive upon this question to my mind, and holds that this provision of the treaty of 1855 so far as it relates to ceded territory has been repealed. It is said that the case of the *United States v. 43 Gallons of Whisky* is a holding to the contrary, and that the

case of *Dick v. United States* is another holding to the contrary; but in both of these cases the treaties were made after the state had been admitted to the Union, and no question of this kind was either discussed or decided. It may be said that the repeal was unintentional. It may be said that there was not any actual intention on the part of Congress to discontinue this clause with reference to ceded territory. In support of this claim, it may be argued that a similar clause was afterwards inserted in the treaty of 1863. But that was not the act of Congress. It was the act only of the President and the Senate. Moreover, the extent of territory covered by that treaty was very much smaller than that covered by the treaty in question. Before one says that this repeal was unintentional, it would be well for him to consider some of the facts alleged in the bill and admitted by the demurrer.

The tract of land ceded by this treaty commences about 30 miles west from the eastern boundary of the state, and extends westward more than 180 miles to the Dakota line. It commences near the city of Brainerd, which is about the geographical center of the state, and extends northerly more than 150 miles to the Canadian line. It covers an area of more than 15,000 square miles, and geographically is larger than the three New England states of Massachusetts, Rhode Island, and Connecticut. It has a population of 382,191, or more than the entire population of the state of Montana. The property in the district was assessed for taxation last year at \$93,910,142. There is within this district Bemidji, the county seat of Beltrami county, Brainerd, the county seat of Crow Wing county, Walker, the county seat of Cass county, Bagley, the county seat of Clearwater county, Grand Rapids, the county seat of Itasca county, Park Rapids, the county seat of Hubbard county, and Detroit, the county seat of Becker county. This is not all. Before the question as to whether the repeal was intentional or not is decided, there must be considered the Sioux treaty of July 23, 1851 (10 Stat. 949). This contained a similar provision, and the land covered by it commences at the southeast boundary of the state, and includes all the land in the state on the west side of the Mississippi river from there to Moorhead. There is more still. The Chippewa treaty of September 30, 1854 (10 Stat. 1109), contained a clause prohibiting the sale of intoxicating liquors in the lands thereby ceded. The tract covered by that treaty includes the present city of Duluth, with a population of 75,000 and a large tract of country, in that part of the state. It is safe to say that at the time Minnesota was admitted into the Union three-fourths of its entire area was in the same condition, so far as the sale of intoxicating liquors is concerned, as the lands in question in this case. While the present condition of the country perhaps was not then foreseen, Congress must have had in mind that the state would increase rapidly in wealth and population. Was it the intent of Congress to keep in force a prohibition through such a vast extent of territory as this? Was it the intent of Congress to keep in force such a prohibition, and pay the enormous expense that would be necessary to make it effective? There is a significant provision in this Sioux treaty of 1851. That treaty

ceded to the United States all the lands owned by the Sioux Indians in the state of Iowa, and all the lands in the then territory of Minnesota east of a line therein described, which is now practically the western boundary of the state. It declared that the provisions of the general law relating to the introduction of intoxicating liquors into the Indian country should continue to be in force in all of the lands ceded which lay within the territory of Minnesota. It said nothing at all about the lands ceded which lay in the state of Iowa. That omission, to my mind, is extremely significant. It can mean but one thing, and that is that it was in the mind of Congress that it had no power to prohibit the introduction of intoxicating liquors into the state of Iowa. If that were not the reason, why was there not the same provision with regard to Iowa that there was with regard to Minnesota? In view of these facts, who can say with any degree of certainty that this repeal was not intentional? It would have been the most simple thing in the world for Congress to have inserted some provision in the enabling act preserving this treaty stipulation with reference to the rights of the Indians, and requiring its insertion in the Minnesota Constitution, as they required Oklahoma to insert a similar provision in its Constitution. But nothing of that kind was done.

There is another matter that has been referred to, and that is the practical construction that has been put upon this treaty by the government. The bill alleges that the United States never attempted to enforce the treaty in the ceded lands until last year. The treaty having been promulgated in 1855, there passed more than 50 years of absolute quiescence on the part of the government. It can therefore well be said that it never was supposed that this treaty stipulation survived the admission of Minnesota into the Union. But it is entirely beside the mark to guess and speculate as to what Congress would have done if its attention had been particularly called to the precise question here under discussion. This case must be decided, not upon an intention which was not expressed, but upon one that was expressed. Referring again to the case of *Ward v. Race Horse*, the court there said:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it were so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority."

The opinion of the Attorney General (25 Op. Atty. Gen. 416) to my mind does not cover this case, because it refers to reservations, and not to ceded lands. While it is true that there are certain statements in the opinion to the effect that the provision as to ceded lands is still in force, yet no authorities are cited in support of that statement.

I can come to only one conclusion in the case, and that is that the provision in article 7 of the treaty of 1855, which prohibited the introduction of intoxicating liquors into the ceded country, was repealed by the act admitting Minnesota into the Union. It is therefore not necessary to consider any of the other questions argued by counsel. I express no opinion upon the question as to whether the subsequent

treaty of 1865 re-ceding to the Indians the land where Bemidji now stands, and the treaty of 1867 by which the Indians again ceded to the United States that land, with no clause of this kind in the treaty, repealed article 7 of the treaty of 1855. One of the grounds of demurrer to the bill states that the court has no jurisdiction of the case. Its jurisdiction rests upon diverse citizenship. It may be said to rest, also, upon the fact that the case arises under the laws of the United States. Yet, if it did, that would not defeat the jurisdiction, even under the ruling in *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300. The objection that the defendants were sued in the wrong district was waived by their general appearance.

The result is that I will make an order overruling the demurrer to the bill, and assigning the defendants to answer at the next rule day. I will also make an order granting a temporary injunction, as prayed for in the bill.

UNITED STATES v. FOSTER.

(District Court, W. D. Virginia, at Roanoke. September 15, 1910.)

CRIMINAL LAW (§ 762*)—INSTRUCTIONS—EXPRESSION OF OPINION ON THE FACTS.

It is the settled law that it is within the right of a federal judge to state his opinion on the facts to the jury in a criminal or civil case, with proper explanation that it has no binding effect; and it is proper for him to do so, giving his reasons therefor, where he has a decided opinion, and in his judgment the case is such that it will be helpful to the jury. Where he does so, it is the preferable practice to give his opinion after the case has been argued by counsel, rather than with the instructions on the law preceding the argument, and it is not objectionable, and sometimes preferable, to defer such statement until after the jury have considered the case, and give it only in case of their inability to agree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

Criminal prosecution by the United States against J. D. Foster. On motion for new trial. Motion denied.

Barnes Gillespie, U. S. Atty.
Hairston & Willis, for defendant.

McDOWELL, District Judge. In this case an opinion on the facts in favor of the government was given to the jury after they had announced themselves unable to agree. Very shortly thereafter the jury returned a verdict of guilty. In *Garst v. U. S.*, 180 Fed. 339, the fact that the trial judge gave the jury a properly guarded opinion on the facts after the jury had been some time in consultation, and had given thereby some indication of a liability to disagree, is adversely commented upon in the majority opinion. As is clearly shown by the opinion—see last paragraph—this expression of opinion is a dictum, and, moreover, it relates to a matter which is not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the subject of review. See *Carver v. Astor*, 4 Pet. 80, 7 L. Ed. 761; *Nudd v. Burrows*, 91 U. S. 426, 439, 23 L. Ed. 286; *Transportation Line v. Hope*, 95 U. S. 297, 302, 24 L. Ed. 382; *R. Co. v. Putnam*, 118 U. S. 545, 553; *Rucker v. Wheeler*, 127 U. S. 85, 93, 8 Sup. Ct. 1142, 32 L. Ed. 102; *Lovejoy v. U. S.*, 128 U. S. 171, 173, 9 Sup. Ct. 57, 32 L. Ed. 389; *R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 574, 11 Sup. Ct. 185, 34 L. Ed. 784; *Cincinnati Gas Co. v. Western Co.*, 152 U. S. 200, 210, 14 Sup. Ct. 523, 38 L. Ed. 411. The criticism comes from a judge for whose opinion I have such very great respect that I have been led to make a careful re-examination of the available authorities, and now feel it proper to state my reasons for holding to the view that the practice is not an improper one.

(1) It is quite true that it is not unusual for the trial judge to give to the jury his opinion on the facts at the close of the evidence, and at the same time that he gives to the jury the instructions on the law of the case. I regard this practice as much more objectionable than that of giving the opinion on the facts, when given at all, after the arguments of counsel to the jury have been made. When a federal trial judge deems it his duty to express to the jury his opinion on the facts, it is of first importance that he make the jury understand that, while they are bound by his instructions as to the law, they are not bound by his opinion on the facts; and yet I know of nothing more likely to cause confusion in the minds of the jury on this very point than the practice of combining instructions on the law with an opinion on the facts, and the objection is rarely wholly obviated if both the instructions and opinion are delivered to the jury at the same stage of the cause. Assuredly there is much less probability of confusion if the delivery of the instructions and of the opinion are separated by the arguments of counsel to the jury.

(2) No trial judge need consider his own judgment infallible. No matter how firmly he may be of opinion, at the close of the evidence, that the jury ought to find for one side or the other, I have long thought it prudent, even if not the right of the side against whom the judge inclines, that the judge at least hear what counsel for that side can say of the facts to the jury before expressing to the jury any opinion on the facts.

(3) None but a decided opinion on the facts should, in my belief, be expressed to a jury. Unless the judge feels that there is no considerable room for doubt as to the correctness of his views on the facts, it is much the better course to leave the case wholly to the determination of the jury. But to express a decided opinion on the facts in advance of argument to the jury is for the judge to painfully embarrass the counsel for the side against which the judge has expressed his opinion. Counsel not infrequently hold intimate and most friendly relations with the judge, and may entertain, and nearly always desire to show, respect for his opinions. It certainly imposes an unnecessary restraint on counsel under such circumstances to put them in the frequently almost hopeless position of having to combat the opinion of the judge before the jury. It is in my estima-

tion the better practice to have the case argued to the jury by counsel when they do not know what the judge's opinion on the facts is, and when it is yet uncertain that he will express any opinion at all.

(4) When an opinion on the facts is given, it must be carefully guarded. The jury must be told that they are not bound by it, and that the ultimate decision of the case rests entirely with them. In addition, it is my practice to say to the jury that my opinion on the facts is submitted to them for just what they think it is worth. In consequence, an opinion on the facts is of real assistance to the jury only in so far as it is well reasoned. Whether it is well reasoned or not can certainly be much better judged by the jury after they have heard the arguments of counsel than before.

Having now indicated briefly some reasons for holding that the opinion on the facts should come after, rather than before, argument of counsel, I reach the more immediate ground of criticism, which is that the trial judge's opinion on the facts in *Garst v. U. S.* was expressed after the jury had been out long enough to indicate the probability of a disagreement. The chief ground of objection is that, at such juncture, the opinion of the judge is likely to have too great influence on the jury.

(1) I am strongly of the opinion, based on repeated experiences, that the judge's opinion on the facts has vastly more influence if given before the jury have commenced their deliberations than if given after they have expressed to each other their views and have had opportunity to have engaged in earnest (frequently heated) arguments with each other. Members of juries, like other men, are likely to have some pride of opinion. A juror who has expressed no opinion on the case to any one is, it is submitted, much more liable to be influenced by a well-reasoned and cogent opinion on the facts by the trial judge than is the same man after he has committed himself to the opposite theory, and after he has possibly argued and expostulated that his view is the only correct one.

(2) There is still another reason why in some—indeed, in many—cases the trial judge may well refrain from stating his opinion on the facts at least until the jury has shown an inclination to disagree. It is to me, as it doubtless is to the majority of trial judges, much more satisfactory to have the jury agree upon the proper verdict without any assistance whatever from the judge. Being strongly impressed, as I am, with the belief that in ordinary cases, especially in criminal cases, the combined judgment of the jury on questions of fact is better than my own, I can see very little force in objecting to a practice which at least has the merit of giving the jury an opportunity to bring in a verdict which will be the jury's unassisted conclusion on the facts.

(3) Considering the numerous terms of court required to be held in this district, and the great expense, both direct and indirect, frequently involved in a final disagreement by a jury, it would seem that the trial judge is, in this district at least, more or less justified in regarding a "hung jury" as one of the lesser calamities, to be

avoided if it properly can be; and if, in seeking in a proper manner and in a proper case to thus avoid mistrials, the trial judge's opinion on the facts exerts some influence on the jurors, I conceive that the fact that it will have influence is the chief reason for the existence of the power to express opinions on the facts.

(4) "Mistrials" are sometimes avoided by jurors agreeing to a verdict which is unjustified by the evidence, rather than be kept in confinement in the jury room. Almost innumerable cases are to be found in the books in which a verdict has been set aside as contrary to the weight of evidence. In such cases, if instead of leaving the jury to debate and argue without assistance, the trial judge had after a reasonable interval called the jury into the courtroom and delivered to them a fair and well-reasoned opinion on the facts, it is not wholly improbable that in some cases at least the erroneous verdict would have been avoided.

(5) The reason for not expressing an opinion on the facts at an earlier stage of the case, which existed in the Garst Case, may also exist in some future cases. In that case the evidence for the government was not introduced in the most effective order, and the argument of the then district attorney was not as cogent as was usual with him. In consequence, both at the conclusion of the evidence and at the conclusion of the arguments, I was not entirely satisfied that the case was of such nature as to demand of me an opinion on the facts. It was only after the opportunity for reflection afforded by the intermission for Sunday that it became entirely clear to me that the case did call for an opinion on the facts, and that it would be an evasion of duty on my part to leave the jury to struggle with the case longer without such an opinion.

(6) Aside from the often repeated statement that the matter is governed by the discretion of the trial judge, there is at least some fairly direct authority for the position taken herein:

See *Aerheart v. Railroad Co.* (C. C. A., Eighth Circuit) 99 Fed. 907, 909, 40 C. C. A. 171. In this case the jury, after having been out for some time, came into the courtroom and advised the judge, through the foreman, that some of them did not understand an expression used in the original charge. The judge thereupon, in the absence of counsel, explained the instruction, and further gave to the jury an opinion on the facts. The judgment below was affirmed.

In *Allis v. U. S.*, 155 U. S. 117, 120-124, 15 Sup. Ct. 36, 39 L. Ed. 91, after the jury had been engaged in considering the case "several hours," the court called them into the courtroom and, as was complained, erred "in recalling the jury and in arguing the testimony and in stating part of the testimony on certain points without stating the entire testimony." In the opinion of the Supreme Court, in affirming, it is said:

"We see nothing in this of which any just complaint can be made."

Simmons v. U. S., 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968, is a case in which the opinion on the facts which was objected to was expressed the day after the jury retired, and after the jury had disagreed, and had requested the court to discharge them from

further consideration of the case. In affirming, the Supreme Court said:

" * * * The judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, *whenever* he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination. * * * "

INTERURBAN LAND CO. v. CRAWFORD.

(Circuit Court, N. D. Alabama, M. D. November 25, 1910.)

No. 1.

1. LANDLORD AND TENANT (§ 30*)—VALIDITY OF LEASE—STATUTORY LIMITATION OF TERM.

Code Ala. 1907, § 3418, which provides that no leasehold estate in lands can be created for a longer term than 20 years, applies only to such leasehold estates as must, by the terms of the lease, endure longer than 20 years, and does not render invalid a lease for a term which may or may not terminate within that time, depending on a future contingency, as one for the life of the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 86; Dec. Dig. § 30.*]

2. LANDLORD AND TENANT (§ 63*)—ESTOPPEL OF TENANT—SUIT FOR CONSTRUCTION OF LEASE.

The rule that a tenant cannot dispute the title of his landlord does not prevent a tenant, or those in privity with him, from maintaining a suit for the construction of his lease and a determination of his rights under it as against his landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 159, 161, 162, 166, 176; Dec. Dig. § 63.*]

3. LANDLORD AND TENANT (§ 44*)—DEEDS (§ 5*)—CONSTRUCTION OF CONTRACT—COVENANTS RUNNING WITH THE LAND.

Defendant was left, by the will of her husband, a life estate in certain lands valuable chiefly for farming purposes, but which were largely unimproved. She entered into a contract by which she granted, bargained, sold, and conveyed all her right, title, and interest in the lands in consideration of monthly payments to be made to her during her life. The contract further provided that, should the grantees lease or sell any part of the lands, or should minerals be developed thereon, they should pay defendant one-half the profits realized from such sales, leases, or minerals. It further provided that defendant should have the right to take wood from the lands during her life, that to secure the grantees against loss on improvements made in case of her death she should take out insurance on her life payable to them on which they were to pay the premiums and for a forfeiture with right of re-entry for their failure to pay any monthly installment or to pay half the profits on leases or sales or development of minerals. *Held* that, construing the contract as a whole and in the light of the situation of the parties, it was not intended as an absolute conveyance of all defendant's interest, but was rather in the nature of a lease, the covenants of which ran with the land and were binding on subsequent grantees not only as to the monthly payments, but also as to the share of the profits of sales, leases, or mineral development; such contemplated sales or leases being only of the lessees' interest.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 108-110; Dec. Dig. § 44;* *Deeds*, Cent. Dig. §§ 7-9; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Interurban Land Company against Cora W. Crawford. Decree determining the respective interests of the parties in certain land.

Goodhue & Blackwood, for complainant.

Culli & Martin, for respondent.

GRUBB, District Judge. This cause is submitted for final decree upon the pleadings and evidence. The evidence, so far as deemed material, is contained in a stipulation and its exhibits filed in this cause. The bill was filed under the Alabama statute (Code 1907, § 5443 et seq.) providing for the determination of titles to and liens upon real estate. The bill calls upon respondent to set up her title to or interest in the lands described in it. The answer responds by claiming a life estate, subject to a leasehold interest in the complainant. The common source of title was Ira Foster, the former husband of respondent, who devised the lands described in the bill, with others, to the respondent, his wife, for her life, with remainder to his children. The respondent, after the death of her husband, executed, with J. F. and J. H. Lovejoy, a contract transferring to them her life estate in these and other lands subject to certain conditions and reservations contained therein. Upon the proper construction of this contract depends the title to the lands in controversy. By intermediate transfers the interest in the lands conveyed by this contract passed to J. H. Lovejoy, who thereafter sold his interest to one Hassinger, complainant's transferor, for \$1,000.

The contract, upon the construction of which the case is to be determined, was executed February 6, 1888, and modified December 22, 1888. It stipulated, among other things, that the respondent granted, bargained, sold, and conveyed all her right, title, and interest in and to a part of the lands so devised to her for life to J. F. and J. H. Lovejoy in consideration of a quarterly payment (made monthly and reduced in amount by the modification) during each year of her life; that, should the said Lovejoys lease or sell any part of the lands, they were to pay the respondent one-half the profits of such sales or leases; that, if minerals were developed, they were to pay respondent one-half the profits they realized therefrom; that the respondent reserved the right to cut wood from the lands for her personal use during her life; it provided for the payment of taxes by them, and for a forfeiture with a right of re-entry for their failure to pay any monthly installment or to pay half the profits on leases or sales or development of minerals within 30 days after due and request for payment and for the taking out of life insurance by respondent to secure the Lovejoys against loss of improvements in the event of respondent's death, and stipulated that respondent was not to be responsible for any expense of improvements so made.

The respondent's contention is that the contract creates a leasehold only, and, having been made more than 20 years ago, encounters the prohibition of the Alabama statute against leasehold estates in excess of 20 years and is now void; that period having elapsed since its execution. The Alabama statute (Code 1907, § 3418) provides

that no leasehold estate in lands can be created for a longer term than 20 years. It seems clear that this statute applies only to tenancies for terms of years, and is not appropriate to or a restriction upon tenancies for the life of the tenant or another. It also seems clear that the statute applies only to such leasehold estates as by the terms of the lease must endure longer than 20 years, and has no application to those which may or may not endure that long, depending upon the happening of a future contingency. *Prout v. Webb*, 87 Ala. 593, 6 South. 190; *Adams v. Adams*, 26 Ala. 279; *Brigham v. Carlisle*, 78 Ala. 244, 56 Am. Rep. 28; *Heflin v. Milton*, 69 Ala. 356; *Derrick v. Brown*, 66 Ala. 165.

The respondent's further contention is that the complainant is a tenant of respondent by virtue of her lease to the Lovejoys under whom it claims and is estopped to question the title of its landlord. Conceding that this principle could in any case apply to a tenant for life or the life of another (tenancies which are not governed by the rules relating to the relation of landlord and tenant in the same sense as are tenancies for terms of years), it is clear it cannot prevent a tenant or those in privity with him from seeking a construction of the lease under which he holds and a determination of his rights and duties under it as against his landlord. This is not questioning the title of his landlord, but recognizing it, and claiming under it the rights he asserts, and asks the court to adjudicate in his favor. The title which the tenant is estopped to dispute is that by which the landlord acquired and owns the lands leased to the tenant.

The conclusion of the court is that, if the complainant had subsisting rights in the lands in controversy, they have not expired by reason of the Alabama statute relied upon, and the complainant at the time of the filing of the bill was not estopped from asserting them and asking the court to adjudicate them in this proceeding.

The further question for decision is as to what are the respective rights of the parties under the contract. This depends upon the construction of the contract, and this is to be arrived at from the intention of the parties to it, as gathered from the language of the contract as an entirety and from the situation of the parties, rather than the technical meaning of isolated words in it. The respondent was the owner of a life estate only, in lands best adapted to farming and largely unimproved. She was unable, both financially and physically, to improve and utilize them herself, and yet her life estate in them would be valueless except by presently using them. In this situation, she and the Lovejoys traded. The duration of the life estate being uncertain, it was natural that the consideration to be paid her by the Lovejoys for the use of the land should be payable in monthly or quarterly installments during her lifetime, and that she should secure the Lovejoys in the improvements to be placed on the land by them and which would be lost to them upon her death, by insuring her life for their benefit, at their expense. The annual value of the land for farming would be reasonably stable over an extended period, and could be easily fixed for the whole life estate, at the making of the contract. On the other hand, the added value of the property, due to future mineral development or arising from

increased value and diversified uses, such as subdivision into lots, etc., was so indeterminate as not to be readily fixed at the time of the making of the contract. To cover such contingencies, the contract provided that, in the event of mineral development by the Lovejoys or sales or leases of part of the land by them, the respondent should be entitled to one-half their profits arising from the mineral development, subleases, or resales, and, to secure such division of profits, the contract provided for its forfeiture in the event of a failure on the part of the Lovejoys to make them good to respondent. It also reserved in the respondent the right to enter and cut wood from the lands for her personal use. Though the words "grant, bargain, sell, and convey all her right, title, and interest in the said lands" are broad enough, standing alone, to convey the entire life estate of the respondent unincumbered to the Lovejoys, yet, taken in connection with the subsequent reservation of the enumerated rights to respondent, it is clear the intention was otherwise. This is equally true whether the contract be construed to be a lease or a grant. In either event, by its express terms, it left rights in the lessor or grantor capable of definition and enforcement.

The form of decree suggested by complainant concedes that the installments of purchase money or rent would remain charges on any parts of the land sold by the Lovejoys, in hands of their purchasers, but contends that all other reserved rights of respondent would cease to be charges on such parts of the land as were so sold, and that respondent could only look to the Lovejoys personally for their enforcement. This contention is based on the idea that the respondent, by the terms of the contract, conferred on the Lovejoys the right to sell or lease her interest in such parts of the land, as well as their own, and that, when so sold or leased, they would be freed from obligation to respond to her reserved rights. I do not so construe the contract, nor do I find in it any language conferring on the Lovejoys any such power. The contract only provides, in the event the Lovejoys sold portions of the land instead of continuing to use them, and made a profit thereby, that half of that profit should inure to respondent. While the language of the contract is "lease or sell any part of the lands," it is clear that this cannot mean the entire interest in the lands, for the respondent only owned and only conveyed to the Lovejoys a life estate, and this life estate was the utmost that they could convey to others. In view of this, the use of the words "sale" and "lands" is without significance. It is clear that it is an interest in the lands, and not the lands themselves, that these words in the contract refer to. It must be, therefore, either the interest of the Lovejoys or that of the respondent. As express language would be necessary to authorize the selling of respondent's interest by the Lovejoys, and such language is absent from the contract, the inference is irresistible that the lease or sale referred to is of the Lovejoys' interest, and not that of respondent. If the sale or lease was of the Lovejoys' interest only, it would be subject to all of the respondent's reserved rights, set out in the contract. The concession that the purchaser from the Lovejoys would take subject to the lien

for installments of rent or purchase money admits the correctness of this conclusion, since all the rights stand on the same footing in the contract. The contract provides that respondent can elect to forfeit as well for unpaid profits of mineral development or of sales or leases as for unpaid purchase money or rent. The right given the respondent to forfeit for such unpaid profits is persuasive that her right to such profits was secured by the interest in the lands even after it had passed into the hands of a subpurchaser or sublessee, and not merely by the personal responsibility of the Lovejoys. Otherwise, the Lovejoys could, by reselling respondent's interest with their own for a nominal consideration, entirely defeat the collection of both purchase money and profits unless they were solvent and able to respond personally to respondent's claim. It is not conceivable that respondent would have made such a contract.

A fairer interpretation is that the Lovejoys could sell only their own interest in the land, and that all sales made by them were subject to respondent's interest, of which subpurchasers were notified by the contract. The profit of the Lovejoys would be the amount received from the subvendee, since the original purchase money would still be a charge upon the land in the hands of the subvendee, and so the Lovejoys would be released from further liability for it, or at least their liability would be postponed. One-half of this profit would go to respondent as the share in the increment of the value of the land, to which the contract entitled her. She would also be entitled to continued purchase-money installments under the contract from the subpurchaser, secured by a charge upon the land. The reserved share of profits from mineral developments, if any, are in the same category. The subpurchaser took subject to respondent's reserved mineral interest. If profits from minerals were made before or after sale by the Lovejoys, one-half of them belonged to defendant, and the payment thereof was secured by the forfeiture clause, just as were the original purchase-money or rent installments. It is true the contract uses the words "one-half the profits we realize from said minerals so developed"; but "we," fairly construed, refers both to the Lovejoys and their subvendees or sublessees. The Lovejoys, by selling the parts of the lands containing minerals before development by them for a nominal consideration, could entirely defeat respondent's reserved right to one-half of the profits from mineral development, if the construction were otherwise. This could not have been within the contemplation of the parties.

For the use of the land by the Lovejoys the contract gave respondent a fixed annual sum during her life. The provision which gave her one-half of Lovejoys' profits from resales, subleases, and mineral development was for the purpose of enabling her to share in any increased value of the lands from contingent future causes arising during her life estate. This was equitable in view of the fact that she was, aside from this provision, paid by the Lovejoys only for the use of her interest in the lands and on a valuation assessed at the beginning of the term but payable monthly during the whole of the term, instead of by a presently paid lump consideration or one based

upon a valuation increasing with the course of time during her life. Complainant's contention goes upon the idea that the half profits were to compensate respondent for relinquishing her reserved rights in the lands, sold by the Lovejoys. The "profits" for one-half of which the Lovejoys were to account to respondent were their profits on mineral development, resales, and subleases. In no just sense can amounts paid to compensate respondent for relinquishing her reserved rights be held to be profits of the Lovejoys. In no just sense can respondent, by receiving compensation for her own property rights, be said to be sharing in the Lovejoys' profits. Her right to such profits arose upon an entirely different theory, viz., the desire to permit her to share with the Lovejoys in any increment in the value of the lands during the life estate.

The right to take wood from the lands for respondent's own use during her life, while not mentioned in the forfeiture clause, is a reserved right which affects the lands, after resale or sublease, in the hands of the subvendees or sublessees.

That this construction of the contract is a correct one is borne out by the subsequent correspondence between respondent and J. H. Lovejoy, which is made part of the evidence by the stipulation, if legal evidence. It relates to negotiations between the original parties to the contract, based upon its proper construction, and so tends to show the practical construction put upon it by the original parties to the contract, before the sale to complainant's grantor. Lovejoy's letter of October 13, 1898, clearly recognizes an interest in the respondent, not only separate from his, but which would remain in her, after he had sold his, and which he was without power to sell or convey, and that a sale by him, in which the respondent did not join, would leave outstanding in her an interest in the lands subject to future disposition by her. This interest, so recognized, could be none other than the rights reserved by her and enumerated in the original contract, since she has never and does not now claim any other interest in them.

For these reasons, it seems to me that the sale of the lands by Lovejoy to Hassinger (through whom complainant claims) did not free the lands from their obligation to respond to the enumerated reserved rights of respondent, and that the respondent has a claim on them for purchase-money installments as they accrue and as well for one-half of any profits derived from the development of minerals by the complainant or its grantees, and the right to take wood therefrom during her lifetime, and also the right to take one-half the profits of the resale, secured possibly by the right to forfeit and re-enter for nonpayment thereof. This, however, is not of consequence, since it is admitted that the complainant has offered and is ready to pay to respondent the entire amount received by Lovejoy from Hassinger for his interest, which would be at least as much as the respondent's share in the profits of the resale. It is clear that Lovejoy had the right to sell his interest for such sum as he deemed proper, with the qualification that he acted in good faith and not in collusion with the purchaser and for the purpose of defeating the re-

spondent's just expectation of the profit to which the contract entitled her; and there is no allegation or proof to the contrary in the record.

Complainant is entitled to a decree confirming its title to an estate for the life of the respondent in the lands described in the bill of complaint, subject to the lien of the respondent to secure all accruing and accrued but unpaid monthly installments due under the contract, and to her right to one-half of the profits of any development of minerals in the said lands, and to cut wood for her own use during her lifetime from the said lands in controversy, as well as one-half of the profits of the sale by Lovejoy to Hassinger. In view of the fact that the decree awards the respondent an interest in the land and each party is benefited by the determination of their respective rights in it by the decree, the costs are taxed in equal parts against each party to the bill.

AMERICAN SURETY CO. OF NEW YORK v. SHALLENBERGER,
Governor, et al.

(Circuit Court, D. Nebraska, Lincoln Division. November 7, 1910.)

No. 7, Docket B.

1. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY—STATUTES RELATING TO CORPORATIONS.

A state statute which applies to all corporations doing a certain business in the state, both foreign and domestic, if invalid as to one class of corporations is invalid as to all.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

2. PRINCIPAL AND SURETY (§ 52*)—SURETY COMPANIES—POWER TO REGULATE.

The business of a surety company engaged in furnishing bonds, undertakings, etc., is not one affected by any public interest nor a monopoly, but is purely a private business, and a state has no power to prescribe rates to be charged by such corporations.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 52.*]

3. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW—DEPRIVATION OF LIBERTY TO CONTRACT—STATUTE FIXING CHARGES OF SURETY COMPANIES.

Act Nebraska April 1, 1909 (Laws 1909, c. 27), which makes it the duty of certain state officers to fix maximum rates of premium to be charged by all surety companies doing business in the state, foreign or domestic, for furnishing bonds, contracts, recognizances, stipulations and undertakings, makes it a misdemeanor for any officer or agent of any company to charge a higher rate and requires the revocation of the authority of the offending company to do business in the state, is void as depriving such companies of their property without due process of law, in violation of the fourteenth constitutional amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

In Equity. Suit by the American Surety Company of New York against Ashton C. Shallenberger, Governor, William T. Thompson,

Attorney General, and Silas R. Barton, Auditor of Public Accounts, of the State of Nebraska. Decree for complainant.

Montgomery & Hall, for complainant.

W. T. Thompson, Atty. Gen., for defendants.

T. C. MUNGER, District Judge. The Legislature of Nebraska passed an act, approved April 1, 1909 (Laws 1909, c. 27), which declared it to be the duty of certain state officers to fix the maximum rates of premiums that any fidelity or surety company transacting business in the state might charge for furnishing each and all of the different kinds of bonds, contracts, recognizances, stipulations, and undertakings. This act also makes it unlawful for any such company to charge or receive any larger rate of premium than the rates so fixed, and any agent or officer charging or receiving such premium is chargeable with a misdemeanor. The State Auditor is also commanded to revoke the authority of the offending company to transact business in the state, and it shall not be permitted to transact business within the state for a period of one year. The act of the Legislature is as follows:

"Section 1. Surety Companies—Board to Fix Rates. It shall be the duty of the Governor, Attorney General and Auditor of Public Accounts to investigate the rates of premium heretofore charged by surety and fidelity companies now transacting business within this state and on or before June 15, 1909, and at other meetings when in the judgment of the board the necessity arises to fix a maximum schedule of rates of premium to be charged by any fidelity or surety company transacting business within this state, upon each and all, severally of the different kind of bonds, contracts, recognizances, stipulations and undertakings.

"For the purpose of conducting the investigations above provided for the Governor, Attorney General and the State Auditor shall have power by appropriate process to compel the attendance of witness which witnesses shall be paid the same fees as are paid witnesses in the District Court and said officers shall also have authority to examine and inspect all the books, papers and records of any such surety or fidelity company for the purpose of gaining information to enable them to fix such maximum rates of premium. The fees of witnesses and necessary expenses of the Governor, Attorney General and State Auditor shall be paid out of the appropriation made to the Attorney General for use in prosecution under Junkin act.

"Sec. 2. Rates. It shall be the duty of the Auditor of Public Accounts when such maximum of premiums has been so fixed by said officer and not later than June 15, 1909, to send a certified copy of such maximum of premium to each fidelity and surety company authorized to transact business in this state, such maximum or (of) premium shall be in force and effect July 1, 1909, and thereafter, it shall be unlawful for any such fidelity or surety company to exact, charge or receive any greater rate of premium upon any bond, contract, recognizance, stipulation, or undertaking than named in the schedule of rates of premium, so fixed by said officer for the same respectively.

"Sec. 3. Violation of Act, Penalty. If any officer or agent of any such fidelity or surety company shall exact charge, or receive any greater rate of premium for any bond, contract, recognizance, stipulation, or undertaking than that so aforesaid fixed by said board, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$100 or more than \$500, or be confined in the county jail for a period of not less than 30 days nor more than three months or both at the discretion of the court.

"Sec. 4. Same—Revocation of Authority. The Auditor of Public Accounts shall revoke the authority to transact business in this state of any such company which shall violate the provisions of this act and it shall not again be permitted to transact business within this state for a period of one year thereafter.

"Sec. 5. Emergency. Whereas an emergency exists this act shall take effect and be in force from and after its passage."

The complainant is a company organized under the laws of New York, and a part of its business is the furnishing of surety bonds. For many years it has been authorized to conduct this business in Nebraska and has been furnishing such bonds, charging such rates of premium therefor as it deemed a proper compensation. There are other corporations, some of them organized under the laws of this state, which are engaged in similar business in this state. The state officers named in the act have fixed a maximum rate of premium to be charged for many kinds of surety bonds, and admit that it is their intention to enforce the rates so fixed. The complainant, by this action, seeks to enjoin the enforcement of this act of the Legislature. The defendants' answer alleged that the complainant has not complied with the terms of the act of the Legislature of this state, commonly known as the "Junkin Act." Comp. St. Neb. c. 91a, art. 2, § 4. This act requires the filing of certain sworn statements in the office of the Attorney General of this state. It is sufficient to say that there is no proof that the complainant has not filed such a statement.

Coming to the real question in the case, viz., the validity of the act of the Legislature of 1909, it will be seen that the act applies, in express terms, to both foreign and domestic companies. Therefore the act cannot be sustained upon the doctrine that the state has the right to exclude foreign insurance companies from doing business in the state, as declared in *Doyle v. Continental Ins. Co.*, 94 U. S. 535-542, 24 L. Ed. 148; *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246-257, 26 Sup. Ct. 619, 50 L. Ed. 10:

"The act is in general terms, and hits all insurance companies. If it is invalid as to some, it is invalid as to all. *United States v. Ju Toy*, 198 U. S. 253, 262, 263 [25 Sup. Ct. 644, 49 L. Ed. 1040]. That the requirements of the act might have been made conditions to foreign companies doing business in the state (*Fidelity Mutual Life Ins. Co. v. Mettler*, 185 U. S. 308 [22 Sup. Ct. 662, 46 L. Ed. 922]; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28 [20 Sup. Ct. 518, 44 L. Ed. 657]) is immaterial, since, as we understand the statute, the Legislature did not attempt to reach the result in that way. A company lawfully doing business in the state is no more bound by a general unconstitutional enactment than a citizen of the state. *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452 [21 Sup. Ct. 423, 45 L. Ed. 619]." *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401-409, 26 Sup. Ct. 66, 67, 50 L. Ed. 246; *National Council, etc., v. State Council, etc.*, 203 U. S. 151-162, 27 Sup. Ct. 46, 51 L. Ed. 132.

The real controversy in the case is over the power of the state to fix the rates to be charged for insurance. No case has been cited where such a question has previously arisen, although acts somewhat to the same effect have been passed in other states. Laws of New Hampshire 1899, c. 85, § 1; Laws of Kansas, 1909, c. 152, § 3. May the state exercise this power, in view of the fourteenth amendment to the Constitution of the United States which declares that no state

shall "deprive any person of life, liberty, or property, without due process of law."

The liberty to enter into contracts is not an unrestricted liberty, but is subject to the police power of the state. The extent to which the state may go, in the exercise of this power, in regulating or prescribing the prices of goods or services is not clearly defined. In earlier days, it was usual for Parliament to fix the rates which lawfully could be charged even by those who were engaged in private business, and such legislation also existed in the colonies before the adoption of our Constitution. Freund on Police Power, § 318. The right to regulate the charges for services of those whose business is devoted to a public use has been thoroughly established. It is also well settled that the right exists in the state to regulate the charges to be made by those whose business is affected by a public interest. *Muhn v. Illinois*, 94 U. S. 113-125, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517-544, 12 Sup. Ct. 468, 36 L. Ed. 247; *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757. The three cases just cited involved the validity of statutes regulating the charges which lawfully might be made by those owning grain elevators, and in each case it was declared that the business conducted by them was so affected with a public interest that the state could regulate the charges imposed by them. Some of the characteristics of that business which led the court to declare it to be affected with a public interest were: The practical monopoly of the business at the places where it was carried on, and the consequent power to levy tribute upon the community; its relation to the business of transportation, and to the business of common carriers—thus being of a quasi public character. The business of the companies engaged in furnishing surety bonds has none of these characteristics. It is in no way a monopoly, for individuals and partnerships are free to furnish such bonds in competition with them, and to make any charge or no charge for assuming such risks. No one is compelled to resort to the surety companies as practically the only source from which may be obtained surety bonds. The public interest in the business of such companies is no different in kind, from its interest in the business of any large mercantile or manufacturing company, whose capital, experience, and facilities may enable it to have a widely extended patronage, but such characteristics do not make the business one which is affected with a public interest. *State v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368.

If the state may fix the amount of compensation for which an insurer may lawfully contract for furnishing such insurance, the state may dictate the price for which all other commodities shall be sold, including the price which may be paid for labor. This cannot be done. The fourteenth amendment to the Constitution protects the right of those engaged in purely private business to fix the price at which they will sell their services or commodities.

The case of *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238-246, 22 Sup. Ct. 881, 46 L. Ed. 1144, involved the right of Congress to regulate the charges to be made by any person or tele-

phone company doing business in the District of Columbia for the use of such telephones. The court said:

"And we start with the proposition that it cannot be presumed that a Legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and therefore, although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor. In many buildings, both those belonging to the government or the district, and those belonging to private individuals, is what may be called a local telephone plant—that is, an arrangement of telephones by which parties in different rooms can communicate with each other—a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public, nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connections, are furnished by the defendant, and the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business. The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by Congress of its charges. A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacturer of cars and locomotives to the supervision of the Legislature, although such body would have the right to regulate the charges for railroad transportation. So, in an inquiry into the reasonableness of the charges imposed by Congress in this legislation, it is essential that the receipts and expenses from such private telephone systems be excluded from consideration."

Ex parte Dickey, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, was a case involving the validity of an act of the California Legislature limiting the compensation which an employment agent may receive to 10 per cent. of a month's wages in the employment furnished. In holding the act invalid the Supreme Court of that state said:

"The petitioner is engaged in a harmless and beneficial business. As part of his 'property' in that business are the services that he renders in obtaining employment for those seeking it. It is not compulsory upon any one to employ him, and who so seeks to avail himself of his services is at liberty to reject them if the terms of the contract for compensation are not satisfactory to him. This right of contract common to all legitimate occupations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the class discussed by Judge Cooley in the paragraph above quoted—'entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities' of one class of citizens 'in a manner before unknown to the law.' For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority therefor, 'instead of calling

upon others to show how and where the authority is negated.' And where, it may be asked, could the line be drawn, if the Legislature, under the guise of the exercise of its police power, should thus be permitted to encroach upon the rights of one class of citizens? Why should not the butcher and the baker, dealing in the necessities of life, be restricted in their right of contract, and consequently in their profits, to 10, 5, or 1 per cent.? Why should not the contractor, the merchant, the professional man, be likewise subjected to such paternal laws, and why might not the Legislature fix the price and value of the services of labor? The law is clearly one of those, the danger of whose enactment was foreshadowed by this court in *Ex parte Jentsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664, when it said: 'So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurk no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant.'

In the case of *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, the court had before it an act of the Legislature of New York providing that laborers on public works should be paid the prevailing rate of wages. This provision of the statute was held to be void, and the court said:

"The contractor is a private individual, engaged in private business. When he enters into a fair and honest contract for some municipal improvement, that contract is property, entitled to the same protection as any other property. It is not competent for the Legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance or to regulate the rate of wages which he shall pay to his workmen, or to withhold the contract price when such conditions are not complied with in the judgment of the city. When he is not left free to select his own workmen upon such terms as he and they can fairly agree upon, he is deprived of that liberty of action and right to accumulate property embraced within the guaranties of the Constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged."

In *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N. E. 895, 61 L. R. A. 154, 98 Am. St. Rep. 325, an act of the Indiana Legislature was in question. It provided that unskilled labor employed on any public work of the state, counties, cities and towns should receive not less than 20 cents an hour. In holding this law to be in violation of the fourteenth amendment to the Constitution of the United States, the court said:

"If the Legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise, and land. But these are powers which have never been conceded to the Legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by the English Parliament, in the worst of times, were the statutes of labor of Henry VI and Edward III. These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own county, required him to work for the first employer who demanded his services, and punished every violation of the statutes with severe penalties. In the very nature and Constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those to whom it professes to favor few of the advantages expected from its provisions. The circumstances that the act of March 9, 1901 [Laws 1901, c. 122], reverses the conditions of the statutes of labor of Henry VI and Edward III, and lays

the burden and the penalty upon the employer instead of the laborer, does not render it any less pernicious and objectionable as an invasion of natural and constitutional rights. Statutes similar to this have been before the courts of other states, and in nearly every instance have been held unconstitutional."

See, also, *State v. Norton*, 5 Ohio N. P. 183; *State v. Firecreek Coal and Coke Co.*, 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. Rep. 891.

The act of the Nebraska Legislature of 1909 falls within the principles announced in these cases, and, as it does not seem that the portions of the act are separable, the whole act must be declared void, and its enforcement will be enjoined.

UNITED STATES v. FORTY-SIX PACKAGES AND BAGS OF SUGAR.

(District Court, S. D. Ohio, W. D.)

1. FOOD (§ 16*)—ADULTERATING AND MISBRANDING—STATUTES—CONSTRUCTION—SEIZED IN TRANSPORTATION.

Where sugar alleged to have been adulterated and misbranded was not seized while in transportation, it was not subject to forfeiture under the clause of Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]) § 10, declaring that any article of food adulterated or misbranded, which is being transported from one state, territory, district, or insular possession to another for sale, shall be liable to seizure, condemnation, etc.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 16.*]

2. FOOD (§ 16*)—ADULTERATION—SEIZURE—STATUTES—CONSTRUCTION—"TRANSPORTED."

Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]) § 10, provides, in the alternative, that any article of food adulterated or misbranded within the meaning of the act which, having been transported, remains unloaded, unsold, or in original packages, shall be liable to be proceeded against by libel for condemnation. *Held*, that the words "having been transported" contemplate a transportation in interstate commerce, and not from one point in a given state, territory, district, or insular possession to another point in the same state, territory, district or possession.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7075-7076.]

3. FOOD (§ 16*)—ADULTERATED FOODS—CONDEMNATION—LIBEL—SALE.

Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]) § 10, provides that any article of food that is adulterated or misbranded within the meaning of the act, and is being transported from one state, territory, district, or insular possession to another "for sale," shall be subject to forfeiture, and that any article of food that is adulterated or misbranded, having been transported and remaining unloaded, unsold, or in the original unbroken packages, shall be liable to be proceeded against in like manner. *Held*, that a libel for forfeiture of certain bags of sugar under the latter subdivision of such section, failing to charge that the sugar seized had been transported "for sale," was fatally defective.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 16.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. FOOD (§ 16*)—FORFEITURE—ACTION TO ENFORCE—PARTY IN INTEREST—INTERVENTION—OBJECTION—TIME.

Where on a libel by the government to enforce a forfeiture of certain sugar, for violation of the pure food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), the court permitted the G. Company to interplead or file a brief, and thereafter permitted the withdrawal of the answer and filing of exceptions, to which the district attorney assented, he could not thereafter object to the G. Company's right to interplead and file a brief in the case, unless further evidence was offered that it was a party in interest, or the bona fide owner of the sugar seized.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 16.*]

Action by the United States against Forty-Six Packages and Bags of Sugar. On exceptions and demurrer to the libel. Sustained.

Sherman T. McPherson, for the United States.

Harmon, Colston, Goldsmith & Hoadly and Lannen & Hickey, for defendant.

SATER, District Judge. The libel is filed under section 10 of the pure food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]). By that section it is enacted that:

"Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or insular possession to another for sale, * * * shall be liable to be proceeded against in any district court of the United States within the territory where the same is found, and seized for confiscation by a process of libel for condemnation."

The case does not fall within that provision of the law because the goods were not seized while in transportation. The section also provides in the alternative that:

"Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act * * * having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against [in like manner]."

"Having been transported" from where to where? Clearly not from one point in a given state, territory, district, or insular possession to another point in the same state, territory, district, or insular possession, because in that case the article has not passed into interstate commerce. The words, "having been transported," etc., are connected by the disjunctive "or" with the preceding portion of the section. Following the words "having been transported" is an ellipsis, an omission of words necessary to the complete construction of the sentence. Those words are found in the preceding part of the section, and, when supplied, the clause under which this libel is filed reads and means:

"Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one state, territory, district, or insular possession to another for sale, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable," etc.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This construction of the section is not only rational and in accordance with the maxim *noscitur a sociis*, but is necessary to make the clause applicable to articles which have entered into interstate commerce. The words, "is being transported," and "having been transported," are coupled together by the word "or" and are both limited by the same qualifying terms. The view above expressed is in accordance with the ruling in *U. S. v. Sixty-Five Casks of Liquid Extracts* (D. C.) 170 Fed. 449, affirmed in 175 Fed. 1022, 99 C. C. A. 667. The libel does not show that the articles seized were transported for sale. It does not show whether the articles were shipped by some one in Illinois to himself at Cincinnati, or to some other person, or how or from whom the Gerke Brewing Company obtained possession or acquired ownership, if such it has.

There is an averment in the third paragraph of the libel that the packages are "owned by or in the possession of the said Gerke Brewing Company, doing business as aforesaid, for the purpose of being used and manufactured, sold and consumed as food." The closing language of the quoted passage, considering the libel as a whole, is somewhat ambiguous, but giving it the construction most favorable to the government—that the brewing company's purpose is to sell it for consumption as food—I do not see how the otherwise defective nature of the libel is helped out.

In view of the conclusion above reached, it is perhaps unnecessary to rule on the contention that there should be a specific averment that the percentage of ash is greater than that found in standard climax sugar, or as to whether or not the court must take notice of the standard fixed by the circular issued by the Secretary of Agriculture. The fact that there is a doubt as to the court's duty in that respect will suggest an averment in future libels that will obviate the objection urged. The exceptions and demurrer are sustained. Exceptions may be noted.

The district attorney disputes the right of the Corn Products Refining Company to interplead or file a brief in the case unless further evidence is offered that it is a party in interest or that it is the bona fide owner of the packages of sugar which have been seized. As Judge Thompson permitted the company to answer, and subsequently another order was granted permitting the answer to be withdrawn and the exceptions and demurrer to be filed, to which latter the district attorney assented, the objection comes too late.

The exceptions and demurrer are ruled on to the extent above named. Several of them were waived by the defendant.

SLOSS-SHEFFIELD STEEL & IRON CO. v. TACONY IRON CO.

(Circuit Court, E. D. Pennsylvania. December 22, 1910.)

No. 1,138.

1. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—CONTRACTS—ENFORCEMENT.

In an action by a foreign corporation in Pennsylvania on a contract made and to be performed in Alabama, it was not material that plaintiff was not authorized to do business in Pennsylvania, because of a failure to comply with Pennsylvania foreign corporations act (Act April 22, 1874 [P. L. 108]).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2539-2546; Dec. Dig. § 661.*]

2. INTEREST (§ 28*)—RATE RECOVERABLE—WHAT LAW GOVERNS.

Where interest is given for breach of contract, the rate recoverable in general depends on the law of the place of performance, irrespective of the law of the place where the contract was made, or the jurisdiction in which suit is brought.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 55-59; Dec. Dig. § 28.*]

3. SALES (§ 378*)—CONTRACTS—BREACH—PLEADING—AFFIDAVIT OF DEFENSE.

Where, in an action for breach of a contract for the sale of iron, an affidavit of defense alleged that plaintiff, after a partial delivery had been made under the contract, stated it would not deliver any more iron under the contract, such statement was a sufficient allegation to support a conclusion that the contract had been rescinded.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 378.*]

At Law. Action by the Sloss-Sheffield Steel & Iron Company against the Tacony Iron Company. On motion for judgment for want of a sufficient affidavit of defense. Remanded in part.

C. W. Van Artsdalen and W. Howard Ramsay, for plaintiff.

Albert B. Weimer, for defendant.

HOLLAND, District Judge. This is a suit to recover the sum of \$11,158, with legal interest, according to the law of Alabama, to wit, 8 per cent. per annum, on \$1,358 from March 3, 1910, and with interest at the same rate on \$9,800 from June 13, 1910. From the statement of claim, it appears that the plaintiff seeks to recover this amount, with interest, upon a contract dated January 3, 1910, wherein it agrees to sell to the defendant 2,000 tons of pig iron, at \$14 per ton, to be shipped 500 tons monthly, beginning January 1, 1910, delivered f. o. b. railroad cars at furnace at Birmingham, Ala., cash 30 days from average date of receipt of material. Ninety-seven tons were shipped during the month of January. No shipments were made during February or March. During the month of April 700 tons were shipped and accepted by the defendant. To this statement of claim an affidavit of defense was filed, which is said to be wholly insufficient to prevent judgment on this motion.

The defendant seeks to interpose one ground of defense to the whole of plaintiff's claim. This will be first considered. It is averred that the contract was made and accepted in the state of Pennsylvania, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the plaintiff is a foreign corporation, doing business in this state, without having registered in the office of the Secretary of State at Harrisburg, as required by the provisions of the Pennsylvania act of April 22, 1874 (P. L. 108), and that this failure to comply with the requirements of this act makes the transaction illegal, upon which the plaintiff cannot maintain an action in the courts of Pennsylvania or this court. The answer to this is that, if the defendant be liable on the written contract, it shows upon its face that it was made and accepted at Birmingham, Ala. It may be that there were preliminary negotiations by the plaintiff's agent here; but the contract was finally accepted at Birmingham, Ala., to be performed at the same state.

Second. A further defense to part of the claim is that the interest on the amount due should be calculated at 6 per cent., the rate prevailing in Pennsylvania, because, as it is claimed, the contract was made and accepted in Pennsylvania. If this be intended to refer to the written contract between the parties of January 3, 1910, it shows upon its face that it was made and accepted in Birmingham, Ala. If, however, the defendant refers to the contract for the delivery of the 700 tons during the month of April, which it is averred in the affidavit of defense was made between the parties after a rescission of the written contract, then it fails to set forth the place of performance, or to state when, where, and by whom this new contract was made, with sufficient particularity to prevent the plaintiff from recovering interest at the Alabama rate. Delivery of merchandise to a common carrier is the delivery to the purchaser, and as the plaintiff claims that the place of performance was at Birmingham, in the state of Alabama, where the iron was delivered, it is entitled to recover interest at the Alabama rate upon whatever amount it is entitled to recover. Where interest is given for breach of contract, the general rule is that the rate recoverable is according to the law of the place of performance, irrespective of the law of the place where the contract was entered into or the jurisdiction in which the suit is brought. 22 Cyc. 1477; 16 Amer. & Eng. Ency. of Law, 1090; Wharton's Conflict of Laws (2d Ed.) 1227; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261.

Third. The defendant admits in his affidavit of defense that 97 tons were shipped on April 7th on the written contract of January 3, 1910, and subject to its provisions, but avers that immediately thereafter the plaintiff demanded "a guaranty by private individuals of the contract theretofore made," and that this guaranty was refused by the defendant, whereupon, it is alleged, "the plaintiff, through its agent, rescinded the said contract, and stated that no more iron would be delivered under it." It is further claimed that no further deliveries were made under this contract, but that subsequently, during the month of April, 700 tons were shipped by the plaintiff after notice from the defendant that it would only accept the deliveries "at the current market price" of \$11.75 per ton. The plaintiff urged that these allegations are insufficient to prevent judgment, as the statement "that the contract was rescinded" is a conclusion of law, but the plaintiff fails to note that the affidavit of defense states, not only that the contract was "rescinded,"

but further avers that the plaintiff "stated that no more iron would be delivered under it."

It would seem that a positive averment that the plaintiff stated it "would not deliver any more iron under the contract" is a sufficient statement of fact to support the conclusion that the contract had been "rescinded," and, if established at the trial, would be sufficient, together with the other averments, to shift the plaintiff's right to recover to the subsequent implied contract upon which 700 tons were delivered at the market price. So that we conclude that the affidavit of defense is only sufficient to prevent judgment at this time for the amount of damages claimed as a set-off for the nondelivery in February and March, and for the difference between the price of \$14 per ton set forth in the statement of claim and the market price of \$11.75 on 700 tons, which it is alleged in the affidavit of defense prevailed during the month of April.

The parties are requested to submit a decree, in accordance with this opinion, and judgment will be entered accordingly.

In re LAUSMAN.

(District Court, W. D. Kentucky. December 16, 1910.)

1. BANKRUPTCY (§ 8*)—STATUTES—CONSTRUCTION.

Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840, amending Bankruptcy Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), providing that the trustee shall collect and reduce to money the property of the bankrupt, and as to all property in the custody, or coming into the custody, of the bankruptcy court, shall be deemed vested with all rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and as to all property not in the custody of the bankruptcy court shall be deemed vested with all rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, does not repeal or alter Bankruptcy Act, § 64, regulating the order of distribution of the bankrupt's estate, or change clause 5 of that section, declaring that debts owing to any person who by the laws of the state or of the United States is entitled to priority shall be given priority in distribution, subsequent to claims given priority by previous clauses of the section.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 6; Dec. Dig. § 8.*]

2. SALES (§ 450*)—CONDITIONAL SALES—CHATTEL MORTGAGE—KENTUCKY LAW.

A contract for the sale of a chattel in fact delivered to the buyer, providing that the title shall remain in the seller until the agreed price is paid, constitutes a sale with a mortgage back to the seller to secure the price under the Kentucky law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1321; Dec. Dig. § 450.*]

What constitutes a contract of conditional sale, see *Dunlop v. Mercer*, 86 O. C. A. 448.]

3. BANKRUPTCY (§ 188*)—LIENS—CHATTEL MORTGAGE—FAILURE TO FILE—VALIDITY OF LIEN—"CREDITORS."

Ky. St. § 496 (Russell's St. § 2062), provides that no mortgage shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until the deed shall be acknowledged or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proved according to law and lodged for record. *Held*, that the term "creditors," as used in such section, did not include general creditors having no liens, and hence an unrecorded chattel mortgage on a computing scale, valid as between the parties, was valid against the mortgagors' estate in bankruptcy; no creditor of the bankrupt having fastened a lien thereon prior to bankruptcy, whether other debts of the bankrupt were created before or after such mortgage was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 292; Dec. Dig. § 188.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1726; vol. 8, pp. 7622, 7623.]

4. BANKRUPTCY (§§ 267, 258*)—LIENS—CONDITIONAL SALES—SATISFACTION.

Where a seller of a scale to a bankrupt had a lien thereon under an unrecorded conditional sale contract which was valid against the bankrupt's estate, the seller was entitled to priority of payment out of the proceeds of a sale of the scale, or if it had not been sold, and it was advisable to do so, the trustee might surrender the scale to the seller in settlement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380, 359; Dec. Dig. §§ 297, 258.*]

In the matter of bankruptcy proceedings of Fred. A. Lausman. On petition for review of a referee's order denying the application of the Computing Scale Company for a lien under a conditional sale. Order reversed, and petition granted.

Walter S. Mendel, for petitioner.

EVANS, District Judge. On May 31, 1910, the Computing Scale Company, which we shall call the "scale company," agreed to sell, and in fact delivered to the bankrupt, one of its computing scales, the price being \$125, of which \$50 have been paid, leaving due a balance of \$75. The contract between the parties was in writing and in terms provided that the title thereto should remain in the scale company until the agreed price was fully paid. Under the settled law of Kentucky, this contract constituted a sale and a mortgage back to the scale company to secure the price. *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146. The mortgage was never recorded, but the scale company proved its debt as a secured claim. The referee refused to allow the claim as secured, but did allow it as a general claim, and of his refusal to allow it as a preferred claim the scale company complains in its petition for a review of the referee's order. The proceedings in the case were begun on September 2, 1910, and the provisions of the act of June 25, 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), amending the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), must govern wherever applicable. The referee based his ruling upon that one of the amendments to the act which reads as follows:

"That section forty-seven, clause two, of subdivision a, of said act as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Precisely what the portion of this amendment which we have italicized may mean, and how it should be applied in any given case, are matters which may give the courts more or less trouble; but one thing seems to be clear, namely, that it does not attempt to repeal nor alter section 64 of the bankruptcy act, which regulates the order of distribution of assets, nor does it change clause 5 of that section, which provides that "debts owing to any person who, by the laws of the states or the United States, is entitled to priority," shall be given priority in the distribution of the bankrupt's estate next after those claims which are given priority by previous clauses of the section. This last provision brings us to a consideration of the law of Kentucky in our effort to ascertain the rights of the scale company. Assuming from what has been said, that the scale company has a mortgage on the computing scale described in its contract, the next step is to ascertain the proper construction and meaning of section 496 of the Kentucky Statutes (Russell's St. § 2062), which reads as follows:

"No deed, or deed of trust, or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, nor against creditors until such deed shall be acknowledged or proved according to law and lodged for record."

The mortgage in this case was neither acknowledged nor proved according to law nor lodged for record. Upon the provision of the Kentucky Statutes just quoted there have been distressing doubts, which, however, the Circuit Court of Appeals for this circuit has at last authoritatively removed by its opinion in the case of *Crucible Steel Co. v. Holt*, 174 Fed. 127, 129, 98 C. C. A. 101, 103. The court said:

"As between them (that is to say, the mortgagor and mortgagee) the mortgage was valid though not recorded. No creditor had fastened any lien upon them (the mortgaged articles), though several of them were in a condition and had a right to do so. * * * The mortgage was valid as between the mortgagor and the mortgagee whether recorded or not, and there is no express definition by the statute which extends the meaning of the word 'creditors' so as to include general creditors having no liens."

And on page 130 of 174 Fed., on page 104 of 98 C. C. A., it was said, in reference to what the court's mandate should be, that there should be "a declaration that the petitioner was entitled to prove its claim as a creditor and was entitled to a lien upon the goods in question for the unpaid purchase money, and to the extent of the amount realized or to be realized upon the sale thereof the trustee should accord to the petitioner a lien thereon paramount to the claims of the general creditors and make distribution of the proceeds accordingly."

Following this ruling, we must hold that it is immaterial whether the other debts of the bankrupt were created before or after the mortgage to the scale company was given, unless a lien upon the computing scale in favor of some other creditor was otherwise acquired pre-

vious to the adjudication in bankruptcy. And we must also hold that it is equally immaterial in this case that this mortgage was not acknowledged, proved, or recorded. As the law of Kentucky for this court in such cases has been settled by the Circuit Court of Appeals, so far as the construction of section 496 of the Kentucky Statutes is involved, the questions arising on the pending petition for a review do not appear to depend upon what sort of title the trustee may take to the property coming into his custody as provided by the amendment to section 47, *supra*, but upon how that property is required to be distributed, as the purpose of Congress in that behalf has been manifested by section 64 of the bankruptcy act. We think that section 47 as amended and section 64 do not conflict either in language or in legislative intention. Under these circumstances, no lien upon the computing scale having been otherwise acquired, so far as the record before us discloses, and under what we regard as the express mandate of the Circuit Court of Appeals, we must reverse the order of the referee, and direct that he ascertain what the computing scale brought, if the same has been sold, and give the scale company priority of payment out of the proceeds. But, if the computing scale has not been sold, then to direct its sale in due course, giving the scale company priority out of the price obtained, or if advisable the trustee might surrender the computing scale to the scale company, especially if the latter will agree to take it in full settlement of its demand. The referee, however, should be at liberty to ascertain whether, before the adjudication, any other creditor had obtained a lien upon the scales, and, if so, to determine the right as between any such creditor and the scale company.

We do not deem it necessary to discuss the question of the constitutionality of the amendment of June 25, 1910, as applied to this case, nor whether that amendment can be given a retroactive operation.

The order of the referee will be reversed, with the directions indicated.

BINNEY et al. v. CUMBERLAND ELY COPPER CO. et al.

(Circuit Court, D. Maine. December 28, 1910.)

No. 660.

1. CORPORATIONS (§ 189*)—SALE OF ASSETS—PROTEST BY STOCKHOLDERS—BILL TO ENJOIN—EQUITY RULE 94.

Where minority stockholders of a corporation protested against the sale of a corporation's property to another company at a meeting of stockholders at which the sale was authorized, such protest constituted a sufficient effort on the part of such nonconsenting stockholders to prevent a sale within the corporation, to enable them to maintain a bill for such relief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 716; Dec. Dig. § 189.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CORPORATIONS (§ 182*)—SALE OF ASSETS—AUTHORIZATION—MODE OF PURCHASING CORPORATION.

Where a sale of a corporation's assets has been authorized by the vote of the purchasing corporation against the protest of all of the stock of the selling company except its own, the sale may be void as a matter of law.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 182.*]

3. CORPORATIONS (§ 182*)—SALE OF ASSETS—VALIDITY.

Where a sale of a corporation's assets is authorized by a vote of the purchasing corporation by which the selling company is controlled, it is insufficient, to sustain the sale as against the protest of minority stockholders, that the price paid was a fair one, but the same proof must be disclosed which would be essential to support a similar transaction between a lawyer and his client or a trustee and his cestui que trust.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 182.*]

4. CORPORATIONS (§ 189*)—SALE OF ASSETS—AUTHORIZATION—MINORITY STOCKHOLDERS—BILL TO VACATE.

Where it was claimed that a sale of a corporation's assets was authorized by the vote of the purchasing company by which the selling company was controlled, a bill by minority objecting stockholders to restrain the sale, which failed to allege how the majority of the stockholders outside the purchasing corporation voted on the question, was not sustainable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 716; Dec. Dig. § 189.*]

5. MONOPOLIES (§ 24*)—SHERMAN ANTI-TRUST LAW—OPERATION.

A proceeding cannot be sustained to set aside or restrain a sale of a corporation's assets to another company under the Sherman anti-trust act, unless it appears that the sale is in furtherance of an intent, and is alleged with proper details, in violation of the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

6. CORPORATIONS (§ 189*)—SALE OF ASSETS—MINORITY OF OBJECTING STOCKHOLDERS—RIGHTS.

Where a sale of property of a corporation was authorized by a majority of its stockholders, the sale would not always be rescinded at the instance of small minority stockholders objecting thereto, though contrary to their interests. The only relief to them may be for the court to order a valuation of their stock under such penalty as would secure that valuation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 716; Dec. Dig. § 189.*]

In Equity. Bill by William Binney, Jr., and others, against the Cumberland Ely Copper Company and another, to set aside a sale of certain mining properties of the Ely Company to the Nevada Company. On demurrer to bill. Sustained, and bill dismissed, with costs, unless complainants amend within a specified time and simultaneously pay costs to the time of amendment.

Comstock & Canning, for complainants.

Drummond & Drummond and Symonds, Snow, Cook & Hutchinson, for respondent Cumberland Ely Copper Co.

N. & H. B. Cleaves and S. C. Perry, for respondent Nevada Consol. Copper Co.

John N. Steele, for both respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PUTNAM, Circuit Judge (orally). This is a bill brought to rescind the sale by the Ely Company to the Nevada Company of certain mining properties, at which sale there was received therefor in cash \$7,554,084.17. The bill makes no complaint that the price obtained was not a fair one for the time of the sale, or that the property could then have been sold for more money. It makes no complaint of fraud.

The bill was brought by holders of 330 shares out of 1,300,000 shares. Of that stock 1,271,117 shares were owned by the purchasing corporation, that is, the Nevada Company, leaving outstanding elsewhere 28,883 shares, of which the complainants' shares formed a part. The Ely Company owed less than \$100,000; so that there was available for distribution to stockholders, and was offered to stockholders as a result of this sale, at somewhat more than par of the stock, which was \$5 a share.

The bill was heard on demurrer, and, as the rescinding of the sale in question involves very extensive consequences, it is plain that the court must proceed with great care, and scrutinize the allegations thoroughly, and find them clearly satisfactory and full, before undertaking to disturb the position under pleadings which shut out all possible considerations except those plainly stated on the face of the bill.

It seems that the sale was made by virtue of a vote passed at the meeting of the stockholders of the Ely Company, legally called, and that the complainants were present at that meeting and protested against the sale. The protest was of an indefinite character, sufficient, however, for the present purposes. Possibly under careful scrutiny it might, on a full hearing of the facts, be found too general. The complainants took no further act than to file this protest. It does not even appear that they voted against the motion. They did not ask that any further meeting of their corporation be called, nor make any application to its directors. Therefore the first point made against the bill is that the complainants failed to show compliance with the ninety-fourth rule in equity. It would be nonsense to protest further than the complainants did against the action of a corporation which has itself formally concluded to act; and the directors, of course, could only proceed as ordered by the vote of the stockholders. The ninety-fourth rule only applies when the party seeking relief undertakes to proceed in the interest of the corporation; and it does not apply when he undertakes to proceed against its formal action. That is settled law. Therefore this objection must be passed over.

We have no statement of the way in which the votes stood at the meeting at which this sale was ordered. For aught that appears here a vast majority of the stockholders outside of the purchasing corporation may have favored the sale; so that, if we set the sale aside, as asked for by the complainant, we might do those stockholders more injury than we could possibly do good to these complainants. This is a matter which we know nothing about. It is a strict rule of law, with certain limitations, that, if this sale had been carried by the vote of the purchasing corporation against the protest of all the stock except its own, the sale might be void as a matter of law; but we are proceeding here in equity. If I should rescind absolutely the sale under the

present circumstances, I might do more injustice than justice, and thus be doing the injury which the equity law prohibits. Neither, on the other hand, is it enough to say, either at law or in equity, on behalf of a corporation purchasing at a sale which it controls, merely that the price was a fair one. The same class of facts must be disclosed which would be necessary to support a transaction between a lawyer and his client, or a trustee and his cestui que trust. Nevertheless, the bill in its present form cannot be sustained, in the absence of any showing as to the position for or against the sale of the outstanding stock, aside from that made by the complainants.

The bill also makes some allegations in reference to the Sherman trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); but, whatever else may have been said about the Sherman trust act, it has never yet been decided that a proceeding can be sustained which does not clearly set out an intent to create a monopoly, or restrain trade, or detail facts which practically result in one or the other. This bill entirely fails in all those particulars.

We will add, however, that, if the complainants desire to amend the bill, we will give them opportunity to do so; but there would in no event be any equity in wholly rescinding the sale. As we have said, to do this would be an act of practical injustice. We could not rescind, except by appointing a receiver, involving parties in legal expenses far beyond any possible value of the stock held by the complainants. If the bill was put in perfect form, we could only order a valuation of the complainants' stock under such penalty as would secure that valuation. The bill as amended should point out distinctly how the outstanding stock voted at the corporation meeting referred to. It should also anticipate all propositions based on the claim merely that the sale was a fair one and without fraud, and all other propositions which might tend to bring out that the sale was not governed by the same considerations which would govern the confidential relations to which we have referred.

Bill dismissed, with costs, unless the complainants amend, on or before the 15th day of January, 1911, in accordance with opinion passed down December 28, 1910, and simultaneously pays costs to the time of amendment.

In re KRONROT.

(District Court, E. D. New York. December 27, 1910.)

1. BANKRUPTCY (§ 268*)—SALES—RIGHTS OF PURCHASER.

A purchaser of a bankrupt's property at public sale held by the trustee is entitled to rely on an absolute compliance with the terms of the sale, and on the absolute fairness of the auction conducted under the order of the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

2. BANKRUPTCY (§ 258*)—SALE OF REAL ESTATE—RIGHTS OF LIENOR.

Where an order was passed directing that petitioner's claims should be a lien on any funds in the hands of the bankrupt's trustee, petitioner

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

did not have a lien on the bankrupt's property, and hence his consent was not essential to a sale of the property by the trustee, if he had notice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 362; Dec. Dig. § 258.*]

3. BANKRUPTCY (§ 264*)—SALE OF REAL ESTATE—CONFIRMATION.

A purchaser of real estate belonging to a bankrupt sold at public sale by his trustee is entitled to have the sale confirmed, if made on sufficient notice, and there appears to have been a compliance with all necessary and proper requirements for holding the sale, and honesty and fair dealing in the sale itself, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 369; Dec. Dig. § 264.*]

4. BANKRUPTCY (§ 269*)—SALE OF REAL ESTATE—CONFIRMATION—OBJECTIONS.

Where petitioner had a lien on any funds in the hands of a bankrupt's trustee, but not on the bankrupt's real estate as such, a public sale of certain of such real estate to a third person, otherwise valid, would not be set aside because petitioner failed to continue bidding, so as to protect his interest, owing to a mistaken prior statement by the trustee that petitioner would be required, on purchasing the property, to make an actual deposit of cash or certified check at the time of sale, notwithstanding his claim of lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. § 269.*]

In the matter of bankruptcy proceedings of Julius Kronrot. On petition of Samuel Palley to set aside a sale of certain real estate belonging to the bankrupt. Denied.

Oscar A. Lewis, for petitioner.

Latson, Tamblyn & Pickard, for trustee.

Lynn C. Norris, for purchaser.

CHATFIELD, District Judge. The petitioner, Palley, was in possession of a large quantity of property, which the bankrupt had turned over to him at the time of a depression in the real estate market, under circumstances which showed plainly that the bankrupt was attempting to avoid the sacrifice of his real estate, even though he may have been attempting also to protect his creditors. A suit was brought against the petitioner to compel him to reconvey the properties, after a motion therefor, in this court, had been denied on the ground that Palley was then claiming title. This suit was settled, under order of this court, which authorized the trustee to discontinue the action upon certain terms, by which a number of real estate liens and other claims, including the disbursements and compensation of Palley, the petitioner, were admitted and transferred as liens to what the order called "any funds in the hands of the trustee."

It would have been wise if at that time Mr. Palley had asked to have the order read that his claim should be a lien upon any funds *or property* in the hands of the trustee, and as the matter now turns out it would seem that such an order would have expressed the intention of the court more accurately than the one in question. But, be that as it may, the order entered provided that Palley's claim should be paid out of the equities—that is, out of the proceeds of the estate; and because of that his consent or release was not expressly required by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court when ordering sales of the various properties, in each case the advantage or propriety of such sale having been favorably acted upon by the creditors, and Mr. Palley having actual notice of what was being done.

• One by one the pieces of real estate comprising the estate have been sold, and but very small amounts realized therefrom; the large equity shown by the bankrupt's schedules having substantially disappeared through the depression in real estate values from the amounts at which the bankrupt rated his property before any trouble arose. Each of the various sales of real estate, as has been said, were approved by the creditors and confirmed by the court, with provisions for taking care of the various real estate claims or liens which were matters of record; and the present application arises from the sale of the last parcel, which was put up at auction, under order of the court, to be sold free and clear, and which has realized a net price of about \$915 over the incumbances.

It appears from the affidavits that Mr. Palley was present at the sale, and that he either assisted in the making of some bids, or bid himself for another party, but that their bids ceased before the one upon which the property was knocked down. It would also appear that Mr. Palley had some correspondence or communication with the trustee, and that he did not bid more because of the impression received by him from the trustee that an actual deposit of cash or certified check would be required, although Palley had his allowed claim against the estate for much more than would be required to bind the sale.

If Mr. Palley had appealed to the court, or had questioned this information by the trustee, it is apparent that his right to interpose a larger bid, even if he did not wish to put up the cash, could have been fairly considered and provided for. If Mr. Palley had insisted on bidding at the sale, and the question of making a deposit or finally being able to pay the amount bid had come up, again the court could have fairly acted upon the rights of the creditors and of Mr. Palley. But unfortunately, as it now appears, no such situation developed. A third party (who had the right to rely upon an absolute compliance with the terms of sale, and upon the absolute fairness of an auction conducted under the order of court) bid the property in, and while the sale was subject in all things to the confirmation of this court, that confirmation must depend upon the sufficiency of the notice, the compliance with all necessary or proper requirements in holding the sale, honesty and fair dealing in the action itself, and a proper treatment of the bidder in considering his rights after the property was knocked down to him, which would generally involve merely the possibility of his completing the purchase and of the adequacy of his bid; this last being particularly involved because of the provision of the statute that a bid of less than 75 per cent. cannot be completed, except upon confirmation thereof by the court.

In the present instance the bid is less than 75 per cent. of the appraised value. The circumstances are such, and a prior sale of the same property indicates, that the sale should not be set aside from the standpoint of inadequacy. There is nothing in the way the sale was con-

ducted, or the notice that was given, or the compliance with the terms of sale, to give to this court the right to take away the property of the purchaser on his bid.

To put Mr. Palley back in the position in which he would have been if he had not allowed the sale to go on, and to disregard the rights of the purchaser, solely to help out Mr. Palley, while appealing to the court, in so far as the court's officer, namely, the trustee, might be found to have made a mistake in his statements to Palley, nevertheless, no basis for relieving Palley actually exists, except sympathy for his failure to protest, or to do something, in the face of the trustee's interpretation of the court's order. The purchaser is entitled to be heard upon such an application, to the extent of showing that he has rights, and to point out why the discretion of the court should not be exercised. *Sturgiss v. Corbin*, 141 Fed. 1, 72 C. C. A. 179.

He has appeared herein, and the affidavits do not satisfy the court that the sale should be set aside, even though the situation appears to be that Mr. Palley has unfortunately allowed the property to pass beyond his control, and at a value where he cannot be reimbursed for charges that are not disputed, and for which he was entitled to credit in any dealings with the estate, and which are still claims against the estate on that account.

SESSLER v. NEMCOF.

(District Court, E. D. Pennsylvania. December 9, 1910.)

No. 2.

1. BANKRUPTCY (§ 11*)—EQUITY JURISDICTION OF COURTS OF BANKRUPTCY—TESTS OF JURISDICTION.

Whatever equitable jurisdiction is conferred upon the District Court by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418) and amendment (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]), is confined to controversies relating to a bankrupt estate, and within this limited area whether or not a bill in equity may be maintained must be tested by the ordinary rules that govern bills before any other tribunal, and perhaps the most familiar test is to inquire whether the complainant has an adequate remedy at law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 11.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. O. A. 313.]

2. BANKRUPTCY (§ 287*)—REMEDY OF TRUSTEE—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill in equity by a trustee in bankruptcy setting up three causes of action: One based on the alleged conversion by defendant to his own use of money intrusted to him by the bankrupt to pay notes of the bankrupt; another on the alleged theft or unlawful conversion of property of the bankrupt; and the third on the alleged sale of goods by the bankrupt to defendant with intent to defraud creditors and payment of the price to the bankrupt after his bankruptcy, but which does not allege that any of the money or property remained in defendant's possession, does not state a cause cognizable in equity, complainant having an ade-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

quate remedy by an action at law for a money judgment, embracing all of his claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 444-447; Dec. Dig. § 287.*]

In Equity. Suit by Irwin L. Sessler, trustee in bankruptcy of Herman Granich, against Charles Nemcof. On demurrer to bill. Demurrer sustained.

Clinton O. Mayer and Emanuel Furth, for complainant.
David Serber and Henry J. Scott, for respondent.

J. B. McPHERSON, District Judge. As it seems to me, the three injuries complained of in this bill may be completely redressed in a single suit at law.

The petition in bankruptcy was filed on October 29, 1907, and the bill charges, first, that the bankrupt "prior to October 22, 1907"—but how long prior is not specified—intrusted the defendant with \$8,000 to be used in paying the bankrupt's notes held by two banks in the city of Philadelphia. This money the defendant, "with intent to cheat and defraud said banks and the said Herman Granich, * * * appropriated * * * to his own uses and purposes. * * *". The bill does not aver when the misappropriation took place, nor that the defendant still has the money. Indeed, if he has applied it to his own use, this fact of itself negatives the idea that he can still be holding it as the bankrupt's hand, or for the bankrupt's benefit. In a word the charge is embezzlement, and this offense in its civil aspect can be adequately redressed by a suit to recover the money.

The second charge is thus set out:

"That in further pursuance of the plans of the said Herman Granich to hinder, delay and defraud his creditors, he concocted a plan with the said respondent whereby he stored large quantities of merchandise in various storehouses in the city of Philadelphia, said goods being stored at the instigation of and by the arrangements perfected by the said respondent. That the goods were conveyed by a teamster, Isaac Black, selected by the said respondent, and were contained in thirteen cases, which were distributed and stored by direction of the said respondent as follows:

"Osborne Storage House, Thirty-Sixth and Market streets, one case.

"Cassidy's Storage House, Fifty-Seventh and Vine streets, three cases.

"Hildebrand's Storage House, Broad and Cumberland streets, two cases.

"A storage house at Fortieth and Woodland avenue, seven cases.

"Complainant is informed, and therefore avers, that the said cases contained valuable pieces of cloth and woollens when delivered by the said Herman Granich to the said teamster, but the said respondent contrary to the arrangements made by him with the said Herman Granich replaced the said cases with other cloth and woollens less valuable, and containing straw and remnants, and appropriated the original cloth and woollens to his own use.

"Complainant is informed and believes, and therefore avers, that the value of said goods so taken by the said respondent is approximately \$12,000."

Whether the defendant still has the goods does not appear from the bill. Neither does it appear when the foregoing acts were done, nor what the "plan" was, nor the "arrangements" between the defendant and the bankrupt. The averment is that the defendant of his own motion, and for his own profit, substituted inferior or worthless ar-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ticles for valuable cloth and woollens, and appropriated these goods to his own use. This act was either theft or an unlawful conversion, and can be redressed civilly by suing to recover the value of the goods.

The third charge is this:

"That prior to the time the said Herman Granich fled the jurisdiction he had had many commercial transactions with the said respondent, and said respondent was then indebted to him in the sum of \$12,518.89 for goods received from the said Herman Granich up to one week previous to the failure. That within said week the respondent received further large quantities of merchandise, all of which were sold at about half their market value, from the said Herman Granich, and, while the value of the same was placed at different figures by the two parties, it was finally agreed between them at \$6,550, making a total owing to the said Herman Granich by the respondent of \$19,068.89.

"It was agreed between the respondent and the said Herman Granich that no record should be made of said indebtedness in the books of the said Herman Granich, except that notes and a second mortgage (not recorded) on property of the said respondent in St. Louis, for part of said indebtedness, were intrusted by respondent and the said Herman Granich to Samuel J. Gottesfeld, attorney for the said Herman Granich, that the amount thereof might be collected by the said Herman Granich, notwithstanding his insolvency and contemplated absconding, and thereafter, in March, 1908, long after the said Herman Granich had been adjudicated a bankrupt, the said respondent, at Elizabeth, N. J., unlawfully paid part of said indebtedness to the said Herman Granich, and the said Herman Granich caused his attorney to deliver to the respondent said notes and mortgage, all with intent to cheat and defraud the creditors of the said Herman Granich."

In other words, when the petition was filed, the defendant was indebted to the bankrupt for goods sold, and afterwards paid him money that ought to have been paid to the trustee. If this be true, the trustee's right to the money has not been affected by the unlawful payment; and he may still recover at law all that the defendant owed when the bankruptcy proceedings were begun.

The prayers of the bill are all directed toward a money decree:

"(1) That the respondent be directed to account for all sums of money, goods, and merchandise received by him belonging to the said Herman Granich at the time of the filing of the petition in bankruptcy, and that the respondent be directed to pay over said amount, and transfer said goods, or the value thereof, to the complainant, and upon his refusal be decreed to be in contempt of this honorable court.

"(2) That the respondent be directed to account to the plaintiff for any and all indebtedness owing by the respondent as aforesaid to the said Herman Granich at the time of the filing of the petition in bankruptcy against the said Herman Granich, and part of which was subsequently unlawfully paid to or for the said Herman Granich, and, upon his refusal so to do, that respondent be decreed to be in contempt of this honorable court.

"(3) That a decree be entered against the respondent for any and all sums received by him from the said Herman Granich, or any indebtedness of respondent at the time of the filing of the petition in bankruptcy against the said Herman Granich, or retained to his own use and paid for the benefit of the said Herman Granich to any other person than complainant."

I see no occasion to discuss any other question that is presented by the briefs. If the trustee has an adequate remedy at law, a bill in equity cannot be maintained in this or in any other court. Whatever equitable jurisdiction may have been conferred upon the District Court by the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) and the amendment thereto (Act Feb. 5,

1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]), it is confined to controversies relating to a bankrupt estate. Within this limited area whether or not a bill in equity may be maintained must be tested by the ordinary rules that govern bills before any other tribunal, and perhaps the most familiar test is to inquire whether the plaintiff has an adequate remedy at law.

A decree may be entered dismissing the bill.

STODD et al. v. CITY OF PHILADELPHIA.

(Circuit Court, E. D. Pennsylvania. December 12, 1910.)

No. 1,114.

1. MUNICIPAL CORPORATIONS (§ 819*)—DEFECTIVE SIDEWALK—ACTION FOR INJURY TO CHILD—SUFFICIENCY OF EVIDENCE.

In an action against a city to recover for the death of a child 4½ years old who fell from a sidewalk into the driveway and was run over and killed by a passing wagon, evidence that there was a defect in the sidewalk at the place, that the child was seen approaching it, drawing a toy wagon, and that he was next seen lying in the street with his toy wagon lying tilted on the edge of the depression in the walk, was sufficient to support a finding by the jury that the defect was the cause of his being thrown into the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1739; Dec. Dig. § 819.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTS IN SIDEWALK—ACTION FOR INJURY TO CHILD—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The parents, of a boy 4½ years old of ordinary intelligence, who lived in a large city, are not chargeable with negligence as matter of law for permitting the child to play on the sidewalk without an attendant, although having knowledge of a defect in the walk likely to cause a child passing over it to fall, but, in an action for an injury to the child from such defect causing his death, the question of contributory negligence of the parents is one for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1754; Dec. Dig. § 821.*]

At Law. Action by William P. Stodd and Elizabeth M. Stodd against the City of Philadelphia. On motions by defendant for judgment non obstante veredicto and for a new trial. Both motions denied.

Gain & Cameron, for plaintiffs.

J. W. Catharine and James S. Alcorn, for defendant.

HOLLAND, District Judge. This is a suit to recover damages by the parents for the death of a minor child, about 4½ years old, who was killed while playing on the public highway in the city of Philadelphia. The case was submitted to the jury, and a verdict returned in favor of the plaintiffs for \$620. A request for binding instructions in favor of the defendant was refused, which now entitles the defendant to move for judgment non obstante veredicto. Motion and reasons for a new trial have also been filed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Plaintiffs were and have been residing with their parents about 11 months at No. 2153 North Twenty-Ninth street, Philadelphia, at the time of the accident which resulted in the child's death. Near the curb line of the pavement in front of premises No. 2131 North Twenty-Ninth street, which was 11 doors south of the child's home, there was a hole in the pavement, about 2 feet long, 8 inches wide, and from 1½ to 2 inches deep, the extent of which both father and mother had knowledge during all the time they lived there, and knew that it was a dangerous place for pedestrians who might inadvertently slip or drop therein and fall. At the time of the accident the father was at work, and the mother was in charge of the boy, and permitted him to go upon the sidewalk with a toy express wagon without any older person to accompany him. There was no caretaker in charge of him, nor is there any evidence to show that he was warned to keep away from that portion of the sidewalk in which the defective condition existed. The boy was traveling north upon the east or home side of Twenty-Ninth street, when opposite the house No. 2131, he fell into the street under the wheels of a heavily laden wagon, traveling in the same direction. The wagon was stopped before going entirely over his body, but the injury caused his death. His toy express wagon was tilted in the defect in the pavement, but no one saw how he was thrown into the street. The evidence simply is that he was seen in the street under the wagon, and his toy express wagon tilted, with the wheels of one side in the depression in the pavement.

It is now urged that there was no evidence to show that the depression in the pavement was the cause of the injury, and, even if the jury was right in finding that the length of time the defect existed was sufficient to charge the city with negligence, yet there was not sufficient to submit to the jury to show that the defect in the pavement was the real cause of the injury. To this view we cannot assent. We think there were sufficient facts submitted from which the jury could draw the inference that the defect in the pavement was the cause of the boy being thrown into the street. The evidence is to the effect that he was going north with his toy express wagon at this point and in the direction of the defect in the pavement, and all of a sudden he was seen prone in the street, and his toy express wagon in the depression in the pavement. From these facts alone, we think the jury was justified in finding that the boy was thrown into the street because of the defect in the sidewalk.

The defendant's counsel contends that binding instructions should have been given, "because the parents of the child were guilty of contributory negligence in permitting him to play in a place of known danger without taking precaution of any kind to safeguard him." It is no doubt true that a father has no right to expose his child of tender years to an old, well-known, and obvious danger without some one to care for it, so that it may not, by reason of its lack of knowledge, be injured. But in the matter of the use of city streets, or streets of any municipality, the sidewalks are for the use of the general public, and to a limited extent the streets can be used also by pedestrians. Parents have a right to permit their children to go upon the sidewalks

to play. There is for many of the children of a city who are old enough to walk about and indulge in childish sports, with toy wagons and other instruments for their amusement, no other place to play and enjoy the benefits of fresh air except the sidewalks and the streets, and in many of the quarters of the city of Philadelphia there are thousands of these little ones from two to seven and eight years of age who are seen daily on the sidewalks and in the middle of the streets in great numbers. The parents of these children are probably engaged—the father at his daily labor, and the mother in her household duties—to an extent that it would be impossible for each child to have a caretaker whenever they are permitted to go upon the streets. To lay down a rule that the parents of a child are not to permit it to go upon the sidewalk or street in a city without a caretaker would put four-fifths of the children of this city upon the streets at the mercy of the reckless driver of the wagon or the automobile or the street car, and prevent many of them from enjoying the benefits of outdoor exercise and air as fresh as it can be secured in the streets of a large city. Nor can it be said as a matter of law that to permit a boy of ordinary intelligence, though of the tender age of four and a half years, to go upon a sidewalk out of repair without a caretaker, is negligence on the part of the parents. A sidewalk is a place to be used by adults and children of tender years, and, when it is not in perfect order, it is dangerous to a degree even though one brick may be removed, and the greater the extent of the depression or excavation at any point the greater the degree of danger, and it may be said that the city, when it permits the sidewalk to remain out of repair to any extent for a long time, is negligence upon its part, yet it may permit the sidewalk to be out of repair to an extent that it would not be negligence on the part of parents to use the sidewalk themselves, or to permit their children of tender years to use it.

The question of contributory negligence on the part of the parents in allowing their children to use a sidewalk is always a question for the jury, whether out of repair or not, for the reason that the extent of the danger by reason of the defect or want of repair varies according to the circumstances, and is not always such an obvious, glaring, and dangerous condition as to make it a matter of law for the court to say that the action of the parents in permitting the child to use the pavement alone amounts to contributory negligence. The size of the family and ability of the parents to care for each child and at the same time earn a livelihood, all his circumstances and surroundings in life, have a bearing upon his ability to care for his children, and a question for the jury in determining the question of contributory negligence.

Our conclusion that this motion for judgment non obstante verdicto should be refused is amply justified by the following decisions: *Evers v. Traction Co.*, 176 Pa. 376, 35 Atl. 140, 53 Am. St. Rep. 674; *Kroesen v. Railway Co.*, 198 Pa. 30, 47 Atl. 851; *Del Rossi v. Cooney*, 208 Pa. 233, 57 Atl. 514; *Henderson v. Refining Co.*, 219 Pa. 384, 68 Atl. 968, 123 Am. St. Rep. 668; *Karahuta v. Traction Co.*, 6 Pa. Super. Ct. 319; *Addis v. Hess*, 29 Pa. Super. Ct. 505; *Distasio v.*

Traction Co., 35 Pa. Super. Ct. 406; Murray v. Scranton, 36 Pa. Super. Ct. 576; Reinike v. Traction Co., 13 Pa. Co. Ct. R. 229.

The reasons for a new trial are also overruled, as all the questions were properly submitted to the jury, and we are of opinion that the evidence justified the verdict.

In re BIG CAHABA COAL CO.

(District Court, N. D. Alabama, S. D. December 30, 1910.)

No. 9,849, In Bankruptcy.

1. REFERENCE (§ 99*)—FINDINGS—REVIEW BY TRIAL COURT.

The rule that weight should be given to a referee's findings by the trial court applies more particularly to cases where the findings are deduced from conflicting evidence, and depend on the credibility of witnesses, than to cases in which different inferences are to be drawn from the established facts.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 153; Dec. Dig. § 99.*]

2. BANKRUPTCY (§ 340*)—CLAIMS—FINDINGS—REVIEW.

Evidence held to require a finding that payments made by a claimant of a bankrupt corporation to the extent of \$2,700, for advances made for its benefit in the nature of a loan was not a contribution to the corporation's capital.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

3. MONEY LENT (§ 1*)—TIME—REPAYMENT.

Where a claimant advanced money to a corporation to enable it to continue its business on agreement that it was not to be repaid until the company was on a working basis, such agreement only affected the time of maturity, and did not authorize the expunging of a claim for the amount advanced against the corporation's estate in bankruptcy.

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

In the matter of bankruptcy proceedings of the Big Cahaba Coal Company. Petition to review referee's order expunging the claim of J. C. Reinhardt. Petition granted, and order reversed.

Campbell & Johnston, for petitioner J. C. Reinhardt.

Ullman & Winkler, for trustee.

GRUBB, District Judge. This is a petition to review the order of the referee, expunging from the record the claim of J. C. Reinhardt against the bankrupt, amounting to \$2,700, for moneys advanced by him to the bankrupt. The decision depends upon whether the moneys, which were admittedly paid to or for the bankrupt by the claimant, are to be considered as contributions by him to the capital of the bankrupt, or as loans or advances made to it by him. The original written agreement was between the claimant and one Chairsell, who was president of the bankrupt corporation and owned more than one-half of its capital stock, and probably was considered by the parties as its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

owner and controller. The bankrupt was a coal mining corporation in need of additional capital to put it on an operating basis. In this exigency, and for this object, the agreement between Chairsell and claimant was made. At the time it was made there were 60 shares of treasury stock owned by and subject to disposition of the company. The effect of the written agreement was that claimant was to supply the company with \$5,000 capital, and, upon his doing so, claimant and Chairsell were to divide the treasury stock between them. The written agreement evidently does not state the complete understanding of the parties, and should be aided by the oral evidence of the parties because of its patent incompleteness and ambiguity. The intention of the parties evidently was, if claimant furnished \$5,000 to the company, he was to be guaranteed by Chairsell an equal ownership with him in the stock of the company, which guaranty was to be secured by Chairsell's deposit of his own stock either with Reinhardt or with the company. The first stock was, in fact, delivered to Reinhardt as he made the advances, and not upon his final contribution as was provided in the written agreement. It is clear that the claimant has no claim as a creditor against the bankrupt for any advances made by him under this written agreement or under the verbal modification of it. On January 14, 1909, the day the agreement was executed, Reinhardt advanced the company \$2,000 and received a certificate of stock for 20 shares on account of it. On February 23d he advanced a further sum of about \$1,000, and received a certificate for 10 shares. Thereafter and up to July, 1909, he made further various advances aggregating \$2,700 for which he received no stock certificates. The question is whether this \$2,700 was paid in to the company as capital under the original agreement or as an advance to be repaid under a subsequent and implied agreement. The referee found that it was paid under the original agreement, and expunged the claim.

The evidence of Reinhardt is to the effect that immediately after the advance made by him on February 23d he took the written agreement to his attorney for an opinion, and was advised by him that it was not binding on the company; that he thereupon informed Chairsell, the president of the company and the other party to it, that he was unwilling to proceed with it unless it was confirmed by the company; that thereafter no further stock was issued to him, though he continued to make advances by reason of the needs of the company and his having already invested \$3,200 in it, and that he looked to the company to repay his advances when the company got on a working basis; that there was no action by the directors or stockholders looking either to the confirmation of the agreement or to the repayment of the advances. Chairsell denies generally that there was ever any loan made by Reinhardt or any agreement by the company to repay Reinhardt the sums paid by him to it, and asserts that all payments were made under the original agreement. He does not deny that he was informed by Reinhardt of the invalidity of the agreement between them as to the company or of the unwillingness of Reinhardt to proceed under it unless it was confirmed by the company. His denials and assertions are in the nature of general conclusions rather than

specific facts, and of less value for that reason. The fact that no stock was issued to Reinhardt on the occasions of the various advances made by him after February 23d, as had been done upon the occasion of each advance prior to that time and as was provided by the agreement should be done, indicates a change of agreement and corroborates Reinhardt's statement that from that time forward the advances were not made under the original agreement. A fair inference from the facts seems to be when Reinhardt learned that the agreement was of no validity against the company, without confirmation, and so informed Chairsell, the agreement was held in abeyance pending such confirmation, and, as the exigencies of the company and of the parties demanded that immediate advances be made to it, such advances were thereafter made by Reinhardt without any definite agreement, but with the knowledge and consent of Chairsell, the president of the company, and with the expectation of repayment both on Chairsell and Reinhardt's part when the company was put on a working basis, in the event the stock agreement between Reinhardt and Chairsell was never confirmed. The action of the stockholders on September 16, 1909, directing the return to Chairsell of his 125 shares, shows that the agreement between Reinhardt and Chairsell was never confirmed by the company. Under this state of facts, payments made by Reinhardt for or to the company with the knowledge and consent of its president would be made under an implied agreement on the part of the company to repay, and create a legal liability against it. The fact that repayment was not to be made until the company was on a working basis would affect the time of maturity only and would not defeat the liability of the company, particularly as its failure to get on a working basis was due to its bankruptcy. That the payments subsequent to February 23d were not made under the terms of the original agreement is corroborated, also, by the fact that the payments substantially exceeded in the aggregate the \$5,000 which the agreement provided was to be the consideration for the interest acquired by Reinhardt under it. If Chairsell's testimony as to efforts made by the company to sell the treasury stock relates to a period after the agreement was made, as it rather seems to do, this would be also persuasive that the agreement was no longer being acted upon by the parties, since such efforts were inconsistent with its continuance.

The weight given to the referee's findings applies more particularly to cases in which such findings are deduced from conflicting evidence and depend upon the credibility of the witnesses, and not to cases in which different inferences are to be drawn from facts established. This case belongs rather to the latter class.

The petition for review is granted, and the order of the referee expunging the claim is set aside, and the costs of the petition for review are taxed against the trustee.

In re KIMMEL

(District Court, E. D. Pennsylvania. December 9, 1910.)

No. 3,879.

1. BANKRUPTCY (§ 227*)—REFEREES—REVIEW OF PROCEEDINGS BY JUDGE.

Where no party in interest has asked that an order made by a referee in bankruptcy be certified to the District Court for review, it is not reviewable merely on a report by the referee of his proceedings, including the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 227.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 391*)—ACTIONS AGAINST BANKRUPT—INJUNCTION.

An injunction, granted by a referee, restraining the prosecution in a state court of an action by a landlord to dispossess a bankrupt and his trustee from leased premises, continued by the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649-651; Dec. Dig. § 391.*]

In the matter of Charles E. Kimmel, bankrupt. On petition by trustee for continuance of restraining order. Motion granted.

C. W. Van Artsdalen, for trustee.

David R. Griffith, Jr., for landlord.

J. B. McPHERSON, District Judge. It may be as well to state briefly the precise point which this controversy appears to have reached. To do so may perhaps help in avoiding future complications.

The bankrupt was a lessee, and the term of his lease was five years from May 15, 1909. The trustee received an offer of \$2,000 for the unexpired term, the good will of the business, and certain personal property. After notice to the landlord and other creditors, the referee on November 22 ordered the trustee to accept the offer and assign the unexpired term with the other property. Meanwhile, on November 10, the landlord had applied to common pleas No. 1 of Philadelphia county, claiming the right so to do under the lease, and had issued a writ of habere facias possessionem to dispossess the bankrupt and his trustee. On November 17 the District Court restrained the writ until November 23, and afterwards continued the stay until December 15. On November 23 the landlord petitioned the referee to modify his order by striking out the clause directing the trustee to assign the unexpired term, and the referee heard and refused this petition on November 28, thus leaving the order unchanged. No one has asked that the order be certified for review, and it therefore continues in force. On December 1 the referee reported informally to the court, stating what proceedings had been had, and my information is derived from this report. It may be added that the parties in interest concede the correctness of his statements. It is clear therefore that the order of November 22 is not before me for review. It stands as the referee made it, and the trustee and others interested in the estate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

must decide for themselves what, if any, further proceedings shall be taken. This court does not offer advice. It decides controversies, and at present no controversy over the order is presented for decision.

One matter, however, is properly before me. On December 2 the trustee petitioned that the restraining order be continued until May 15, 1914, and the landlord filed an answer. I need not summarize these papers. They recount the foregoing facts and some others, and I shall only add that I feel bound to preserve the status quo—at least for a reasonable time—and I shall therefore continue the restraining order until the further order of the court. It can readily be modified or rescinded as may seem advisable.

The clerk will make the appropriate entry.

LAUTZ CO. v. GLENN.

(Circuit Court, E. D. Pennsylvania. December 19, 1910.)

No. 1,018.

1. **CONTRACTS (§ 286*)—BUILDING CONTRACTS—DECLARATION OF ARCHITECT—EVIDENCE.**

Where a subcontract required the subcontractor to perform his work in accordance with plans and specifications prepared by an architect, written declarations made by the architect during the progress of the work as to its sufficiency, and his decision that plaintiff had performed the work satisfactorily, and in accordance with the plans and specifications, would be evidence for plaintiff in an action for the price.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 286.*]

2. **NEW TRIAL (§ 40*)—GROUNDS—ADMISSION OF EVIDENCE.**

Error cannot be predicated on an application for a new trial on the admission of evidence on a different ground than that on which the evidence was objected to when offered and received.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

3. **DAMAGES (§ 189*)—BUILDING CONTRACTS—DELAY—LIABILITY OF SUBCONTRACTOR.**

Where a contractor claimed to have been delayed in the finishing of a building by reason of the delay of a subcontractor, and was damaged thereby, the contractor could only recover such damages as he proved in fact resulted to himself from the subcontractor's delay; indefinite opinions and calculations of the architect being insufficient therefor.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 189.*]

4. **NEW TRIAL (§ 40*)—CHARGE OF COURT—EXCEPTIONS.**

An objection to the charge cannot be assigned as a reason for a new trial where no exception was taken to the particular part of the charge objected to at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

At Law. Action by the Lautz Company against George A. Glenn, trading as George A. Glenn & Co. A verdict was returned for plaintiff, and defendant moved for a new trial. Denied.

Harry M. McCaughey and Wm. S. Furst, for plaintiff.

John C. Gilpin and George S. Graham, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOLLAND, District Judge. This was an action of assumpsit tried in this court on November 1 and 2, 1910. The suit is by a subcontractor against a contractor for the balance of the contract price alleged to be due the subcontractor for work done and materials furnished in erecting and putting in place interior marble work, tile floor, wainscoting, and rubber floor for a new office building in Scranton, known as the "Miller Building."

The suit was defended on the ground that the contractor had been obliged to expend certain moneys in making good certain defects in the plaintiff's work, and, furthermore, that the contractor had been charged by the owner for delays in completing the building, which delays, it is claimed, were caused by the subcontractor, who is liable for any resulting damage.

The jury returned a verdict in favor of plaintiff for \$3,565.57. In due time this motion and reasons for a new trial were filed. They are four in number, but at the argument only two were urged. The first relates to an alleged erroneous admission of evidence in permitting the plaintiff to introduce letters written by E. H. Davis, the architect, to the plaintiff as to the completion of the work by the plaintiff. The plaintiff, who was a subcontractor, was to do the work according to plans and specifications prepared by Davis, and of which he was to judge and to determine the question of the subcontractor's substantial performance. The evidence, which it is claimed was erroneously admitted, consisted of a letter written by the architect to plaintiff in which the plaintiff was told in effect that his work was satisfactory. The architect was not called, but any written declaration made by him during the progress of the work as to the sufficiency of the work, or a decision by him that the plaintiff had performed his work satisfactorily and in accordance with the plans and specifications, would be evidence for plaintiff, but, if we are wrong about this, the objection now assigned, for the rejection of the evidence cannot be considered because defendant did not raise the question of his right to have the letter excluded upon the ground that he (defendant) was entitled to cross-examine the architect on the matter contained in the letter, the ground upon which he now urged the admission was error, and which error entitles him to a new trial. There was merely a general objection to the admission of these letters. There was no specific reason assigned at the time why they should be excluded, and the defendant cannot now successfully urge as a reason for a new trial his objection to the admission of evidence at the trial on grounds which were not then specified or called to the attention of the court. 2 Cyc. 710, 711.

The other point raised at the argument in support of a new trial was the objection to the charge of the court as to the date when the damages began to run against the subcontractor by reason of his delay in completing the work. The contractor is entitled to hold the subcontractor for such damages only as result from the latter's delay in finishing the building. The former, under his contract with the latter, is required to establish damages to himself resulting from such delay. The evidence in support of damages charged by the owner against the contractor consists of a calculation made by the architect,

with some indefinite opinions on the part of Mr. Rowland. The question as to the date when the damages began to run against the subcontractor depends upon when the damages began to run against the contractor, and an examination of the one question would involve the other.

Without passing upon this question, it is sufficient to say that a mere statement or calculation by the architect is scarcely sufficient to prove that the amounts claimed by the architect will eventually be the amounts paid by the contractor to the owner. Even if there was sufficient evidence as to the contractor's damage to submit to the jury, the objection to the charge of the court cannot now be assigned as a reason for a new trial, because there was no exception taken to this part of the charge as required by the rules of court.

For the reasons stated, the motion and reasons for a new trial are overruled.

In re BAUGHMAN.

(District Court, M. D. Pennsylvania. December 9, 1910.)

No. 1,170, In Bankruptcy.

1. BANKRUPTCY (§ 400*)—JURISDICTION OF COURT—EXEMPT PROPERTY.

While a court of bankruptcy is without power to administer the exempt property of a bankrupt, the exemption must be claimed and allowed, and under the law of Pennsylvania the specific property selected, before it is withdrawn from the jurisdiction of the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671, 672; Dec. Dig. § 400.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. BANKRUPTCY (§ 399*)—PROPERTY PASSING TO TRUSTEE—ABANDONMENT OF CLAIM TO EXEMPTION—WAIVERS IN FAVOR OF EXECUTION CREDITOR.

At the time of the filing of a petition in bankruptcy, all of the property of the bankrupt, which was less in value than the amount of his exemption, was under levy by the sheriff on a debt in which he had waived his right to exemption. In his schedules he made an insufficient claim to his exemption which he afterwards withdrew. *Held*, that it was competent for him to abandon his claim to exemption, and the effect was to render the levy void and leave the property subject to administration in the bankruptcy proceeding for the benefit of all creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

In the matter of Jonas B. Baughman, bankrupt. On certificate of W. W. Fletcher, referee. Sur exceptions to account of trustee. Exceptions overruled.

G. Wilson Swartz, for exceptions.

Jasper Alexander, for trustee.

ARCHBALD, District Judge. At the time the petition in bankruptcy was filed, the goods of the bankrupt were under levy by the sheriff on an execution, in which the \$300 state exemption was waived;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and on application to this court, except as to goods claimed and set aside to the bankrupt as exempt, this execution was stayed. In the schedules filed by the bankrupt, along with his petition, he claimed as exempt "property to the amount of \$300, as allowed by the act of Assembly of Pennsylvania of 1849"; and on appraisal subsequently had it was found that the goods levied on by the sheriff amounted to but \$251.60, these being the whole of the bankrupt's possessions. Later on, by agreement, the trustee sold these goods for the amount of the appraisal; and, this being less than the exemption to which the bankrupt was entitled, it is now claimed by the execution creditor, by virtue of his levy, and the waiver which he holds, and should not therefore, as it is contended, have been brought by the trustee into his account. Within a few days, however, after the trustee had been selected, and without any goods having been set apart to the bankrupt under his exemption, the trustee was notified by the bankrupt's attorney that he intended to withdraw his claim, and some two weeks afterwards the bankrupt filed a petition, asking leave to amend his schedules so as to withdraw the claim there made, which amendment the referee allowed. There is no dispute over these facts, and the question is to whom, under the circumstances, the money derived from the sale of the goods belongs.

The claim of the bankrupt, as made in his schedules, was invalid; no particular property having been designated or set out. In re Pfeiffer (D. C.) 19 Am. Bankr. Rep. 230, 155 Fed. 892. And, while this was amendable (In re Duffy [D. C.] 9 Am. Bankr. Rep. 358, 118 Fed. 926; *Burke v. Guarantee Title & Trust Co.*, 14 Am. Bankr. Rep. 31, 134 Fed. 562, 67 C. C. A. 486), it was insufficient as it stood, and without amendment was not in shape to be allowed. But, instead of amending the claim, the bankrupt abandoned it, after which it was the same as if it had never been made. The execution creditor could not prevent this. He had no right by virtue of his waiver to proceed against the goods of the bankrupt which he had seized, even though they amounted to less than the law allowed; but only against the specific property, within that amount, which the bankrupt selected and had set off to him; and, this designation never having been made, and all that was done by the bankrupt in that direction having been recalled, the execution creditor was left without anything on which his writ could take effect. Nor was the bankrupt, because of his waiver, prohibited from doing as he did. He was not required to make claim to his exemption for the benefit of this particular creditor, and, if he had said nothing about it in his schedules, there would have been no remedy. Nor was he bound to proceed with the claim after making it; the result doing him no good, although designed by the law for his benefit. It may be that, by the withdrawal of the claim, he was able to defeat the waiver. But, however it may stand under the state law, there is no particular reason in bankruptcy why a waiver should be favored. The \$300 exemption is allowed to the unfortunate debtor for the benefit of himself and his dependent family. And if he is authorized to waive the right to it, in favor of one creditor over others, he certainly is authorized to make no claim to it after bankruptcy, so that all may fare alike.

It is said that the bankruptcy court has no jurisdiction over exempt property except to set it apart. No doubt, to a qualified extent that is true; but it does not apply here. In order to get the benefit of the exemption, it must be claimed. And until it is, and specific property has been set off under it, the court has full authority to consider and dispose of whatever is involved. It may deny the bankrupt his exemption where he has waived or forfeited it, or for any reason it cannot be rightly claimed. In *re Highfield* (D. C.) 21 Am. Bankr. Rep. 92, 163 Fed. 924. It is only after the bankrupt has been found entitled to it, and it has been set off to him, that the court loses its hold.

The exceptions are overruled, and the account of the trustee is confirmed.

HAMMERSTEIN v. TETRAZZINI.

(Circuit Court, S. D. New York. December 5, 1910.)

INJUNCTION (§ 155*)—PRELIMINARY INJUNCTION—RESTRAINING BREACH OF CONTRACT.

On an application for a preliminary injunction to restrain defendant, who was a professional singer, from singing in the United States during the ensuing operatic season for any person except complainant in compliance with a contract between the parties, where the affidavits were conflicting as to all questions of fact in issue, the principal one being as to whether complainant had exercised the option of renewal given him by the contract which was executed two years before and where it was shown that defendant had entered into a contract with another for the coming season, an injunction was refused on condition that defendant deposit one-half her receipts under the new contract to abide the result of the suit, and to answer any judgment which might be recovered by complainant for breach of his contract.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 339; Dec. Dig. § 155.*]

In Equity. Suit by Oscar Hammerstein against Luisa Tetrazzini. On motion for preliminary injunction. Motion denied on conditions.

Application for a preliminary injunction to restrain defendant, pending the determination of the suit, from appearing or singing, or advertising her performance as a performer or singer, in any opera, concert, or theatrical performance at any place within the United States for any person other than complainant during the operatic season of 1910-1911. A restraining order was issued with the order to show cause on which this hearing was had.

House, Grossman & Vorhaus, for complainant.

Towne & Spellman, for defendant.

LACOMBE, Circuit Judge. The controlling question in the case is whether the option of renewal for the season of 1910-1911 given by the contract of 1908 to complainant was availed of by him, so as to continue the contract in force for the present season.

Complainant alleges that notice of renewal was given by him to defendant personally in February, 1910, and was then accepted by her.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is stated that such notice was in writing, but no copy was kept, so that the affirmative of the proposition is supported only by the recollection of complainant and his son. Defendant and her agent flatly deny the giving or receiving of such notice at that time. This particular controversy need not now be determined, because the contract is silent as to when the notice should be given, and, if given a reasonable time in advance of the preparation for a new season, it would be a sufficient compliance with the terms of the contract. The circumstance that on two prior occasions notice of renewal was given in February is hardly sufficient to establish a practical construction of the contract by action of the parties restricting the exercise of the option to that date. But, if it were, the affidavits submitted by defendant show clearly that she waived any insistence upon the exercise of the right of option at that early date, and agreed to postpone the same to a later time.

On April 26, 1910, complainant made the contract with representatives of the Metropolitan Opera House, assigning all his contracts with "artists," subject, of course, in the case of personal contracts, such as this, to the artist's consent to the transfer. When the terms of that contract were made public in the newspapers defendant and her agent were in London. They thereupon sent to defendant, at his New York address the following cablegram:

"London May 4th. 1910.

"Oscar Hammerstein: Following news published by newspapers that you cease to do opera business, please to announce me that I am free from your contract.
Tetrazzini."

To this the following reply was sent and received:

"New York May 5th. 1910.

"Tetrazzini: You are still under our management. Will see you in London in three weeks and will direct you where you will sing here next season.
"Oscar Hammerstein."

This cablegram was sent by complainant's son, who held full power of attorney to act for his father.

If these exchanged cablegrams were all the evidence on the question of renewal of the contract, this motion could be easily disposed of. The objections raised as to the "passages from Paris to New York and return" and as to the advance payment seem unimportant. But there is additional evidence as to what took place between the parties, or their respective agents, subsequent to May 5th. At that time it happened that complainant was himself in London, and there received a letter from defendant's agent in substance the same as the cablegram of the same date. To this complainant replied under date of May 6th, saying:

"In regard to your contract, I can tell you the following: The Metropolitan Company will take over the contract I have with you as per written agreement which I received yesterday from my lawyer. A representative of the Metropolitan Opera Company is coming here to arrange further particulars with the members that are to join their staff."

The letter also stated that within a week complainant would call in person; and on or about May 10th there was an interview in London between the parties and defendant's agent.

Although the option was exercised and the contract made binding by the cablegram from New York, the complainant could, of course, with the consent of defendant, withdraw his notice of renewal, and either decline to renew or leave the matter open till some future date. It is the contention of defendant that at this interview complainant practically canceled and withdrew the notice of renewal, which his agent had cabled, and from that time on, through a long series of negotiations, never again exercised his option, but, on the contrary, led defendant to believe that, unless she could make some agreement with the Metropolitan Company satisfactory to herself, she would be free to make other arrangements for her professional appearances in the United States during the coming season; thereupon she signed a contract with Mr. Leahy for 30 concerts at \$2,500 per concert.

All of this (except the signing of the Leahy contract) is flatly denied by complainant. As is usual in these cases, the affidavits submitted by the respective parties are in direct contradiction not only on the substantial facts, but on the subsidiary facts asserted by one side or the other as corroborative of its narrative of the transactions. What writings there are subsequent to May 5th are susceptible of interpretation consonant with the theory of either side. It is unnecessary to undertake to rehearse the testimony. Such a controversy of fact cannot safely be decided on such conflicting *ex parte* affidavits. It must be left for the trial court, after cross-examination, to determine at final hearing. All that can be done here, is to secure the respective parties as far as may be possible in accordance with equitable principles, so that the one who shall finally prevail may find success substantial in results. If complainant were granted preliminary injunction precisely as prayed for, he would practically be securing judgment in advance of trial and meanwhile defendant would be exposed to the payment of such heavy damages for the breach of her contract with Mr. Leahy that, even if she should finally prevail in this suit, she might really be a loser. On the other hand, if complainant were refused all injunctive relief and relegated solely to his claim for damages for breach of contract, he might, if ultimately successful, find himself with a judgment which he could not collect, since defendant is a bird of passage and may not be here when the case, probably many months hence, is finally decided. In view of all these circumstances, it seems the most equitable course to dispose of this motion as follows.

Complainant may take an injunction as prayed in the bill, unless defendant shall stipulate that one-half of all moneys received under the Leahy contract shall forthwith upon receipt be deposited as an interest-bearing fund in some trust company in this city, to await the final disposition of this suit. If the parties cannot agree upon a trust company, the court will select one. Defendant shall also file monthly sworn statements of moneys received under that contract.

In the event of failure by defendant to file any such statement or to deposit any such money, the court will entertain an application by complainant to modify the provisions of this order.

In the event of complainant unreasonably delaying to prosecute this case to final hearing, the court will entertain a similar application by defendant.

ERIE R. CO. v. SCHULTZ.

(Circuit Court of Appeals, Sixth Circuit. January 3, 1911.)

No. 2,067.

1. RAILROADS (§ 330*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—EFFECT OF MAINTAINING GATES.

A man driving a loaded wagon about to cross several parallel railroad tracks at a crossing where safety gates are located and in operation, and who has waited before a closed gate until a passing train has gone by, and for whom the gate has been lifted so that he may cross, does not still continue under the same absolute duty to look and listen as soon and as far as physical obstacles permit, which he would have borne if the crossing had been unguarded; but he discharges his legal duty if, under those circumstances, he uses his senses of sight and hearing for his protection as soon as, and as far as, a man of ordinary prudence would do under similar circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.*]

2. RAILROADS (§ 350*)—ACTION FOR INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence considered in an action against a railroad company to recover for an injury to plaintiff by being struck by an engine while driving a heavily loaded wagon over a crossing on defendant's road after the gates had been lifted for him to pass, and *held* not to establish his contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

3. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where the plaintiff is urging a heavily loaded team across a railroad track, and in the presence of clear negligence by the railroad company, a conclusive legal presumption of contributory negligence should not be based on a safety margin of ten feet of distance or two seconds of time between the heads of his horses and the train, when plaintiff could first see the train.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.*]

4. TRIAL (§ 207*)—INSTRUCTIONS—PURPOSE AND EFFECT OF EVIDENCE.

Where, on cross-examination of a witness for plaintiff, defendant's counsel had him identify and admit his signature to a written statement previously signed by him, and it was then agreed between counsel for both parties and the court that the entire statement should go in as evidence, defendant was not thereafter entitled to an instruction that the jury should consider the statement only as affecting the credibility of the witness.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 207.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action at law by August Schultz, as guardian of John Balke, against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cushing, Siddall & Palmer, for plaintiff in error.

Skiles, Green & Skiles and R. B. & A. G. Newcomb, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
183 F.—43

Before WARRINGTON and KNAPPEN, Circuit Judges, and DENISON, District Judge.

DENISON, District Judge. After the first trial of this case, the railroad company (hereinafter called the defendant) brought the case to this court, and the judgment which had been rendered below for Balke's guardian (hereinafter called plaintiff) was reversed in an opinion by Judge Severens, upon the ground that the question of plaintiff's contributory negligence had not been properly submitted to the jury. 173 Fed. 759, 97 C. C. A. 573. The general facts are fully stated in the former opinion.

Upon the second trial, the plaintiff again recovered a judgment, and the defendant has again brought the case here, upon the grounds hereinafter stated. Upon the second trial, the jury was instructed, in effect, that, if the gates were standing erect while Balke was waiting for the freight train to pass, this would be notice to him that the gates were not being operated, and their upright position would not amount to an invitation to him to cross; and inasmuch as he did not, after the freight train moved by, stop to look or listen, his contributory negligence would be clear, and he could not recover. The verdict of the jury, therefore, goes upon the theory and amounts to a finding that the gates were being operated, and that they were down and closed before him as he was waiting for the freight train to pass, and that they were then raised before him, thus permitting him to proceed across the tracks. Under these circumstances, and as a part of the situation controlled by this finding, defendant, by its requests numbered 6 and 7, asked the trial court to say that, "under the circumstances of the case," there was on Balke's part an absolute duty to look and listen, as soon as his head came clear of, and beyond, the obstructions, so that he could see down the track; and that if, had he done so, he would as a matter of fact have had knowledge of the approaching engine in time for him to have avoided the accident, then the plaintiff could not recover. One of these requests pertains to looking, after passing all obstructions, and one pertains to looking and listening, after passing certain obstructions, but the distinction is not now important. Both assume the existence of an absolute duty.

The court refused these requests, and charged the jury that Balke could not recover unless, while crossing, and notwithstanding the lifting of the gates for him, he was exercising ordinary care for his own safety; that there would be a distinction between the state of mind and the consequent conduct of one crossing where there were no gates and one crossing where the gates had been lifted for him to cross, but that even in the latter case he must not assume that the place is safe, and must still exercise ordinary care, and must use his senses of sight and hearing to do those things for his own safety which men of ordinary prudence are accustomed to do under similar circumstances; that the lifting of the gates in a certain sense lulls the person about to cross into a sense of security, but this must not be an absolute sense of security; that he must still exercise ordinary care for his own safety; and that it was for the jury to say whether he did exercise that kind

of care which men of ordinary prudence are accustomed to exercise under such circumstances.

The case, therefore, seems now to present the clear question whether a man, driving a loaded wagon, about to cross several parallel tracks, at a crossing where safety gates are located and in operation, and who has waited before a closed gate until a passing train has gone by, and for whom the gate has been lifted so that he may cross, still continues to carry the same absolute duty to look and listen, as soon as and as far as physical obstacles permit, which he would have borne if the crossing had been unguarded; or whether, on the other hand, he discharges his legal duty, if, under those circumstances, he uses his senses of sight and hearing for his protection as soon as and as far as a man of ordinary prudence would do under similar circumstances.

We think the latter rule is the one properly to be drawn from the decisions upon this subject, and that the instruction of the court to this general effect, was correct.

At ordinary railroad crossings, not protected by flags or gates, the highway traveler's usually imperative duty to look is not removed merely by the presence of obstacles to his vision. It is only suspended and does not attach to him until he reaches a point where he can look to advantage; but then, unless for some peculiar reason, it does attach in full force. This is exactly the rule of conduct invoked as an absolute rule in this case by requests 6 and 7; and to have granted them would have been to ignore the whole effect of the invitation conveyed by the raising of the gates. If a flagman beckons the waiting team driver to come ahead, or if a tower man raises the lowered gates, in either case, there is a representation to the driver that there is no approaching train within striking distance. The driver who moves forward under this representation cannot be held to the same strict rule of instant and constant and extreme vigilance which is enforced against one who crosses in sole reliance on his own judgment.

In some jurisdictions, it has been held that the failure of the gate-man to lower his gate, or of the flagman to give the stop signal, amounts only to the absence of a special and extraordinary precaution which the railroad company might have taken, and has little or no bearing upon the rule of contributory negligence (*Greenwood v. R. R.*, 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614; *Swanson v. R. R.*, 63 N. J. Law, 605, 44 Atl. 852); but the more general holding is that the rule is modified by such facts (*Pa. Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136; *Conaty v. N. Y.*, etc., Co., 164 Mass. 572, 42 N. E. 103; *Glushing v. Sharp*, 96 N. Y. 676; *Richmond v. Ry. Co.*, 87 Mich. 374, 49 N. W. 621; *Central Trust Co. v. Wabash Co.* [C. C.] 27 Fed. 159, Treat, D J.; *C. & N. W. Ry. v. Prescott* [8th Circuit] 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654). Even in Pennsylvania the supposed strict rule seems to have been relaxed. *Roberts v. D. & H. Co.*, 177 Pa. 183, 35 Atl. 723.

In this court it has been distinctly recognized that the opened gate is in the nature of an invitation to cross, and that the presence of such fact in the case generally makes the question of contributory negli-

gence one for the jury, and that the same degree of watchfulness cannot be expected from the driver of a loaded wagon as from a pedestrian. *Blount v. R. R.*, 61 Fed. 375, 9 C. C. A. 526. So far as this point is concerned, there is a measure of analogy (although not complete) between a highway traveler who is by invitation crossing a railroad track, and a passenger who in the act of leaving the station is by invitation crossing the track; and in the latter situation this court has held that the person crossing does not carry the imperative duty at all events to look and listen, saying:

"The right to rely on the care and caution of the company furnishes some reason for the failure to exercise that high degree of care which one is bound to exercise when his safety depends wholly upon his own watchfulness." *Lurton, C. J.*, in *Graven v. MacLeod*, 92 Fed., at page 851, 35 C. C. A., at page 52.

And see *C. & O. Ry. v. King*, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102.

There is not in the decision of the majority of the court in *U. P. R. R. Co. v. Rosewater*, 157 Fed. 168, 84 C. C. A. 616, 15 L. R. A. (N. S.) 803, anything inconsistent with the view above expressed. The decision is to the effect that the rule of invitation does not go to the extent that the person crossing need take no care for his own protection, unless he is confronted by danger, "known, obvious or threatening"; and in discussing the underlying question the court says:

"But when the traveler has performed his full duty in that respect, and has driven upon the crossing at the invitation of a flagman stationed there by the railroad company to assist in the prevention of accidents, whether, in addition to his attention to the guidance of his vehicle, he should continue to look to the right and to the left, is a more doubtful proposition. He is then in a position of possible peril, and, in view of the various emergencies likely to arise, just what particular precaution he should take is not so clear and plain as to justify its prescription as a definite, fixed rule of conduct. Were it otherwise, the doing of the very thing prescribed might lead to disaster. The measure of care and caution to be observed in such cases should be more adjustable to the particular conditions and emergencies, and is that active watchfulness which ordinarily prudent men would adopt under like circumstances; and the question whether the driver fell short is one for the jury."

In spite of the fact that, as we think, the traveler, crossing under circumstances like those shown by this record, is not bound absolutely and at all events to look both ways on the very instant when he comes clear of the obstructions, still his failure to use his eyes and ears might, under some circumstances, be so clearly not the conduct of a prudent man that a verdict would be directed against him, but in the present case this question was rightfully left to the jury.

It is true that requests 6 and 7 embody a part of the language found in one sentence of the opinion of this court on the former trial; but we do not think that this language, used in the course of stating the argument leading to the conclusion reached, was intended to decide the present question, which was not then distinctly before the court.

The defendant also urges that it was entitled to a peremptory instruction to find in its favor, because the undisputed facts showed contributory negligence. The same position was urged when the case

was here before, and was overruled, and we do not think the record now is materially different. Giving its greatest weight to the testimony for plaintiff, the jury might have concluded that at the instant when Balke could first have seen down the track for any distance his horses' heads, in their forward travel, had reached a point within a few feet, perhaps even within six feet, of the point where they would be struck by the passing engine then only one hundred feet away. Under such a state of facts, it cannot be said as a matter of law that a man exercising ordinary prudence must have seen the approaching engine in time so that he could have stopped and kept clear of the danger zone. On the other hand, we think it not impossible that an ordinarily prudent man, having received this invitation to cross, might not have observed the engine until such a moment that it would be natural for him to do as Balke did, viz., whip up his horses and try to get across.

Considering this question, the train which had just passed forms an element of the situation. One witness says that the caboose of the freight train formed an obstacle interposed between Balke and the oncoming engine until Balke's horses were actually on the track. It may, be, as defendant urges, that this is physically impossible, and that the caboose must have passed by an appreciable distance so as not to form an additional visual obstacle; yet the facts that it had just passed and that Balke's attention might be distracted thereby and that it might have tended to cause noise and confusion would all be circumstances proper to be considered in deciding whether he must, if exercising due care, have seen the engine in time to have stopped. Even discarding the extremest testimony for plaintiff, and adopting the statement made by defendant's counsel in their brief, the horses' heads were 10 feet from the danger line at the point where, as counsel say, Balke must have seen the engine. His horses would cover this distance, advancing at the stated rate, in less than two seconds. Where the plaintiff is urging a heavily loaded team across a railroad track, and in the presence of clear negligence by the railroad company, a conclusive legal presumption of contributory negligence should not be based on a safety margin of ten feet of distance or two seconds of time.

Defendant also complains of the refusal to give its request numbered 8, pertaining to a question of evidence. Plaintiff's witness Broughton had, before the trial, signed a written statement. Upon his cross-examination defendant's counsel caused the witness to identify this statement and admit his signature. At a later point in the trial, when defendant had the case, defendant's counsel read this statement to the jury, saying, "I desire to read, for the purpose of contradicting the testimony of Samuel Broughton, the statement that has been referred to"; and after reading the statement, further said, "I use this merely as contradictory." The court was requested to charge that "the written statement of the witness Broughton is not to be regarded by you as evidence in the case, but only for the purpose of affecting the credibility of his testimony given you from the witness stand"; but failed so to charge.

Regardless of what might be thought as to whether the request was properly formulated in saying broadly that the statement was not evidence, or as to whether the error, if any, in refusing the charge would have been prejudicial, we think the circumstances under which the statement was first received made the request improper. When the paper was identified, defendant's counsel queried whether he should call witness' attention to specific statements. Counsel said: "We want it all in." The court said: "Then it may be all in as evidence." Defendant's counsel commented, "Very well." A few moments later, this colloquy occurred: "Plaintiff's counsel: The understanding is this goes in? The Court: Yes. Plaintiff's counsel: The entire statement? The Court: Yes."

This occurred while Broughton was on the stand, and the court below might well have thought it justified plaintiff's counsel in supposing that the statement was in evidence generally, and that he therefore might excuse the witness without bringing out the facts recited in this statement. Under such circumstances, defendant's counsel could not, by stating that he read the statement only for a qualified purpose, prevent plaintiff's counsel from having advantage of the general admission which had already occurred.

The assignments of error cannot be sustained, and the judgment must be affirmed.

WHITNEY v. WHITNEY ELEVATOR & WAREHOUSE CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 147.

1. DIVORCE (§ 231*)—ALIMONY—CONSENT—DEATH OF HUSBAND.

Since a wife's right to support by her husband terminates with the husband's death, the court, in divorce proceedings under the New York law, has no jurisdiction, in the absence of consent of parties, to impose a charge on the husband's estate for his wife's support after the husband's death.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 658; Dec. Dig. § 231.*]

2. EVIDENCE (§ 43*)—JUDICIAL NOTICE—DIVORCE PROCEEDINGS.

Courts will take judicial notice of the fact that it is not infrequent in divorce proceedings for the parties to agree on details of alimony to be allowed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 62; Dec. Dig. § 43.*]

3. DIVORCE (§ 236*)—ALIMONY—CONSENT OF PARTIES—CONTINUING PROVISIONS OF SEPARATION AGREEMENT—MORTGAGE.

A separation agreement between husband and wife entitled her to receive from him \$250 a month during her life, if she should not marry until after her husband's death. She sued for divorce, and obtained a decree, which continued the prior agreement, except for the substitution of a mortgage on different property for that previously executed to secure payment of the agreed amount, allowing the wife \$3,000 per year during her natural life, irrespective of whether the husband lived or died. *Held*, that the decree would be regarded as having been made by consent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of parties as far as the alimony was concerned, and hence the wife was not limited to support thereunder during the period of the husband's life.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 666, 667; Dec. Dig. § 236.*]

Separation agreements, see note to Daniels v. Benedict, 38 C. C. A. 608.]

4. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE FROM RECORD.

Where a real estate mortgage, executed pursuant to a divorce decree to secure support for the wife, and expressly referring to the decree, was properly recorded, a purchaser of the property was chargeable with whatever notice an inspection of the decree would have given, and was not a purchaser without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513, 515; Dec. Dig. § 231.*]

Appeal from the Circuit Court of the United States for the Western District of New York.

Bill in equity by Belle N. Whitney against the Whitney Elevator & Warehouse Company. Decree for complainant (180 Fed. 187), and defendant appeals. Affirmed.

This cause comes here upon appeal from a decree in favor of complainant for the foreclosure and sale under a mortgage of certain real estate on Oak street, in the city of Rochester. The mortgage was made February 21, 1893, by James W. Whitney, who then owned the property, which was afterwards bought by the defendant company. The mortgage was given as collateral security for a bond of Whitney, by which he bound himself, his heirs, etc., in the sum of \$100,000, upon condition that he should pay to one Ashley, as trustee for Belle N. Whitney, the complainant, \$250 on March 1, 1893, and the same sum on the 1st day of each and every month thereafter during her natural life. The Circuit Court found that there was due to complainant the sum of \$24,483, with interest from October 27, 1909, and rendered judgment accordingly.

Perkins, Duffy & McLean (John Desmond, of counsel), for appellant.

J. G. Tracy (William G. Tracy, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The facts are quite fully set forth in the opinion below, which may be referred to. It will be found in 180 Fed. 187. The following excerpts will sufficiently indicate the questions raised and argued upon this appeal:

"In 1880 Belle N. Whitney was married to James W. Whitney. In 1889 Mr. and Mrs. Whitney, together with William J. Ashley, as trustee for Mrs. Whitney, entered into an agreement of separation. By this agreement Mr. and Mrs. Whitney agreed to live apart, and Mr. Whitney agreed to pay to Mrs. Whitney during the time she should remain the wife or widow of [James W. Whitney], or during her life if she shall not marry until after the death of [James W. Whitney], \$3,000 a year in equal monthly payments. The agreement also provided for the payment of a certain sum with which to provide her a residence. It also provided that as security for the payment of the annuity Whitney was to execute and deliver a mortgage on certain land in the city of Rochester. It also contained a covenant by Mrs. Whitney

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that she would at any time, upon request, release her inchoate right of dower in any of the property of Mr. Whitney."

These provisions were duly complied with. Mr. Whitney executed the mortgage, which covered other real estate than that now under foreclosure, and the annuity was for some years thereafter duly paid to Mrs. Whitney.

"In 1893 she brought an action against her husband for an absolute divorce. The defendant appeared by attorneys, but did not answer. The case was referred to a referee to take proof. * * * He reported in favor of an absolute divorce."

Thereafter a decree was entered which, inter alia, provided that Whitney—

"pay to the plaintiff, Belle N. Whitney, the sum of \$3,000 per year, for and during her natural life, as a suitable allowance to said Belle N. Whitney, the plaintiff, for her maintenance and support."

It also provided that the mortgage previously given should be canceled, and that Whitney should give another bond and mortgage, on other real estate, as security for the payment of the \$3,000 a year. Thereupon the old mortgage was canceled, and a new bond and mortgage given on the real estate which is the subject-matter of this suit. The bond and the mortgage both recite that they are given pursuant to the judgment of divorce. By various agreements to which Mrs. Whitney was a party the amount of \$3,000 for certain specified years was reduced and the reduced amounts paid and accepted for those years.

James W. Whitney died October 1, 1907, and after July 1, 1909, the defendant company and the representative of his estate took the position that Whitney's death terminated his obligation under the divorce decree to pay any further amount for the wife's support and that therefore the mortgage was no longer operative. It contained a provision that in the case of a default there might be an election to have the whole amount secured immediately payable. This clause was availed of, and the amount found due by the Circuit Court includes unpaid arrears and the amount required to cover her probable duration of life. The amount found due in the decree is not disputed.

Except for possible subsequent statutory changes, to none of which has our attention been called, the law of this state relevant to the subject-matter of this appeal is fully and definitely set forth in two decisions: *Johns v. Johns*, 44 App. Div. 533, 60 N. Y. Supp. 865 (affirmed on opinion below 166 N. Y. 613, 59 N. E. 1124), and *Wilson v. Hinman*, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820. With the conflict of law in other states we have no concern. Briefly stated, the law of New York is this: When a suit by a wife for absolute divorce comes before a court for determination, and it grants the relief prayed for, it is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of support which the divorce cuts off, and is also authorized to require security for the payment of the allowance. But since the right of support, if the marital relation were not disturbed,

terminates with the death of the husband, the court has no power to enlarge it, and impose a charge upon the deceased husband's estate for support of the wife, who secures a divorce, after his death. The reasons for this will be found in the exhaustive opinions cited *supra*. Therefore when in a decree of divorce the court undertakes to go further, and to provide that such allowance shall continue during the wife's natural life, after the husband's death, the decree is—

"subject in legal construction to mean during the lives of both parties, and upon the death of the defendant the binding force of the judgment in this respect comes to an end."

This is the language of the opinion in *Johns v. Johns*; but it should be noted that in that case the provision for an allowance continuing after the husband's death was inserted by the court itself in its decree. In *Wilson v. Hinman*, *supra*, after stating the law as above set forth, the court says:

"It may very well be that by the agreement of the parties alimony might be awarded in a different form from that provided for in the statute; that is to say, the parties might agree that a gross sum should be paid as alimony, or that an allowance should be made to the wife which would bind the husband's estate after his death. An agreement of that character would in no way contravene public policy, and the performance of it would, doubtless, be enforced by the courts. It is on this ground that the decision in *Storey v. Storey*, 125 Ill. 608 [18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417], proceeded. The present case is barren of any such feature."

In the case cited, apparently with approval, in the quotation *supra*, *Storey v. Storey*, it was held that, when husband and wife agree upon alimony, the court may embody their agreement upon that subject in its decree, and it will thereafter conclude the parties. The decree there before the court was entered by consent of parties, and provided that the husband should thereafter pay the wife, so long as she should remain sole, the sum of \$2,000 per annum. On the same day the decree was entered the husband executed a bond and trust deed to secure the payment; the bond and deed being made binding upon "heirs, executors, administrators, and assigns"—the same language as in the bond in the case now before us. The court held that the annual allowance under the decree should be continued after the husband's death, so long as the wife remained sole and unmarried.

We may take judicial notice of the fact that it is not infrequent for the parties to agree upon the details of alimony allowance, without asking the court to settle the question. Inchoate dower rights, existing "wife's policies" of life insurance, are sometimes to be considered, and when the parties can agree on this branch of the controversy it would certainly seem desirable that they should.

This agreement may be embodied solely in some written contract between the parties; but we know of no reason why their agreement, if they make one, should not be embodied in the decree. Indeed, the New York Court of Appeals seems to countenance this very way of making the agreement effective. In the excerpt from the opinion in *Wilson v. Hinman*, *supra*, the suggestion is that:

"By the agreement of the parties alimony might be awarded in a different form from that provided in the statute."

This language plainly contemplates an agreement embodied in the decree.

The final question, therefore, is whether the divorce decree now before us is one entered by consent of parties, and embodying agreements which they were competent to make, or whether it records merely the decision of the court upon a controversy coming before it for adjudication. It may be noted that when the question of absolute divorce, terminating the marital relation with permission to the wife to marry again, came before the court, the parties had already provided for a separation which they contemplated should be permanent, and had made careful provision as to allowance, security, inchoate dower, etc. This had lasted four years, and rights had been acquired under it.

In addition to the provision that the allowance of \$3,000 per annum should continue during the wife's natural life, irrespective of whether the husband lived or died—a provision the court had no power to make except by consent—the decree provides that the mortgage, on other real estate, given under the separate agreement, should be discharged. It also provides that certain money and securities held under that agreement by the wife's trustee should be surrendered. It secures to the wife the \$8,000 provided for a residence, and certain life insurance policies referred to in the agreement. It further adjudges that, except as otherwise specifically provided:

"This decree shall in no wise affect said agreement of May 13, 1889, between the parties to this action, which said agreement shall remain unimpaired and in full force."

A decree such as this has all the earmarks of one entered by consent of parties and embodying their mutual concessions and agreements. It is difficult to believe that, with nothing before it save a question as to the granting of an absolute divorce and the exercise of its statutory power to award alimony, the court would have undertaken to make any such adjudication as to vested rights.

In addition we have affirmative evidence that the provisions of the decree as to alimony were inserted by consent of both parties. Counsel for Mrs. Whitney in the divorce action so testified. His testimony is objected to as incompetent, as an effort to vary the language of the decree by oral testimony. If the recitals of the decree indicated that there was any opposition to its terms, there might be force in this objection. But it very carefully avoids making any such statement. It recites the report of the referee, and proceeds to adjudicate "after hearing W. P. Goodelle, Esq., of counsel for the plaintiff, and Edward Harris, Esq., appearing on behalf of the defendant"; but it does not state that defendant's counsel was heard, or asked to be heard, or objected in any way to any of the provisions of the decree.

We do not base our decision, however, on this oral testimony of Goodelle. The decree itself, taken in connection with the proof as to existing conditions when it was applied for, furnishes convincing internal evidence that, on the subject of provision for the wife's support, it embodies the agreement of the parties.

We find no force in the suggestion that the defendant corporation, which subsequently bought the real estate from its president Whitney, was a purchaser "without notice." The mortgage, which was on record when the purchase was made, expressly referred to the decree, and the purchaser is chargeable with whatever notice an inspection of that decree would have given it.

We concur in Judge Holt's conclusion that plaintiff's right to payment during her life was not affected by the death of Mr. Whitney, and that the mortgage in suit is valid security for the amount due under it.

Decree affirmed, with costs.

ORR v. PARK.

(Circuit Court of Appeals, Fifth Circuit. Nov. 29, 1910.)

No. 2,078.

1. BANKRUPTCY (§ 340*)—PROOF OF CLAIM—PRECEDINGS BEFORE REFEREE.

Where a petition of intervention filed in a bankruptcy proceeding set up as a claim against the estate of the bankrupts a note and chattel mortgage on a stock of merchandise executed by them, alleging that they were given to secure a loan of money, but the mortgage, a copy of which was attached, recited that it was given for the purchase money for the goods which were to remain the property of the mortgagee until paid for, the claim taken as a whole was self-contradictory and warranted the referee in requiring proof and investigating its fairness and legality.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

2. BANKRUPTCY (§ 339*)—HEARING ON CLAIMS—WAIVER OF OBJECTIONS TO INFORMALITY.

There is nothing in Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), nor in the rules in bankruptcy, prescribing any particular form for objections to claims, which matter rests largely on the discretion of the referee, and where a claimant appeared in person and by attorney at a hearing on his claim, and testified and took part in the examination of other witnesses without objection, it is immaterial whether pleadings were filed by the objectors, or whether formal notice was given him of the objections.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 339.*]

3. BANKRUPTCY (§ 340*)—PROOF OF CLAIMS—VARIANCE.

A creditor of a bankrupt who files his claim against the estate is required to present a statement under oath of what his claim is, and he cannot sustain it by evidence of an indebtedness arising in a different manner from that stated.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

4. BANKRUPTCY (§ 340*)—FRAUDULENT TRANSFERS—CHATTEL MORTGAGE.

Evidence considered, and *held* to sustain the finding of a referee that a chattel mortgage executed by bankrupts within four months prior to their bankruptcy was made to hinder, delay, and defraud creditors and was fraudulent and void.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

Appeal from the District Court of the United States for the Southern District of Georgia.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of Dunn Brothers, E. J. Dunn and C. M. Dunn, bankrupts. Appeal by Oliver Orr, trustee, from an order of the District Court allowing the claim and sustaining a mortgage in favor of W. C. Park. Reversed.

Upon petition filed January 4, 1909, by certain of their creditors, Dunn Bros., a firm composed of E. J. and C. M. Dunn, engaged then in the business of general merchandise at Molena, Ga., were adjudicated involuntary bankrupts on January 23, 1909.

On March 1, 1909, a petition of intervention was filed with the referee by W. C. Park, the appellee herein, alleging that said firm was indebted to him in the sum of \$2,600, with interest, being the balance due on a promissory note dated September 9, 1908, secured by mortgage on the stock of merchandise contained in the store of said Dunn Bros.; a copy of said note and mortgage being attached to the petition. He prayed that said claim be declared a valid prior lien, and that the trustee be ordered to pay over to him from the proceeds of sale of said stock of goods the full amount of his claim if the fund were sufficient, after deducting the expense and costs of making the sale, and, if not sufficient to pay said claim in full, then to pay over to petitioner such sum as may be received from said sale, after deducting the expense and cost thereof.

The referee directed the trustee to investigate said claim, but no formal pleadings, or written notice of objections to the claim, appear from the record to have been filed. On April 16, 1909, the day set therefor by the referee, testimony in regard to the claim, pro and con, was taken before the referee. The petitioning creditors and the trustee, by attorney, and the petitioner W. C. Park in person, and by attorneys, were present. It does not appear from the record that Park, or his attorneys, objected to proceeding with the hearing in the absence of formal pleadings or written objections to the claim, or asked that they be filed or presented. The hearing proceeded, and said Park and other witnesses were examined in the matter. A further hearing was then continued to April 27, 1909, when argument of counsel for the parties was heard by the referee, who, on May 4, 1909, filed his finding in the case, in substance and effect as follows: That the said promissory note and the paper purporting to be the mortgage to secure its payment made by Dunn Bros., the bankrupts, were fraudulent and void, and were made by said bankrupts to hinder, delay, and defraud their creditors; that the recital in said mortgage that it was given for the purchase money of the property described therein was not true; and that said mortgage was executed and delivered within four months prior to the filing of the petition in bankruptcy and was null and void. The paper referred to is "Exhibit A" attached to the claimant's petition, and dated September 9, 1908. It shows by indorsement thereon to have been filed for record on December 19, 1908. T. J. Blassengame, whose name appears on the mortgage as a witness, testified that some time in December, 1908, C. M. Dunn and W. C. Park called on him, and said Dunn took from his pocket a paper and asked him to witness the signature on it. He refused to do so until C. M. Dunn put his name on it, which he did in witness' presence, and the latter then signed as a witness thereto. J. C. Madden, whose name also appears on said mortgage as a witness, testified that about October 1, 1908, at the store of Dunn Bros., he witnessed the mortgage signed by Dunn Bros. to W. C. Park. He did not remember how the paper was signed at the time, but that he witnessed it for E. J. Dunn; that this was two or three months before the failure of Dunn Bros. Witness did not remember whether C. M. Dunn was or not in the store at the time. He thought that he and E. J. Dunn only were present.

Said mortgage recites that the consideration for the mortgage was the purchase money for the entire stock of goods described therein and then purchased by Dunn Bros. from said Park, and provides that the title to the same was to remain in said Park and his assigns until the note was fully paid.

Said W. C. Park testified that he loaned Dunn Bros. \$3,825, of which \$1,500 belonged to him, \$1,200 to his father's estate, and \$325 to his grandfather; that he had the money in a desk at his home, the exact amount he

had in the desk at the time of the loan he did not know; that it had been accumulating there for several years. While he kept an account in bank, he also put money in said desk. He stated that he had the transaction with C. M. Dunn, and let him have the money on the date of the mortgage, September 9, 1908; that he thought he had been to the store of Dunn Bros. one night and looked at the stock of goods; and that he had previously agreed to let them have the money when he came down there and looked at the stock of goods. He testified that C. M. Dunn turned the mortgage over to him before he paid Dunn the money; that the mortgage was not witnessed at the time and did not show who signed the name of Dunn Bros. It was witnessed some time after. He further stated that nothing was said at the time the mortgage was given about keeping it off the record. C. M. Dunn also testified that nothing was said at the time the mortgage was made about keeping it off the record. E. J. Dunn testified that the business went right on after the mortgage was given as before, and goods were sold in September, October, and November, etc.; that the money obtained from Park was used personally and in buying cotton and in the business generally. He also testified that a short time before the mortgage was put on record, and just prior to the filing of the petition in bankruptcy, Park said something to him about putting the mortgage on record; that he would have to put it on record to protect himself, or something to that effect. Witness further stated that Park promised his (witness') brother that he would not put the mortgage on record.

The judgment and finding of the referee was that said mortgage was made to hinder, delay, and defraud the creditors of Dunn Bros., the bankrupts, and was null and void. On review the district judge rendered a decree reversing said judgment and finding, and held said mortgage to be a valid and subsisting lien on the mortgaged property, and directed the trustee to pay the amount due thereon to said W. C. Park from the proceeds of said property in his hands. On appeal from this decree the case is here.

Hardeman, Jones, Callaway & Johnston (Geo. S. Jones, M. P. Callaway, and W. H. Beck, of counsel), for appellant.

E. C. Armistead and Martin & Morcock (F. R. Martin, of counsel), for appellee.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge (after stating the facts as above). The petition of intervention, which is the proof of claim in this case, does not directly or expressly allege the consideration for the note described in the petition. It alleges that "the only security held by petitioner for the balance due is said note and mortgage, which was given to secure the said loan of \$3,825 made by petitioner to said Dunn Bros." on the date said note and mortgage were executed and delivered. Thus it impliedly alleges that said note was given for money loaned on that day. Petitioner, however, attaches to the petition, as "Exhibit A," a paper writing which he says is a copy of said note and mortgage, and which he makes a part of the petition. Said writing recites that the consideration of the note is:

"For the purchase money we (Dunn Bros.) hereby mortgage our (their) entire stock of merchandise consisting of fixtures, dry goods, notions, shoes, hats, hardware, groceries, and farm implements for the above advanced money. * * * Now purchased by us from him (W. C. Park) with the proviso that the title to the same is to remain in him and his assigns until this note, with expenses of collection, fully paid off and discharged."

Said writing also provides that, should the maker of the note before its maturity attempt to sell or otherwise dispose of the described property, the note shall become due and payable at once. In this condition the sworn petition was presented to the referee as a claim against the bankrupt estate.

Sections 57a and 57b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) provides:

"That the proof of claim shall consist of a statement under oath in writing signed by the creditor setting forth the claim, the consideration therefor, and whether any, and if so, what securities are held therefor, and if founded upon an instrument of writing such instrument shall be filed with the proof of claim."

The proof must show the consideration for the claim, and the statement of the consideration must be sufficiently full and explicit to enable other creditors to investigate as to the fairness and legality of the claim. In *re Blue Ridge Packing Co.* (D. C.) 125 Fed. 619; In *re Scott* (D. C.) 93 Fed. 418; In *re Stevens* (D. C.) 107 Fed. 243.

"The proof of claim should be sufficient to enable the referee passing on it to do so intelligently and judicially." In *re Wooten* (D. C.) 118 Fed. 670; In *re Eagles* (D. C.) 99 Fed. 695.

If the allegations of the proof do not set forth all the necessary facts to establish a claim, or are self-contradictory, the claim may be disallowed; or the referee may unquestionably order proper and legitimate inquiries into the fairness and legality of such claim, that he may be enabled to pass on it intelligently and judicially. In *re Castle Braid Co.* (D. C.) 145 Fed. 224.

The proof of claim as presented in this case did not show its consideration with certainty or clearness. It inferentially showed it was for money loaned, but it, with more directness and certainty, showed it was for money due petitioner for a stock of goods, wares, and merchandise purchased by Dunn Bros. from him, the title to which was to remain in him until the note given for the purchase money was fully paid.

The allegations of the proof of the claim were clearly self-contradictory and were, in our opinion, such as to warrant, if not to require, before allowance, an investigation of its fairness and legality, if its absolute disallowance.

"A referee in the interest of fair dealing and good conscience has unquestioned power to postpone the claim of a creditor, and should do so whenever the circumstances are such as to arouse suspicion or to throw doubt upon the validity of the claim." *Brandenburg on Bkrcy.* § 850.

The referee is vested with a wide discretion in the allowance and disallowance of claims. *Brandenburg on Bkrcy.* § 862.

But it is contended by the appellee, and was so held by the district judge, that there was no notice by proper pleadings filed before the referee, raising objections to Park's claim, and that the referee's action in investigating it and taking evidence as to its bona fides and validity was without authority and was erroneous. With this contention we do not agree.

The bankruptcy act is silent as to the form of objections to claims against a bankrupt estate. Although, preferably they should be filed in writing, they may be stated orally. *Collier on Bkrcy.* (7th Ed.) p. 608; *Brandenburg on Bkrcy.* § 862.

"There is nothing in the act or in the rules in bankruptcy directing the form of such objections." *In re Royce Dry Goods Co.* (D. C.) 133 Fed. 100.

The court, in *Re Cannon* (D. C.) 133 Fed. 837, said:

"The manner of making such objections is thus left open, and should, I think, be largely committed to the discretion of the referee."

Whether there was or not any formal notice to Park of the objections made to his claim is, we think, wholly immaterial in this case, as he appeared in person and by attorney at the hearing, was fully examined as a witness, and participated in the examination of the other witnesses in regard to his claim, and, so far as the record shows, made no objection thereto. He thereby waived all informality or irregularity, if any, in the proceeding had.

The form of the claim as presented to the referee, and the facts and circumstances shown by the evidence on the hearing in regard to its validity, were such as to arouse suspicion, and to throw doubt upon such validity. The evidence showed that the statement in the mortgage as to the consideration therefor was not true, and that the indebtedness claimed on the hearing arose in a different manner from that stated. A creditor of a bankrupt estate who files his claim against the estate is required to present a statement under oath of what his claim is, and he cannot sustain it by evidence of an indebtedness arising in a different manner from that stated. *Brandenburg on Bkrcy.* § 682; *In re Lansaw* (D. C.) 111 Fed. 365.

Waiving the variance between the statement and the mortgage of the consideration therefor and that testified to on the hearing, we will consider the question presented on the good faith and validity of the mortgage. Park testified that the mortgage was delivered to him by C. M. Dunn and the money given by him to said Dunn on the date of the mortgage, September 9, 1908. It was not witnessed at the time, and neither the signature of C. M. Dunn nor E. J. Dunn, composing the firm of Dunn Bros., was signed to the mortgage. There is also some doubt on the evidence whether it was signed by "Dunn Bros." at that time. However this may be, it appears that Park claimed to be dissatisfied with the mortgage and subsequently carried it to E. J. Dunn and asked him about it. Dunn took it and said "they would fix it." It appears that about October 1, 1908, at the store of Dunn Bros., J. C. Madden witnessed the signing of the mortgage by E. J. Dunn; but said Madden in his testimony does not state what particular signature or name was signed and was witnessed by him. The mortgage is signed "Dunn Bros., by E. J. Dunn." It also appears from Park's testimony that C. M. Dunn had the transaction with him, delivered the mortgage to him, and received the money from him on or about September 9, 1908; but it appears that said C. M. Dunn had the mortgage in his possession on December 19, 1908, and on that day signed it in the presence of the witness Blassengame. So it is we find the mort-

gage in the possession of one of the makers of it in October, and in the possession of the other in December, when each separate and apart from the other signed it in the presence of a witness. It does not appear when, if ever, the mortgage was redelivered to Park, otherwise than by its deposit for record. It was shown to have been in the possession of C. M. Dunn, last prior to its record, and on the date of its record.

No inventory or valuation of the stock of goods seems to have been made and furnished to Park, and no special examination of the stock made by him. Dunn Bros. remaining in possession of the goods, continuing business, and selling goods, just as before the mortgage was made; their failure to sign the mortgage and have it witnessed until from one to three months after it purports to have been made; their possession of the mortgage subsequent to their signing it; and the withholding it from record—are badges of fraud which were sufficient, in our opinion, to warrant the judgment and finding of the referee that the mortgage was made to hinder, delay, and defraud the creditors of said Dunn Bros., and was null and void, in which judgment and finding we concur. *Blennerhasset v. Sherman*, 105 U. S. 100-118, 26 L. Ed. 1080; *Clayton v. Exchange Bk.*, 121 Fed. 630, 57 C. C. A. 656; *Hilliard v. Cagel*, 46 Miss. 309.

The decree of the District Court is reversed, and the case remanded, with instructions to proceed in conformity to this opinion.

UNITED STATES GYPSUM CO. v. SLIWIENSKA.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 98.

1. COURTS (§ 325*)—FEDERAL COURTS—JURISDICTION—WAIVER.

An objection to federal jurisdiction on the ground that plaintiff, a subject of the emperor of Austria, could not maintain the action in the district where the suit was brought against defendant, a corporation of another state, involved a matter of personal privilege, which defendant waived by appearing and answering to the merits.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 884; Dec. Dig. § 325.*]

2. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—MINE—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of a miner by the fall of material from the roof, owing to the alleged negligent taking out of certain props preparatory to removing a tramway, whether the props were taken out in accordance with the express directions of defendant's mine foreman *held* for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 293*)—DEATH OF SERVANT—ACTION—INSTRUCTIONS.

In an action for death of a miner by the fall of a portion of the roof, due to the alleged negligent removal of certain props, there was evidence that the props were removed in the manner prescribed by defendant's foreman, while he denied having directed that the props be so removed. The court in charging the jury reminded them that there was a sharp

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conflict of testimony on such issue, and that, unless they found by a fair preponderance of the evidence that the foreman was negligent, plaintiff could not recover, and that, if the action should be determined in plaintiff's favor, it must be so determined because the foreman was negligent, either in failing to give proper instructions as to how the work should be done or in giving faulty instructions. The court also reminded the jury that plaintiff's witness had received injuries from the falling rock at the same time, and had brought suit against defendant therefor, and that the same person was still defendant's foreman. *Held*, that such instructions sufficiently presented to the jury the controverted issue as to the foreman's instructions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

4. COURTS (§ 366*)—FEDERAL COURTS—FOLLOWING STATE'S DECISION.

Since the sufficiency of a notice of injury to or death of an employee to a master preliminary to a suit required by the New York employer's liability act (Consol. Laws, c. 31, art. 14) depends on the construction to be given to that statute, the federal courts in determining such question will follow the construction of the statute approved by the state court of last resort.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

5. MASTER AND SERVANT (§ 252*)—DEATH OF SERVANT—EMPLOYER'S LIABILITY ACT—NOTICE.

The New York employer's liability act (Consol. Laws, c. 31, art. 14), provides that no action shall be maintained under the act for injuries to, or death of, a servant unless notice of the time, place, and cause of the injury is given to the employer. *Held*, that a notice under such act alleging a servant's death, and that it occurred on the morning of August 13, 1909, in a chamber of defendant's mine, known as the "Big John room," that while decedent in the discharge of his duties as a laborer in the mine was taking down props which supported the roof it suddenly caved in and buried him, and that the cause of the accident was the negligence of defendant's superintendent in directing deceased to knock down props to enable another workman to shift the tramway or track, instead of directing the latter workman to remove the track in sections, was not defective because it also stated several additional alternative causes of the accident, to wit, that the roof was not properly supported and timbered; that there had not been the proper inspection; that the place was unsafe; that proper rules had not been promulgated; and that the superintendent and workmen were not competent, none of which additional causes plaintiff was successful in proving.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 252.*]

In Error to the Circuit Court of the United States for the Western District of New York.

Action by Maryjanna Sliwienska, as administratrix, etc., of Frank Sliwienska, her husband, to recover damages suffered by his death, against the United States Gypsum Company. The action was instituted under the New York employer's liability act (Consol. Laws, c. 31, art. 14), and, the jury having found a verdict for plaintiff, defendant brings error. Affirmed.

C. B. Gibbs, for plaintiff in error.

T. A. Sullivan, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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LACOMBE, Circuit Judge. An objection discussed on the briefs to the jurisdiction of the Circuit Court on the ground that the plaintiff, a subject of the emperor of Austria, could not maintain the action in the Western District of New York against defendant, a corporation of New Jersey, was abandoned on the argument. Such objection was a matter of personal privilege, which was waived by defendant's appearing and answering on the merits.

The accident happened through a fall of rock from the roof of a gypsum mine then being operated by defendant; the particular chamber where it occurred being known as "Big John room." The character of the roof is succinctly set forth in the following excerpt from the charge:

"The stratum consists of a bed of gypsum, a formation of so-called ash rock, then an upper formation of limestone. When the gypsum is removed the ash rock becomes a menace and a danger to those who are employed in the mine, in that, when the ash rock becomes exposed to the atmosphere or to moisture, it becomes brittle, and is apt to fall down upon the miners, and it is for that reason that props are required to be placed underneath the layer of ash rock in order to keep it in place; and it is for that reason that two rows of props were placed on each side of this rail leading into and out of the chamber called 'Big John.'"

The chamber was about 40 to 50 feet wide, and through its center there ran a tramway, on a curve. On the day in question it was desired to brush the roof in order to permit the mule to draw the cars in which the debris and the mined material is placed so as to draw it to the shaft to be hoisted to the surface of the mine. It was contended by the plaintiff that orders were also given to straighten the track, shifting it somewhat from its old position, an operation which necessitated the removal of some of the standing props. Engaged in this work were decedent, who was a prop setter, one Julian, also a prop setter, and Dominick a track layer. All these had had experience in such work, and had received general instructions as to the way in which it should be done. The evidence tended to show that it is safer to move the track in small sections, because in that way it would not be necessary to disturb so many standing props. The moving, however, can be done faster if the track be shifted as a whole. Moreover, it was testified that, before any prop is removed to make clearance for the track, another should be set up as near the place from which the prop is removed, as the conditions of the work will permit. On this occasion Dominick, being ready to shift the track, asked the two prop setters to remove some of the props, and himself knocked out one. Julian knocked out another and decedent knocked out two; but in no instance was a new prop set up before the standing one was knocked out. There seems no dispute on the testimony that as a consequence of this careless way of doing the work the rock which killed Sliwien-ska fell from the roof. If this were all, plaintiff could not recover, because Julian and Dominick were concededly fellow servants of decedent. But there was evidence as to the instructions given by O'Brien, the mine foreman, a "person intrusted with and exercising superintendence" within the terms of the statute. Julian testified that

O'Brien told him that morning, in the presence of deceased, to go to the Big John room to move that track. Being asked specifically what O'Brien said, he replied:

"O'Brien says for Frank and me to go to Big John room, knock down props, move the track, and after set up props in a straight line."

O'Brien flatly denied this. The witness Julian was a foreigner apparently speaking English imperfectly, and his testimony seems not to be especially persuasive, but with such a statement by him in the case it would have been error for the court to take it from the jury. It was for them to decide which statement was truthful. In charging the jury the court reminded them that there was a sharp conflict of testimony on this branch of the case between O'Brien and Julian and instructed them that "Unless the jury find, by fair preponderance of the evidence, that O'Brien was negligent, plaintiff cannot recover." And again:

"If the action is to be determined in favor of the plaintiff, it must be so determined because the foreman O'Brien was negligent, either in failing to give proper instructions to these men as to how the work was to be done, or because he instructed them faultily."

He also called the jury's attention to the facts that Julian had received some injuries from the falling rock, and had brought a suit himself against defendant, and that O'Brien was still defendant's foreman. We think the controverted question as to specific instructions for the doing of this work was presented to the jury most carefully and with conspicuous fairness, and find no merit in the assignments of error dealing with this branch of the case.

It is further assigned as reversible error that the court submitted to the jury, as a question of fact, whether the place where the accident occurred was reasonably safe when the work commenced, and that it declined to charge that it was a reasonably safe place at that time. The record of what took place from the beginning of the charge to the close of the case does not sustain this assignment. Besides the instructions given in the excerpts already quoted, the court, after referring to the fact that there were a number of charges of negligence asserted in the complaint, stated that:

"At the close of the case reliance is finally placed upon the assertion that defendant was negligent in that it failed to properly and adequately inspect this mine, and, further, that the foreman, O'Brien, failed or omitted to give proper and sufficient instructions to the employé Julian and the deceased as to the manner in which this track should be shifted, and, in fact, by negligently instructing them on this morning in question to go into the Big John chamber to shift this track and to first to take down the props. Now, it is to those two questions, I think, that plaintiff directs your attention."

Elsewhere in the charge the court stated the general rule as to the master's obligation to furnish a reasonably safe place in which to work, pointing out that it was the position of defendant that this Big John chamber was reasonably safe on the morning the work began, and that, if it became unsafe, it was due to the faulty manner in which decedent and his associates performed their work. When the time came for

either side to state objections to the charge, it was suggested that there was being submitted to the jury questions as to the reasonable safety of the place when the work commenced and as to failure to inspect. After some discussion, the court finally charged the jury that:

"Before plaintiff can recover in this action, she is bound to show by a fair preponderance of the evidence that what O'Brien said and did was the sole cause of the injury."

We are satisfied that the jury were sufficiently instructed that this was the only point in the case for their consideration.

It is finally assigned as error that the notice of the time, place, and cause of the injury "was insufficient in that it did not properly state the cause of the accident." We had the subject of notice under this statute before us in *Pennsylvania Steel Co. v. Lakkonen* (C. C. A.) 181 Fed. 325, decided August 1, 1910, holding that, since the sufficiency of the notice depends upon the construction to be given to a state statute, the federal courts will follow the construction of the statute approved by the state court of last resort. The decisions of the New York Court of Appeals down to that time were referred to, and we found the notice then before us sufficient, because, beside giving time and place, it stated—

"the cause of the injury, to wit, the fall of the large piece of iron from above at the place where Lakkonen was put to work, and indicated that the cause of the accident was the negligence of a superintendent or an acting superintendent. With such a notice as this there certainly would be no difficulty in investigating the charge and preparing to defend against it."

We further held that the notice was not vitiated because it stated an alternative cause of the occurrence, viz., furnishing the deceased with an unsafe tool, a cause since abandoned. In so holding we followed *Finnigan v. N. Y. Contracting Co.*, 194 N. Y. 244, 87 N. E. 424, 21 L. R. A. (N. S.) 233, where the court said:

"A claimant at the time of serving notice might justifiably believe that there was a cause of the accident, which, however, on the trial he might fail to establish, and the notice should not be held invalid because it contained a statement of plural causes—really believed to exist even though some one was not established."

The notice served in the case at bar is given in full in a footnote.¹ It states that the accident which caused the death took place on the morning of August 13, 1909, in a chamber of defendant's mine known as "Big John's room"; that while deceased in the discharge of his duties as a laborer in the mine was taking down props which supported the roof the said roof suddenly caved in and buried him; and that the cause of the accident was due to the fact that defendant's superintendent negligently directed deceased to knock down props for the purpose of enabling another workman to shift a tramway or track, instead of directing this latter workman to move the track in sections, the removal of the props causing this roof to become insecure and unsafe and to cave. The notice also states several alternative causes of the

¹ See note at end of case.

accident, viz., that the roof was not properly supported and timbered, that there had not been proper inspection, that the place was an unsafe one, that proper rules had not been promulgated, and that the superintendent and workmen were not competent.

There is no reason to suppose that this statement of plural causes was not made in entire good faith, plaintiff believing that they all contributed to produce the unfortunate result. It cannot be said of them as it was in the *Finnigan Case* that "all of them could not within any reasonable probability be applicable to a single accident." Upon the trial plaintiff undertook to prove most of them, but failed except as to the one sent to the jury. The notice here differs from those in the *Finnigan Case*, *supra*, and in *Logerto v. Central Building Co.*, 198 N. Y. 390, 91 N. E. 782; because, as was said by the same court of the notice in *Bertolami v. United States Engineering & C. Co.*, 198 N. Y. 71, 91 N. E. 267:

"It does state beyond substantial criticism what did actually and directly cause the injuries, whereas the *Finnigan* notice did not, and also the specifications of defendant's legal agency in causing the accident, although perhaps in some degree general when considered simply by themselves, are apt and applicable, whereas no one of those in the *Finnigan case* was."

In the *Finnigan Case* the physical cause of the accident was the failure to discover and remove an unexploded charge of dynamite at a place near where the deceased was put to work and where he was liable to and did accidentally cause its explosion. But the notice wholly failed "to describe or include what was the underlying cause of the accident, namely, allowing an unexploded charge of dynamite to remain in the rocks near where intestate was placed at work."

In *Heilig v. Burns*, 133 App. Div. 764, 118 N. Y. Supp. 101, cited on defendant's brief, the notice, which was held insufficient, merely stated that while plaintiff was in a shanty under a trestle a large heavy timber fell or was thrown or precipitated down through the roof of said shanty, but wholly failed to indicate what caused the timber to fall and what act or omission of defendant constituted negligence.

In *Logerto v. Central Building Co.*, *supra*, although the notice enumerated various assignments of negligence, all that was told about the accident was that "certain earth, stone and material was caused and permitted to fall upon me." The court held the notice insufficient, saying:

"Whether the plaintiff was injured by the caving of the bank, by earth falling from boxes in which the material excavated was removed, by accident to the derricks which elevated the boxes, suffering the material to fall, or by the foundation walls, which were being constructed, falling on him, the notice gives no intimation whatever. The most illiterate person would not have stated to another the occurrence of this accident and injury to the plaintiff in the bald terms of the notice. He would have told to some extent how the occurrence happened. It might be in the most terse language that a bank in which the plaintiff was digging fell down on him; that material which was being taken out of the excavation had been suffered to fall on him; that a wall had given way and injured him. This much, at least, should be specified in the statutory notice, and it is imposing no unreasonable burden on the employé to require it."

The notice in the case at bar when tested by the decisions of the New York Court of Appeals seems to be sufficient under the statute. The judgment is affirmed.

NOTE.

The notice referred to in the opinion reads as follows:

"You will please take notice that Frank Sliwienska while in your employ as a laborer on the 13th day of August, 1909, was injured, and that such injury resulted in his death on the said 13th day of August, 1909.

"You will take further notice that the place where the accident occurred which caused the injury to and the death of the said Frank Sliwienska was in a chamber or tunnel commonly known as 'Big John's Room,' and being about 300 feet distant in an irregular line from the foot of the shaft or entrance to a gypsum mine or quarry, owned, operated, and maintained by you in the town of Oakfield, county of Genesee, New York, known as 'Number 3 mine.'

"You will take further notice that the cause of the said accident, injury, and death was due to the fact that on the morning of the said 13th day of August, 1909, while the said Frank Sliwienska was in discharge of his duties as a common laborer in the employ of your company in the said mine or quarry, above referred to, and while he was taking down and removing timbers or props which supported the roof or ceiling of the said mine or quarry the said roof or ceiling suddenly and without warning caved in and buried him under the same, causing injuries which resulted in his death; that the cause of the said accident, injuries, and death was also due to the fact that your company and your superintendent or person charged with and intrusted with the duties of superintendency negligently and carelessly directed and required him to knock down and remove said timbers or props for the purpose of enabling another workman to move and shift a tramway or track a distance of about four feet, instead of causing, directing, and requiring him to take said tramway or track apart and move the same in sections, the taking down and removal of the said timbers or props causing the roof or ceiling of the said mine or quarry to become weak, insecure, and unsafe and to cave in.

"You will also take notice that the cause of the said accident was also due to the fact that your company and your superintendent or person exercising the duties of superintendency carelessly and negligently failed to properly timber said mine or quarry, and failed and neglected to properly secure and support the roof or ceiling of the said mine or quarry and in directing and requiring him to work in an unsafe and dangerous place, and under dangerous materials in violation of the provisions of section 122 of chapter 31 of the consolidated laws (Labor Law); and also by reason of the fact that you and your superintendent failed to designate a competent person to make a daily inspection of the said mine or quarry and the roof and ceiling of the same, and failed to furnish timbers of ample size and strength and of sufficient quantity to properly protect, secure, support, and shore up the said roof or ceiling, and that you failed and neglected to personally examine or have a competent person inspect said roof or ceiling in said mine or quarry after blasting and before the same was safe, and also failing to inspect and examine the appliances in said mine or quarry to see whether they were safe, in violation of the 367 rules and regulations prescribed by the Commissioner of Labor; and also in failing and neglecting to provide a safe and proper place for the said Frank Sliwienska and his fellow employes to work and in failing to provide safe and proper ways, and by reason of your failure and of your superintendent to make, promulgate, and enforce and to post rules for the daily guidance of the said Frank Sliwienska and his fellow employes in the said mine or quarry under the provisions of chapter 31 of the consolidated laws (Labor Laws), and also by reason of the neglect and failure of you to employ a competent superintendent and competent fellow servants to work with him in failing to warn him of his danger and negligently and carelessly managing and operating said mine or quarry."

PROCTOR & GAMBLE CO. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 92.

1. MASTER AND SERVANT (§ 279*)—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to a servant by his clothes becoming caught in a revolving shaft, evidence *held* to warrant a finding that a fellow servant who was directing the manner of performing the work was negligent either in directing the continuance of the work while the live shaft was in motion, or in so placing the staging as to expose plaintiff when standing thereon to the risk of being caught, when by the exercise of ordinary care it could have been safely placed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975; Dec. Dig. § 279.*]

2. MASTER AND SERVANT (§ 196*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Where plaintiff worked in defendant's factory as a helper to S., who, with his father and another, all millwrights, usually worked together in one gang, plaintiff helping the others as well, when directed to do so by S., plaintiff and S. were fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 486-488; Dec. Dig. § 196.*]

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

3. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES—CONSTRUCTION.

In an action in a federal court for injuries to a servant based on the New York employer's liability act (Laws, 1902, c. 600), such act will be construed in accordance with the construction placed thereon by the highest state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-963; Dec. Dig. § 366.*]

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

4. MASTER AND SERVANT (§ 182*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—PERSON EXERCISING SUPERINTENDENCE.

The New York employer's liability act (Laws 1902, c. 600) provides that the employer shall be liable for personal injuries to an employe "by reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent, with the authority or consent of the employer." Plaintiff, a machinist's helper, was employed by defendant to assist S. and other millwrights, and on the day of his injury was directed by S. to go on a staging to loosen a set screw on the coupling attached to a dead shaft preliminary to taking the shaft down. The platform had been erected so that its center was midway between the dead shaft and live sections of shafts immediately beyond it; the platform projecting about 15 inches under the live shafting. S. directed plaintiff to loosen the screws of the live shafting while it was in motion, when it was entirely feasible to have done the work at noon when the live shaft was stopped, or to have so placed the staging that plaintiff would not have come in contact therewith. Defendant had a general superintendent at the time of the accident, and he directed S. to take down the dead shaft, but gave no instructions as to the manner of performing the work, and afterwards came into the shop, and, seeing the men engaged in the work, paid no attention to them, instructing other mechanics as to their work for the day. *Held*, that it was not essential

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that a servant should be authorized to superintend by the corporation's board of directors in order that his act be that of a superintendent within such statute, and that S. should be regarded as exercising superintendence for defendant in the matter of removing the shaft, so as to render the master liable for his negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Action by John E. Williams against the Proctor & Gamble Company. Judgment for plaintiff, and defendant brings error. Affirmed.

B. L. Pettigrew, for plaintiff in error.

R. J. Donovan, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff was 22 years of age, and had been employed as millwright's helper in defendant's factory for about eight months. For the two months immediately preceding the accident he had acted as helper to Otto Schumann, who with his father, Henry Schumann, and Charles Roseman, all millwrights had usually worked together in one gang during this period, and plaintiff helped the others as well when directed to do so by Otto Schumann. His duties as a millwright's helper were to run errands for the millwright, strike blows with the hammer, use a wrench, assist in the assembling of the shafting, putting it in place and in the placing of machinery, and generally to do what he was told to do by the millwright.

On the day in question plaintiff and the two Schumanns were in one of the shops of the plant, through which there ran shafting about nine feet above the floor. One section of this shafting had been dead (that is, disconnected with the live or moving portion) for some time. The rest of the shafting was in motion. The dead section was a portion of the main shafting, by which the machinery in the shop was driven, and had been pushed over towards the west so that the clear space between the westerly end of the live shafting and the easterly end of the dead shafting was variously estimated by the witnesses at from six to twelve inches. The shafting was suspended in hangers placed at intervals of about eight feet. Upon the east end of the dead shaft there was a coupling ten inches long with screws in its west end to hold it on the shaft. There was a keyway in the west end of the live shaft designed to receive a set screw in the coupling which keyway had been widened and roughened somewhat by use. It had been decided to take down the dead shafting. To do that, it was necessary to erect a platform successively under each of the hangers and to attach a rope to either end of the shaft, after passing the same over the overhead timbers. The bearings of the hangers were to be taken out, so as to permit the shafting to be lowered directly to the floor. The nearest hanger to the easterly end of the dead shaft was four feet from that end. Under Otto Schumann's direction, a platform or staging was erected so that its center was midway between the dead and the live sections of shafting; the platform projecting about 15 inches under the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

live shafting. He directed plaintiff to go up on the staging and loosen the set screw on the coupling. Plaintiff asked him if he was going to shut off the power, and he said: "It is all right. Get up there and loosen the set screws." During the noon hour the live shafting would stop, at which time it was expected to put a hanger on it. Plaintiff testified that he did not know of the existence of the roughened keyway. He mounted the staging and while working with a wrench at the screw, having his back towards the revolving shaft, his clothing was caught, and he was whirled around and badly hurt. It is conceded that, had the platform been erected underneath the hanger which was to be loosened, it would have been well away from the live shaft and the plaintiff could not have come in contact with it. The location of the scaffold was determined by Otto, who himself set the horses for it. He put it where it was instead of further west because there was a lot of stuff, scrap, valves, etc., lying on the floor which it would have taken them some time to move to make a place to stand the horse in. We are clearly of the opinion that there was enough in the record to warrant a jury in finding that Otto was negligent, either in undertaking the work on this hanger while the live shaft was in motion, or in so placing the staging as to expose the plaintiff when standing on it to the risk of being caught, which might have been wholly avoided by giving the time necessary to clear up the floor sufficiently to enable them to place the staging a short distance further west. But, if the action were the ordinary one, plaintiff could not recover for Otto's negligence, since they were fellow servants, although the latter gave him directions about the details of the work.

The action, however, is brought under the New York employer's liability act (chapter 600, Laws 1902), which provides that the employer shall be liable where personal injury is caused to the employé "by reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent, with the authority or consent of such employer." The defendant had a general superintendent, Robert Anderson, who at the time of the accident was employed in supervising the equipment of the plant and the placing of the apparatus within the buildings. He hired the men, millwrights, helpers, and others. Manifestly he was within the terms of the statute as a "person intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." In his particular sphere, the supervision of the work of equipping the plant and placing the machinery in place, he stood in place of the master. For that purpose he was the Proctor & Gamble Company, their alter ego. He was the one who determined that the dead shaft should be taken down and instructed Otto to attend to it. He gave no instructions as to the manner in which it was to be done. He afterwards came into the shop, and saw the three men there, but paid no attention to them, since he was instructing the other mechanics as to the work for the day.

It seems to us that the particular piece of work in which plaintiff was engaged was one which might reasonably be held to require su-

pervision. Of course, there were many details of the work, which in the nature of things would be left to the judgment of the workmen themselves, but surely it called for superintendence to determine whether or not work should be done near a live shaft while it was in motion, or whether such work should wait till it came to rest at noon hour. So, too, it would be for a superintendent to direct whether the staging should be placed in one location or another. If Anderson had not had other mechanics to direct, if he had remained in the room, superintending the job, it seems manifest that he would himself have given the directions as to these two details. When, therefore, he turned the whole matter over to Otto, without giving him any specific instructions, he authorized him during Anderson's absence to act as superintendent of that job. When Otto so acted, it was with the authority and consent of the general superintendent, which was the full equivalent of the authority or consent of the owner, since the general superintendent was the alter ego of the master. It cannot be that the statute affords no relief when the negligence is that of a person acting as superintendent, unless he is authorized so to act by resolution of the board of directors. This statute is a remedial one. It was intended to secure to all workmen proper and reasonable superintendence of all work on which they might be employed, by making the employer liable if he failed to provide such superintendence, and it would seem that it should be liberally construed.

This, however, is a state statute, and the federal courts will follow the construction placed upon it by the highest court of the state. It will be desirable, therefore, to examine the authorities cited on the briefs, to see if there is anything in them which would call for a different conclusion upon the facts than that above expressed.

In *McConnell v. Morse Iron Works*, 187 N. Y. 341, 80 N. E. 190, 10 L. R. A. (N. S.) 419, a plumber's helper was injured through the giving way of an unsound ladder which the plumber had selected out of a number of ladders supplied by defendant. The Court of Appeals held that:

"They were laborers engaged together doing the same class of work. Wilson as the mechanic, fitting or repairing pipes, and McConnell assisting him in the work. While it is true that it was McConnell's duty to obey Wilson's directions with reference to handing him tools and waiting upon him in various ways, which was necessary in the conduct of the work, we are clearly of the opinion that the relation between them was merely that of coemployees, and, that Wilson did not occupy the position, and had never been intrusted with the powers of superintendent within the meaning of the statute. The case is brought within the rule so often recognized and applied in this court, to the effect that, where the master has on hand at the place where the work is performed sufficient suitable material or appliances for the doing of the work, he is not liable for injuries resulting to a workman by reason of an error in judgment of the foreman or of a coemployee in selecting defective material or appliance."

This seems not to be a parallel case with the one at bar because no work was being done that required superintendence. If the general superintendent had been himself in the room actually superintending, it can hardly be claimed that it was any part of his duty to select a ladder out of the pile placed there for the workmen to choose from. But, if he had been superintending the work in the room where plain-

tiff was injured, he would be the one to determine whether any work should be done on the east side by the live shaft while it was revolving, and to direct where the staging should be placed.

In *Lowrey v. Huntington Light & Power Co.*, 193 N. Y. 629, 86 N. E. 1127, the same court affirmed the Appellate Division writing no opinion. Reference to the opinion below (121 App. Div. 245, 105 N. Y. Supp. 852), shows that the alleged "superintendent" was foreman of a gang engaged in trimming trees, and that he did not devise the method of trimming the tree: that he gave no instructions or orders in the doing of the work, merely holding the rope attached to a smaller limb as two other workmen held the rope attached to a larger one. "The directions that were given were not by him, but rather to him, for the plaintiff called out to him not to hold the rope so taut, but to let the rope go, in order that the limb might fall to the ground." The court refers to *Hope v. Scranton & L. Coal Co.*, 120 App. Div. 595, 105 N. Y. Supp. 372, and says:

"The test of acts of superintendence is that unless the act itself is one of direction or of oversight, tending to control others and to vary their situation or action because of his direction, it cannot fairly be said to be one in the doing of which the person intrusted with superintendence is in the exercise of superintendence. Slackblower's superintendence consisted in designating the tree to be trimmed, but from aught that appears in the record this is all he did of direction or oversight."

In *Heffron v. Lackawanna Steel Co.*, 194 N. Y. 598, 88 N. E. 1121, no opinion was written. Reference to the opinion below (121 App. Div. 35, 105 N. Y. Supp. 429) shows that one Lawrence was foreman of a gang of men at work on the third or "tapping" floor of a steel mill, and that he directed one of the workmen to remove one or two sets of planks from the floor to facilitate his work which was finished just before quitting time. When the work was completed, Lawrence told him he need not cover the hole again, and accordingly he left it uncovered. After an extended discussion, the court says:

"Unless a direction of this kind comes within the function of a superintendent, or one exercising an act of superintendence, the statute referred to is shorn of much of its efficiency. Many of the acts which formerly were held to be those of a fellow servant and related to a detail of the work have been eliminated from that category and come within the scope of superintendency by virtue of this act."

In *Guilmartin v. Solvay Process Co.*, 189 N. Y. 490, 82 N. E. 725, an oiler was injured while repairing machinery under the direction of a shift foreman, who (although he had the power to do so) failed to stop the engine before repair work began, and himself joined with the other workmen in doing the work. The court reversed the Appellate Division holding that the foreman was acting as superintendent. It said:

"If the act be of that character (superintendence), the fact that it is a detail of the work will not relieve the master from liability. In the prosecution of many, if not most works, superintendence is a detail of the work in the accurate use of that term. It is often so denominated in the older cases and properly so, because before the statute it was unnecessary to distinguish between negligence of a superintendent and that of a collaborer of the same grade as that of the person injured, so far as any liability of the master was involved. The statute has changed this. * * * The question in any case

brought under the statute is not whether the negligent act is a detail of the work, but whether it is a detail of the superintendent's part of the work, or that of the subordinate employes and servants. In the present case had the foreman attempted to stop the engine himself, and so carelessly done the work as to cause injury to other employes, that might very well be deemed the negligence of a coservant for which the master would not be liable; but the determination of the question whether the machinery should be stopped before the men were put to work on it was of a very different character."

In the case now before us it does not appear that Otto had authority to stop the running shafting; but apparently he could have set plaintiff to work at a place remote from the live shaft and waited till noon hour before beginning work in dangerous proximity; and certainly he could have directed the staging to be erected where plaintiff could have done the very work he was set to do, without any risk from the revolving shaft.

In *Andersen v. Pennsylvania Steel Co.*, 61 Misc. Rep. 504, 115 N. Y. Supp. 570, a so-called "pusher" who was doing work similar to that before us in *Penn Steel Co. v. Lakkonen*—August 1, 1910—(C. C. A.) 181 Fed. 325, was held to be acting as superintendent, and the case was affirmed, without opinion in 197 N. Y. 606, 91 N. E. 1109.

It seems unnecessary to refer to any other of the authorities cited. They have all been examined, and in our opinion do not indicate that the state courts are inclined to give any narrower construction to this statute than the one above indicated.

The conclusion we have reached as to the status of Otto renders it unnecessary to examine the assignments of error predicated upon the judge's charge on that branch of the case. The statutory notice, which inter alia stated that the injuries were caused by the negligence of superintendent and foreman in directing him to work about the main line of shafting while it was in violent motion, seems to be sufficient. See our opinion in *U. S. Gypsum Company v. Sliwienska*, 183 Fed. 688, handed down to-day. We find no force in the other assignments of error as to admission of testimony.

There was evidence from which the jury might well infer that plaintiff had not fully recovered at the time of the trial and that it might be a long time before he fully recovered. The court told the jury that they could not award damages for permanent injuries in the absence of testimony that they were permanent. We think that was all defendant was entitled to.

Judgment affirmed.

In re HUDSON RIVER POWER TRANSMISSION CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

Nos. 180-183.

BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—PUBLIC SERVICE CORPORATIONS.

Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309), does not include in the classes of corporations thereby made subject to the act public utility corporations, such as gas and electric companies principally engaged in supplying means for lighting in cities and other communities.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank of Mattoon*, 42 C. C. A. 4.]

Appeals from the District Court of the United States for the Northern District of New York.

Separate petitions in bankruptcy in the matter of the Hudson River Power Transmission Company, the Hudson River Electric Power Company, the Saratoga Gas, Electric Light & Power Company, and the Hudson River Electric Company. Petitions dismissed, and the petitioners appeal. Affirmed.

For opinion below, see 173 Fed. 934.

These causes come here on appeals from decrees of the District Court dismissing petitions in involuntary bankruptcy filed against the companies above numerated. The opinion of the District Judge will be found in 173 Fed. 935.

C. C. Lester, for appellants.

A. J. Rose and George B. Curtiss, for receivers.

J. A. Van Voast, for Schenectady Trust Company.

C. E. Hotchkiss, for trustees of the mortgages.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Various points have been discussed upon the argument, but under the view we take of the questions presented this discussion may be confined to one subject only. It will be necessary first to state precisely what is the business of each company.

The Saratoga Gas, Electric Light & Power Company was incorporated under the transportation corporations law of the state of New York, having authority under its charter and franchises to lay down, erect, or maintain wires, pipes, conduits, or other fixtures in, over, or under the streets, highways, and public places of the village of Saratoga Springs, for the purpose of furnishing or distributing gas, or furnishing or transmitting electricity for light, heat, or power, or maintaining underground conduits or ducts for electrical conductors. At the time petition was filed it was engaged in making gas at a plant which it maintained in Saratoga Springs. It also purchased electricity from a corporation known as the Hudson River Water

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Power Company. This gas and electricity it distributed through mains and wires for lighting the streets, avenues, public parks, and public and private buildings in the village. It also had a supply store for the furnishing of gas and electric light fixtures and appliances. This, however, was a mere incidental activity, amounting to a very small part of its business. The pursuit in which it was principally engaged was the public and private lighting aforesaid, by means of the gas and electrical current which it made or bought.

The Hudson River Electric Company was incorporated under the transportation corporations law of the state of New York, having authority under its charter and franchises to lay down, erect, or maintain poles, wires, pipes, conduits, ducts, or other fixtures in, over, or under the streets, highways, and public places of the cities, villages, and towns in the counties of Warren, Saratoga, and the adjoining counties, for the purpose of furnishing or transmitting electricity for light, heat, or power and of maintaining underground conduits or ducts for electrical conductors. It did not own a generating plant, buying electric current from the Hudson River Electric Power Company. It owned transmission lines, with various substations and switch houses, and was engaged in the distribution of electrical energy in the cities of Glens Falls, Watervliet, and Cohoes, not only to private consumers, but also to the municipalities, for the lighting of public streets, parks, and buildings.

The Hudson River Electric Power Company was also incorporated under the transportation corporations law of New York, its object being to conduct in the state of New York the business of generating and dealing in electricity; the use of electricity for light, heat, and power; the carrying on of the business of "lighting by electricity and using it for heat and power in cities, towns, and villages within the state and the streets, avenues, and public places thereof, and public and private buildings therein." It had an electric power plant at Utica, also transmission line from Utica to Clark's Mills, and tower transmission line from Ballston Spa to Amsterdam. It supplied electricity to other companies belonging to the group now under consideration and to one or more electric railroads. Except for a small proportion which it got from the Kane's Mills Company, it generated all the electricity it supplied. It held franchises in Johnstown, Little Falls, Ft. Plain, and Nelliston. It was engaged in furnishing public street lighting. It held the whole or a controlling interest in the stock of the other companies of the group, and conducted the whole as one business enterprise.

The Hudson River Power Transmission Company was also organized under the transportation corporations law for the development, use, sale, and transfer of electric power, light, and heat. It had a generating plant at Mechanicsville and various transmission lines. It supplied power to the United Traction Company, which runs cars in Albany, Troy, Cohoes, and Watervliet, and through the Albany Electric Illuminating Company furnished light and power both to the public and to private individuals in the city of Albany.

The District Judge held that these corporations were not such as could be made bankrupts under the act of 1898 (Act July 1, 1898,

c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3418]) and its amendments.

Various arguments are advanced in support of this decision. It is contended that whether or not companies manufacture or trade in gas or electricity, the dominant and characteristic feature of their activity is the transportation of the light-producing substance, which they obtain through their wires or ducts to the individual points of consumption; and it is pointed out that the state of New York by legislative action has expressly classified corporations for manufacturing and supplying gas, or for manufacturing and using electricity for producing light, heat, or power, and in lighting streets, avenues, public parks, and other places, and public and private buildings of cities, villages and towns, within the state as "transportation corporations." Chapter 566, Laws 1890. See, also, Public Service Commissions Law, as amended by chapter 480, Laws 1910 (Consol. Laws, c. 48).

It is contended that the generating of electricity is not technically a manufacture, and that the buying and selling of illuminating gas and electricity is not properly a trading or mercantile pursuit, which terms it is insisted should be restricted to dealings in merchandise, goods, or chattels, the ordinary subjects of commerce.

Without considering these several arguments, we find sufficient reason to sustain the decrees in the peculiar character of these companies. If they do manufacture and do trade, they do much more. Under authority conferred by the state and by various local authorities they are "principally engaged" in supplying the means whereby streets, avenues, and public places in the state are lighted and the public safety and comfort thereby promoted. They are corporations of "public utility," and if they did not themselves light these localities the public authorities would no doubt be constrained to do so themselves. By reason, moreover, of the circumstance that they are given this authority, with, to a certain extent, the right of exercising eminent domain, they are correlatively charged with a duty to the public, which is no part of the obligations of ordinary corporations engaged in "manufacturing, trading, printing, publishing, mining or mercantile pursuits." And as a result, when financial adversity overtakes them, there are interests which have to be considered other than those which require attention when the ordinary corporation of the enumerated classes becomes insolvent.

In the case of an ordinary manufacturing or trading corporation, the matters presented for disposition are in their last analysis merely the disposition of dollars and cents. The assets are to be realized and their proceeds distributed among creditors of different classes, and the residue, if any, to owners. But in the case of a "public utility" corporation, such as these, the public itself, the community in which the corporation is rendering service, has a right superior even to creditors of every class, and which right cannot be extinguished by the payment of a dividend in money. With the power to terminate franchises for failure to discharge the obligations inherent in their grant, the state or local authorities can destroy what is usually the most valuable asset of the defaulting company, against the wishes of all

creditors, and before the latter might succeed in finding an assignee of the franchise satisfactory to local authorities who would assume the burden and perhaps pay something for the transfer. Moreover, the public safety and comfort imperatively demand that, whatever else may happen, the corporation, devoid of ready cash though it be, shall not make default on its public obligations, with the result of plunging the community in darkness or stopping the transportation of passengers, and that in some way or other the public service shall be rendered while the financial affairs of the company are being wound up. There are no indications in the bankrupt act that Congress intended to arrange any administrative machinery competent to accomplish these results. On this branch of the case the opinion of Judge Ray is especially illuminative, when it is remembered that he was chairman of the House judiciary committee when the bankrupt act was passed. He says:

"There was a serious and wide difference of opinion in the committee on the judiciary and in the Congress itself whether corporations, any corporation, should be brought under the operation of the law. There was a feeling on the part of some that railroad corporations should be included, if any were. But when it was considered that railroads are the arteries of commerce and transportation, state and interstate, created by state laws in the main, and extending with their connecting lines from state to state and lakes to gulf under merger and consolidation agreements, it was seen that, to properly administer the property of such corporations in the bankruptcy courts and under a bankruptcy law, it would be necessary to make many special and extraordinary provisions for those cases, if the public service was to be considered and the interests of the public conserved."

We have been referred to some dicta and to the expressions of some text-writers (In re Bay City Irrigation Co. [D. C.] 135 Fed. 850; In re New York & Westchester Water Co. [D. C.] 98 Fed. 711; Collier on Bankruptcy [6th Ed.] 71; Remington on Bankruptcy, § 89), but the point raised here has never been decided. So far as we can ascertain, no corporation engaged in rendering public service has been made an involuntary bankrupt, which may be some indication of the general understanding as to the scope of section 4 of the bankruptcy act. We are of the opinion that Congress had no intention to include corporations such as these now before us in the enumeration of that section, either as it originally stood or as it was amended in 1903.

The decrees are affirmed.

LOEB v. EASTMAN KODAK CO.

(Circuit Court of Appeals, Third Circuit. November 29, 1910.)

No. 1,389.

1. MONOPOLIES (§ 28*)—FEDERAL ANTI-TRUST ACT—ACTION FOR DAMAGES—INJURY TO CORPORATION—RIGHT OF STOCKHOLDER TO SUE.

Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), which provides that "any person who shall be injured in his business or property by any other person or corporation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States * * * and shall recover threefold the damages by him sustained," does not give a right of action to a stockholder or creditor of a corporation by reason of a combination or conspiracy alleged to have been in violation of the act and to have caused the bankruptcy of the corporation resulting in the loss of plaintiff's stock or debt; the right of action in such case being in the corporation or its trustee in bankruptcy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

2. PLEADING (§ 339*)—WITHDRAWAL OF PLEA TO FILE DEMURRER—DISCRETION OF COURT.

It is within the discretion of a federal court to permit a defendant to withdraw a plea and file a demurrer on such terms as to costs as it deems just.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1038; Dec. Dig. § 339.*]

3. PLEADING (§ 236*)—AMENDED PLEADINGS—DISCRETION OF COURT.

Granting or refusing leave to a plaintiff to file an amended statement of claim rests in the sound discretion of the court, and, where the application is to file an amended statement containing different counts as an entirety, the court may properly pass on it as an entirety.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 236.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action at law by S. S. Loeb against the Eastman Kodak Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Joseph A. Langfitt, H. W. McIntosh, and William Kaufman, for plaintiff in error.

William M. Robinson and David A. Reed (M. B. Philipp, Walter S. Hubbell, and Reed, Smith, Shaw & Beal, of counsel), for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. This action was instituted in the court below to recover treble damages under section 7 of the Sherman anti-trust act, approved July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202). Section 7 is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The suit was commenced February 23, 1909, and a statement of claim filed on the same day. The pertinent parts of that claim are as follows:

"The said plaintiff claims damages from the said defendant in the sum of \$45,505.80, upon a cause of action of which the following is a statement:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"At divers and various times and from time to time prior to the year 1902 and in the years 1902, 1903, 1904, and 1905, the defendant company entered into various contracts, combinations in the form of trusts and otherwise, and conspiracies in the restraint of interstate trade and commerce, with American Aristotype Company, Napera Chemical Company, Photo Materials Company, Blair Camera Company, American Camera Manufacturing Company, Kirkland Lithium Paper Company, Rochester Optical Company, Century Camera Company, Rochester Panoramic Camera Company, Seed Dry Plate Company, Standard Dry Plate Company, Stanley Dry Plate Company, and Tapprell & Loomis Company, and divers other persons, firms, and corporations to the plaintiff unknown, and by means of said contracts, combinations, and conspiracies the defendant attempted to monopolize, and did monopolize, the interstate trade and commerce in cameras, films, photographic dry plates, photographic papers, and all other sorts, kinds, and descriptions of photographic supplies. The said contracts, combinations, and conspiracies, and the monopoly thereby established, continued throughout and during the years 1902, 1903, 1904, and 1905, and still continue, and the said monopoly has become more complete and stronger from time to time as more and more of said illegal contracts, combinations, and conspiracies have been entered into.

"The Liberty Photo Supply Company was a corporation organized under the laws of the state of Pennsylvania, for the purpose of manufacturing and selling photographic supplies of all descriptions, including all of the articles which the said defendant was monopolizing, and attempting to monopolize as hereinabove set forth. The business of the said Liberty Photo Supply Company had been established by a partnership of the same name which was incorporated in or about June 27, 1902. Its place of business was No. 5907 Baum street, in the city of Pittsburgh, and was continued therein until January, 1906, when it was thrown into involuntary bankruptcy, upon petition filed by the said defendant, the said Rochester Optical Company, and the said Century Camera Company, at No. 3,121 in bankruptcy, in the United States District Court for the Western District of Pennsylvania, upon which petition it was duly adjudged a bankrupt, its property seized upon by a receiver appointed by said court, at the instance of said defendant and its co-petitioners, and sold at prices far below its real value. On distribution of the fund realized in said proceedings, only the costs of administration, state taxes, and about 29 per cent. of the wage claims were paid, leaving absolutely nothing for distribution to the balance of wage claims, rent, unsecured creditors and stockholders—all of which, upon reference to said bankruptcy proceedings, will fully and at large appear.

"Plaintiff was a stockholder in said Liberty Photo Supply Company on the date of filing of said petition in bankruptcy to the extent of 162 shares, par value \$50 per share, and said stock was worth the full par value thereof prior to the completion by the defendant of the said illegal monopoly; plaintiff was also an unsecured creditor for moneys loaned and advanced by him to said bankrupt to the amount of \$1,200. Plaintiff had also satisfied out of his own funds the rent claim against said bankrupt, amounting to \$229, taking an assignment thereof from the claimants. Plaintiff had also satisfied out of his own funds the claim of John Nunlist for wages due from said bankrupt amounting to \$81.50 and claim of Carrie Hartz, also for wages, due from said bankrupt, amounting to \$80, and received in distribution on account of the former claim \$15.80 and on account of the latter \$11.71, thus sustaining a loss of \$133.99 on these accounts. And plaintiff has also a claim for wages due to himself from said bankrupt amounting to \$615.36, upon which he received \$109.75, thus losing \$505.61. And plaintiff was also injured and damaged in his personal credit and in divers other ways by reason of the bankruptcy and failure of said Liberty Photo Supply Company, to the amount of \$5,000.

"Plaintiff further avers that the business of the Liberty Photo Supply Company was totally ruined and destroyed by the defendant, as the direct and immediate result of the illegal monopoly established by defendant in the said articles of interstate trade and commerce by reason of the said illegal contracts, combinations, and conspiracies."

The grievances of the plaintiff summarized were that the defendant, by means of its alleged illegal monopoly, had ruined the business of the Liberty Photo Supply Company, a corporation, in which the plaintiff was a stockholder, whereby the plaintiff suffered the total loss of his shares of stock therein; also, that he had claims against the company which for the same reason were rendered worthless and a total loss, and that he was further injured in his personal credit and in divers other ways "by reason of the bankruptcy and failure of the Liberty Photo Supply Company." Subsequently the defendant filed a plea of not guilty to the plaintiff's statement of claim. Numerous other steps and proceedings in the suit were thereafter had and taken, which it is unnecessary to set forth in detail. It is sufficient to say that the case proceeded so far upon the issues joined therein that an ex parte rule to take depositions had been entered by the plaintiff, and considerable testimony taken thereunder, when on December 10, 1909, the defendant presented a petition to the court in which the action was pending, asking leave to withdraw its plea of not guilty, and to file a demurrer to the statement of claim. The plaintiff demurred to this petition; but the demurrer was overruled, and subsequently, after argument upon the merits of the petition, the court granted its prayer and permitted the defendant to withdraw its plea, and file a demurrer upon terms, however, that the defendant should pay all costs incurred to the date of the order. It should be noted at this point that, before argument was had on the demurrer, the plaintiff on his part applied to the court for permission to file an amended statement of claim of the form then presented, and that argument was heard upon this application at the same time that it was heard upon the demurrer. Subsequently the court denied the application for leave to file the amended statement of claim, sustained the demurrer to the original statement, and entered judgment thereon in favor of the defendant.

The demurrer was based upon the following grounds:

"First. The statement of claim does not aver with reasonable certainty or definiteness any unlawful or tortious act on the part of the defendant.

"Second. The statement of claim does not show the nature of the alleged conspiracy or combination in restraint of trade.

"Third. The statement of claim shows no causal relation between the alleged unlawful or tortious acts of the defendant and the alleged injury suffered by the plaintiff.

"Fourth. The statement of claim shows that the cause of action, if any, on the allegations of the statement of claim, is in the Liberty Photo Supply Company or its trustee in bankruptcy, and not in the plaintiff.

"Fifth. The plaintiff has no standing, either as a stockholder, director, officer, employé, or creditor of the Liberty Photo Supply Company to maintain this action.

"Sixth. The injuries alleged to have been suffered by the plaintiff as stockholder, director, officer, employé, or creditor of the Liberty Photo Supply Company, or otherwise, are too remote, indirect, consequential, and uncertain to support an action against the defendant.

"Seventh. This action is a collateral attack upon the petition and adjudication in bankruptcy of the Liberty Photo Supply Company and the other proceedings in said action in bankruptcy.

"Eighth. The judgment in the bankruptcy proceedings mentioned in the statement of claim is conclusive against the plaintiff as to the existence of the allegations of the statement of claim and is conclusive against the plain-

tiff's claim that said petition was filed in pursuance of, or said adjudication in bankruptcy was obtained as a result of, a combination or conspiracy by this defendant.

"Ninth. The alleged wrongful acts of the defendant are presumed to have been set up in defense of said petition in bankruptcy, and that by the adjudication in that action the plaintiff is precluded from asserting them here."

The amended statement of claim which the plaintiff asked leave of the court to file sets forth the same cause of action as the original statement, but in a more precise and amplified form. Among other things, it alleges that there were additional persons, firms, and corporations with which the defendant had combined and conspired, in establishing the illegal monopoly complained of. It also amplified the methods whereby the defendant, in the exercise of its monopoly, injured and destroyed the business of the Liberty Photo Supply Company, and thereby injured the plaintiff. It further alleged that, in the schedules filed by the bankrupt company, there was exhibited a claim against the defendant which the trustee in bankruptcy never asserted by suit or otherwise, although requested by the plaintiff so to do; also, that the trustee had filed his final account, been discharged, and the bankruptcy case closed; that the bankrupt had ceased doing business since the date when the petition in bankruptcy was filed against it; and that it had no organization or assets and had never been discharged in bankruptcy. The proposed amended statement of claim also contained a new count setting up other damages alleged to have been directly sustained by the plaintiff through and by means of the illegal acts of the defendant. The gravamen of this count was that the plaintiff had been engaged in the year 1894, and prior thereto, in business as a photographer, and had continued therein to the present time; that in the prosecution of his said business he used large quantities of photographic materials manufactured, sold, and controlled by the defendant; that, by reason of its illegal monopoly therein, it controlled and raised the prices thereof and imposed thereon illegal and unreasonable terms of sale, whereby plaintiff was compelled to pay for such materials large sums of money in excess of the prices which he paid therefor prior to the establishment of said illegal monopoly, whereby, and as a direct result of such monopoly, he was damaged by the defendant to the amount of \$1,000.

The main point in the case, however, is whether the plaintiff can recover for the loss of his stock in the Liberty Photo Supply Company, and of his claim as a creditor of that corporation, under section 7 of the Sherman anti-trust act.

The further point was raised in various forms by the demurrer that the statement of claim did not aver with reasonable certainty any illegal act of the defendant, or show the nature of the alleged conspiracy or combination in restraint of trade, or show any causal relation between the alleged illegal acts of the defendant and the injuries alleged to have been suffered by the plaintiff. In these respects the statement is open to serious criticism, even if it is not fatally defective, and the objections thus made would require careful consideration were it not for the view, unfavorable to the plaintiff, that we have taken of the main point, which we shall now proceed to consider.

A right of action is given, by section 7 of the statute above referred to, to "any person who shall be injured in his business or property, by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act." By a subsequent section the word "person" is declared to include a corporation. Admittedly the words of the statute are comprehensive. Prior to the statute, however, a stockholder in a corporation would have been without direct relief for an injury to his stock, through a wrong done to the corporation. The remedy for such an injury resided in the first instance, solely in the corporation. By means of such a suit it could have enforced the rights and redressed the wrongs of each of its stockholders. The statute above referred to was passed, as we must assume, with full knowledge of existing law in that respect. We have no reason to suppose, much less to assume, that it was intended thereby to run contrary to the settled policy of the law. Such an assumption would require us to believe that the act was intended, among other things, to multiply suits. Certainly it is not apparent that the act was intended to or did confer upon hundreds or thousands of stockholders individual rights of action when their wrongs could have been equally well and far more economically redressed by a single suit in the name of the corporation. Moreover, it is manifest that the plaintiff did not receive any direct injury from the alleged illegal acts of the defendant. No conspiracy or combination against him as a stockholder or creditor is alleged. The injury complained of was directed at the corporation, and not the individual stockholder. Hence any injury which he, as a stockholder, received was indirect, remote, and consequential. If a stockholder could successfully maintain such a suit, why not any creditor of the corporation? A creditor would apparently be injured in the same way and to the same extent as a stockholder, assuming that their interests were equal. Indeed, the claim demurred to assumes that both are equally injured, since the plaintiff sued not only for damages for alleged injuries to his rights as a stockholder, but also as a creditor of the Liberty Photo Supply Company.

There must exist some barrier which will effectually prevent such a multiplicity of suits as the plaintiff's position suggests, and we believe not only that that barrier exists, but that it is found now just where it was prior to the passage of the act in question. To illustrate, before bankruptcy a right of action, of the character in question, resided, as we have said, in the corporation, and subsequent to bankruptcy we think it equally clear that it resided in the trustee. It was suggested, however, on behalf of the plaintiff, that a trustee in bankruptcy could not institute such an action, nor could a suit in equity be maintained under the Sherman act. The answer is obvious even if we assume that a suit of the suggested character could not be maintained in equity. The stockholder could certainly apply to the court to have the trustee instructed to bring the action, and the court could require it to be brought, or it could permit the stockholder to sue in the name of the trustee upon indemnifying the estate against the costs of the suit. Moreover, it appears that the plaintiff herein evidently thought that the trustee could maintain the action, for in his proposed

amended statement of claim he alleges that he requested the trustee to bring such a suit. We think the statement of claim demurred to is bad, in that it did not, under the circumstances, set forth a cause of action in the plaintiff. This view is in accordance with that taken by Judge Brown, in *Ames v. American Telephone & Telegraph Company* (C. C.) 166 Fed. 820, which likewise arose upon demurrer. The principles laid down in that case are sound, and the clear and able reasoning of Judge Brown is well supported by the authorities cited, to which others might be added upon some of the points, were it necessary.

It is claimed, however, that the Circuit Court erred in allowing the defendant to withdraw its plea and file a demurrer, likewise in denying the plaintiff's application to rescind such permission after it had been granted. This was a matter which rested entirely in the sound discretion of the court, and under the circumstances of the case we think that it was not only permissible, but proper, to grant such leave. When the plaintiff's statement of claim was first brought to the attention of the court, if it appeared that the plaintiff had misconceived his rights, and that he had no cause of action, it would seem that the interests of the parties and the speedy administration of justice were alike furthered by permitting the question to be raised and decided at once, thereby saving costs and expense to the parties. The action of the learned judge in the premises should be commended rather than censured. Had the case been permitted to go to trial, the same result would, in our judgment, have ultimately been attained.

In *Baltimore & O. R. Co. v. Camp*, 81 Fed. 807, 26 C. C. A. 626, and *Deakins v. Lee*, Fed. Cas. No. 3,697, answers were permitted to be withdrawn and demurrers filed, and in *Eberle v. Moore et al.*, 65 U. S. 147, 16 L. Ed. 612, the court below was sustained in granting permission to the defendant to withdraw a plea in bar and file a plea in abatement. In *Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902, the Circuit Court, on the other hand, had denied an application by a defendant to withdraw his plea in bar and file a plea in abatement. The Supreme Court upheld the ruling below and said:

"This court has decided that such applications are addressed to the judicial discretion of the inferior court, and its decision is not open for revision here. It has decided that the refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or a continuance, or to reinstate a cause which has been legally dismissed, cannot be questioned for error in this court. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206 [3 L. Ed. 200]; *Simms v. Hundley*, 6 How. 1 [12 L. Ed. 319]."

The only remaining assignment of error which requires consideration alleges that the Circuit Court erred in refusing the motion to amend the plaintiff's statement of claim and in sustaining the demurrer. This assignment is not strictly in form, since it alleges two distinct and independent grounds of error, but, waiving that, we proceed to consider the only question not already considered as to whether the court erred in refusing permission to the plaintiff to amend its statement of claim. We think it did not. The propriety of allowing the amendment in this instance also rested in the sound discretion of the

court, and, in the form in which the application was presented, the judge could not have done otherwise than he did. The proposed statement of claim contained two counts, one of which merely restated in a more amplified and specific form the matters contained in the original claim. Such modifications as were made therein did not cure the vice of the original statement, since, as amended, it did not set forth a valid cause of action in the plaintiff. The amended statement, so far as the count of which we are speaking is concerned, would have been as open to demurrer as the original. It is true that the amended statement proposed to insert a new count of the character hereinabove indicated; but no application was made to the court for leave to file this count by itself, so that the court was not obliged to pass upon its sufficiency. The application was made to file both counts as an entirety, and the application could properly be refused or granted as an entirety.

Furthermore, it should be noted that the amplified and amended original count related to indirect and consequential injuries alleged to have been sustained by the plaintiff as a stockholder through the illegal combinations and conspiracies of the defendant, while the new or additional count pertained to certain direct injuries alleged to have been sustained by the plaintiff in his own business; hence it was intended to, and did, set up a new and independent cause of action. Furthermore, the refusal of the judge to allow its introduction into the statement of claim did not substantially injure the plaintiff, since there was nothing, after the demurrer was sustained, to prevent the plaintiff from instituting a new action upon the injury alleged to have been directly sustained by him in his own business. Under the circumstances, the court did not abuse its discretion.

Upon the whole case, we think the judgment below was right, and that it should be affirmed, with costs.

UNITED STATES v. ROBERTSON.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910. Petition for Rehearing Overruled November 18, 1910.)

No. 1,668.

1. APPEAL AND ERROR (§ 846*)—PRESENTATION OR RESERVATION OF GROUNDS OF REVIEW—ACTION TRIED TO COURT.

In an action at law in a federal court, tried to the court without a jury by stipulation, where the court made a finding of facts, but omitted to state its conclusions of law thereon, a motion by plaintiff that the court instruct itself as a jury to find the issues for plaintiff, and exceptions to the overruling of such motion, and to a finding of the issues for defendant, while irregular, was sufficient to present the issues of law arising on the facts found for review by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3347-3362; Dec. Dig. § 846.*]

2. INTERNAL REVENUE (§ 8*)—WAR REVENUE ACT—LEGACY TAXES.

Where on the death of the owner, title to his personal property passed to others under a prior instrument creating a joint tenancy therein, such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

title was not limited by a recital in the instrument of a purpose to devote the property to charitable uses, not made binding on the transferee, so as to bring the transfer within the proviso to section 29 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), which excepts from the property thereby taxed "bequests or legacies for uses of a * * * charitable * * * character."

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

3. INTERNAL REVENUE (§ 8*)—WAR REVENUE ACT—LEGACY TAXES.

Under a written instrument creating a joint tenancy in personal property to be held share and share alike, the share of one dying to vest in the survivors, each held title to his own proportionate share until his death, and on that event the title to such share vested in his cotenants, and where such a death occurred while section 29 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), was in force, the property transferred became subject to the legacy tax thereby imposed.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States against Ina Law Robertson. Judgment for defendant, and plaintiff brings error. Reversed.

Edwin W. Sims, U. S. Atty., and Elwood Godman and Seward S. Shirer, Asst. U. S. Attys.

Otto Gresham, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error sought to recover a judgment for a tax alleged to be due from defendant under section 29 of the Spanish War Revenue Act (Act June 13, 1898, c. 488, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]). A jury was waived, the court made a special finding of facts, and from a judgment for defendant this writ of error is prosecuted.

Contention is made that plaintiff has failed to preserve any questions of law for review. When the "finding of facts" was made and filed, the court omitted to draw formally thereon any "conclusions of law." Thereupon plaintiff "moved the court sitting as a jury to instruct itself as a jury to find the issues in favor of plaintiff." This motion was overruled, and the court upon the special finding of facts found the issues for defendant, and entered judgment accordingly, to all of which plaintiff took exceptions. Granting that the method pursued was irregular, we think it clear that the court and the parties understood that the only issues remaining to be found were the issues of law arising from the application of the statute to the special finding of facts, and that the court and defendant were as fully apprised of plaintiff's objection and exception to the adverse ruling on the questions of law as if the court had formally stated its conclusions of law, and plaintiff had formally excepted thereto.

The part of the statute that applies to the special finding reads as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"* * * Or any personal property or interest therein transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies politic or corporate, in trust or otherwise, shall be and hereby are made subject to a duty or tax to be paid to the United States as follows, that is to say: * * * Provided that nothing in this section shall be construed to apply to bequests or legacies for uses of a religious, literary, charitable or educational character."

The special finding shows that on May 4, 1897, James Law, Ellen Law, and defendant executed a contract, establishing a joint tenancy in certain personal property, under the following circumstances: James and Ellen, brother and sister, advanced in years, had long been receiving from their personal property incomes above their needs, and had been giving the excess to charitable uses. Several years prior to 1897 James and Ellen became deeply interested in defendant, a young woman devoted to education and charities. They desired that she should give up her position as teacher and associate herself with them in benevolent work. She agreed "on condition that the same (the Law estate) should be devoted to religious and benevolent uses," and put her money into the joint fund covered by the contract. The special finding also shows that after the execution of the contract the personal expenses of the parties thereto were paid from the income, and that some of the principal as well as the excess of income was distributed for benevolent purposes; that James died on March 11, 1899; and that since his death Ellen and defendant have continued the charitable use of the joint fund as aforesaid.

It is urged that defendant's increment by survivorship is not subject to the tax because the fund is held in trust for charitable uses. The oral negotiations and inducements became merged in the written contract. In that "it is agreed between the parties, each with the others, that all of the right, title, and interest of each in and to the above-mentioned property, whether now standing in the name of James or Ellen Law or Ina Law Robertson, shall be, from the execution of these presents, the joint property, share and share alike, of the three parties to this instrument, to be from thenceforth held and owned by them as joint tenants and not as tenants in common; and in case of the death of one his or her share shall pass to, be vested in, and become the property of the two survivors; and in case of the death of the second of such survivors, the whole property shall pass to, be vested in, and become the sole property of the last survivor." This grant or bargain left the parties in unconditional dominion of the fund as joint tenants. In one of the "whereas" inducements it is recited that James and Ellen "are desirous that said Ina Law Robertson shall become interested in said property (the Law estate), and ultimately relieve the said James Law from the care and management thereof when he shall so request her to do, and to that end that she shall be a joint owner thereof, so that, if she shall survive the said James and Ellen Law, they, having entire confidence in her, shall feel satisfied that their said property will be by her wisely managed, used, and employed." A preamble may sometimes be found an aid in interpretation, but it can never be used to create a limitation of a grant.

But this preamble even fails to express an intended limitation; it merely expresses the confidence of James and Ellen that defendant, if she should survive them, would continue to be disposed to devote to charity the excess above what she might care to spend for herself. And it may be further noted that the terms of the exception apply only to "bequests or legacies," not to grants, bargains, or sales.

So we come to the question: Did the title of defendant to one-half of the share that James Law possessed in his lifetime vest on the execution of the contract or did it vest only after the death of James Law? Defendant's insistence upon an affirmative answer to the first alternative comes, we believe, from a confusion of estates in entirety with estates in joint tenancy. Survivorship is a characteristic of both. In estates by the entirety the title of each is to the whole, and from this it inevitably follows that no adverse act of the one can destroy the right of survivorship in the other. When the one dies, the other takes nothing by a new title of survivorship; he merely ceases to divide the enjoyment of an estate of which he was completely seized by virtue of the creative instrument. 21 Cyc. 1198, 1199, title "Husband and Wife"; Freeman on Cotenancy (2d Ed.) §§ 63-76; Preston on Estates, p. 131. But in joint tenancy the title is to a share only. If, during the continuance of the joint tenancy, the one dies, the survivor comes into the whole. But since the creative instrument gave him title to his own share only, it follows that he acquires the other share by the new title of survivorship. And since the creative instrument confers upon the one only a title to his own share, he has no lawful basis for interposing obstacles to the other's enjoyment of his unconditional title to his share. Incidents of enjoyment of an unconditional title are sale, mortgage, lease, partition. So, if the one puts a stranger in his place, the original unities of title, of interest, of possession, of enjoyment, and of the right of survivorship in the possessors, are all destroyed. If survivorship occurs it is because the decedent failed to exercise his legal right of severance. If survivorship occurs, the survivor by the death of the other for the first time acquires a title and right of enjoyment in the decedent's share. 23 Cyc. 487, 488, title "Joint Tenancy"; Freeman on Cotenancy (2d Ed.) §§ 29-33, 194-196; Preston on Estates, pp. 136, 137; Co. Litt. § 292; 2 Bl. Com. p. *185; 4 Kent's Com. pp. *363, *364.

The constitutionality of the act was settled in Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969.

The judgment is reversed, with the direction to enter judgment in plaintiff's favor for the amount shown in the special finding, with costs and interest from the commencement of the action.

RITCHIE COUNTY BANK et al. v. McFARLAND et al.

(Circuit Court of Appeals, Fourth Circuit. November 14, 1910.)

No. 947.

1. BANKRUPTCY (§ 440*)—REVIEW—PETITION TO REVISE.

Where the validity of a trust deed given by a bankrupt more than four months prior to the institution of bankruptcy proceedings, as against other creditors, arises in bankruptcy proceedings in determining the priority of claims, an order holding the trust deed invalid is reviewable on a petition to superintend and revise, and need not be taken up by appeal.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. CHATTEL MORTGAGES (§ 185*)—POSSESSION BY MORTGAGOR.

Under the West Virginia law, where property of a transitory character, subject to changes in the use and handling thereof, was conveyed by a deed of trust to secure a debt, and yet left in the hands of the grantor, who was authorized to control and sell the same at will, the conveyance was void as an entirety, though it also covered other property of a permanent nature.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 367, 369-371; Dec. Dig. § 185.*]

Petition to Superintend and Revise, in Matter of Law, Proceedings in the District Court of the United States for the Northern District of West Virginia, at Parkersburg, in Bankruptcy.

In the matter of the Elletson Company, bankrupt. Proceedings by the Ritchie County Bank and others against R. L. McFarland, trustee in bankruptcy of the Elletson Company, and another, to establish priority under a certain deed of trust. From an order of the District Court (174 Fed. 859), reversing a referee's order holding the deed of trust valid in part only, petitioners prosecute a petition to superintend and revise. Affirmed.

See, also, 183 Fed. 718.

Sherman Robinson, for petitioners.

Smith D. Turner and C. D. Merrick, for respondents.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This case is now before the court upon a petition to superintend and revise, in matter of law, proceedings of the District Court of the United States for the Northern District of West Virginia, at Parkersburg. The respondents herein have moved the court to dismiss this petition to superintend and revise, for the reason that the relief sought, if obtainable, must be by an appeal; but after mature consideration of the same we are of opinion, for the reasons stated by this court in the case of *Morgan v. First National Bank of Mannington*, 145 Fed. 466, 468, 469, 76 C. C. A. 236, that the motion should be denied.

On the 4th day of February, 1909, a petition in involuntary bank-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruptcy was filed against the Elletson Company, formerly known as the Elletson-Carver Company, and upon due proceedings had the company was thereafter duly adjudged an involuntary bankrupt, and the respondent R. L. McFarland was elected and qualified as trustee of the bankrupt's estate. Some years prior to the bankruptcy, to wit, on the 15th day of February, 1905, the Elletson-Carver Company executed a trust deed to George H. Carver, trustee, upon its job printing outfits, machinery, type, presses, paper cutters, cases, racks, galleys, etc., also its machinery and appliances used in connection with its book bindery, "together with all the stock of furnishings, fixtures, and materials of whatsoever nature or use in the sales room, stock room, bindery room, or composing room, together with all stock of books, paper, stationery, office supplies, furnishings, and fixtures, to include every and all item or items of whatsoever kind and whatever nature used in and about or now in and upon the premises known as No. 231 Third street, in the F. R. Rose Building, it being the intention of this deed of trust to convey every and all appliances, attachments, furniture, fixtures, and machinery of all kinds and character, together with the attachments thereof and every part of the equipment, furnishings, and fixtures used in and about the conducting of the business known as the Elletson-Carver Company, now in or upon the premises, together with all accounts then due the Elletson-Carver Company, or the Elletson-Carver Company as assignee of the Elletson Printorium, Will A. Elletson, proprietor, it being all the property of every kind, character and description, together with the books, accounts, lease, furniture, fixtures, and stock now on hand of the said the Elletson-Carver Company," to secure E. M. Carver five certain negotiable notes, aggregating \$12,000, said notes maturing on or before June 1, 1905, September 1, 1905, November 1, 1905, January 1, 1906, and March 1, 1906, and all payable at the Ritchie County Bank. The trust deed provided that on default in the payment of any of said notes, or any installment of interest, or the rent of the premises, or insurance upon the property which was required to be kept up for the benefit of the note holder, that the trustee, upon the request of the said E. M. Carver, or of his lawful assignee, should advertise and sell for cash all the property mentioned in this trust deed, or which might be and belong to the Elletson-Carver Company. The first two of these notes were paid, and the others remained unpaid at the time of the bankruptcy, and between the time of the execution of the trust on the 1st of February, 1905, and the 4th of February, 1909, the date of filing the petition in bankruptcy, the trustee did not take possession of the property conveyed, and the debtor, the bankrupt herein, continued in the undisturbed possession and control thereof, and carried on the business of manufacturing and binding blank books, job printing, selling stationery, etc., buying and selling as is usual in the conduct of such business.

In the progress of the administration of the bankrupt's estate, the petitioner herein, the Ritchie County Bank, presented and filed before the referee a claim of \$6,400, based upon three notes remaining unpaid, and secured under the trust deed aforesaid. To the allowance of this debt as a preferred claim the trustee in bankruptcy excepted,

and insisted that the trust deed under which the notes for \$6,400 were secured was fraudulent in fact and in law; the contention being that upon its face the conveyance was void, as it sought to give a lien upon a shifting stock of merchandise, and other personal property of a character subject to constant change and absorption in the use thereof, that it was manifest it was not intended that the trustee under the deed should actually possess himself of the property conveyed, and that, in reality, the alleged conveyance thereof was intended as a protection of the property for the debtor, and not a security for the creditors. Upon appropriate proceedings had before the referee, and the hearing of testimony, he determined that the lien was good as to all the property conveyed therein "except the stock of goods in the stationery and binding departments, the former of which was sold by the trustee in bankruptcy for \$750 and the latter for \$350," being what remained thereof at the time of the bankruptcy, and ordered that said debt be paid from the proceeds of the property conveyed other than the two items mentioned. To this decision the respondent here, the trustee in bankruptcy, excepted, and asked that the action of the referee in the premises be revised by the District Court. Thereupon, upon review of the action of the referee, the District Court reversed his finding, holding the deed to be void in toto, and from this decision, rendered on the 3d day of December, 1909, the proceeding here was inaugurated.

The learned judge of the District Court, in an able and elaborate opinion (174 Fed. 859), reviewed the facts and discussed the law applicable to the case. After careful consideration, we concur in and adopt the conclusions reached by him. In our view, it is entirely clear under the decisions of the state of West Virginia, as announced in the recent case in the Supreme Court of Appeals of that state of *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361, that a conveyance of a shifting stock of goods, or of other personal property of a transitory character, and which changes in the use and handling thereof, left in the possession of the grantor, who is allowed to control and dispose of the same at his will, is void per se, and on its face, and hence can form no basis as security for payment of a debt. *Knapp v. Milwaukee Trust Co., Trustee, etc.*, 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610. We think it is equally well settled by the decisions of the Supreme Court of Appeals of West Virginia that, where property of the same class as last herein stated is conveyed under like conditions and treated in the same way, along with other property of a permanent nature, as here, and the transitory property forms, as it does in this case, a material part of what is conveyed, the deed, as respects both classes of property, is equally void. *Gardner v. Johnston*, 9 W. Va. 403; *Claffin v. Foley*, 22 W. Va. 441; *Livesay v. Beard*, 22 W. Va. 585; *Shattuck v. Knight*, 25 W. Va. 590, 600; *Landeman v. Wilson*, 29 W. Va. 703, 2 S. E. 203. The case of *Shattuck v. Knight*, 25 W. Va. 590, *supra*, a decision of Judge Green, will be found to contain a full and interesting review of the decisions of Virginia and West Virginia covering this class of conveyance, where some portions of the property are transitory and some are not.

It follows from what has been said that the action of the District Court complained of should be in all respects approved, and the petition for review dismissed, at the cost of the petitioner.

Affirmed.

RITCHIE COUNTY BANK et al. v. McFARLAND et al.

(Circuit Court of Appeals, Fourth Circuit. November 14, 1910.)

No. 965.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg, in Bankruptcy.

In the matter of the Elletson Company, bankrupt. Proceedings by the Ritchie County Bank and others against R. L. McFarland, trustee in bankruptcy of the Elletson Company, and others. From a decree in favor of defendants (174 Fed. 859), the bank and others appeal. Dismissed.

Sherman Robinson, for appellants.

Smith D. Turner and C. D. Merrick, for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is an appeal from a decree of the District Court of the United States for the Northern District of West Virginia, rendered on the 3d day of December, 1909, in the bankruptcy proceeding of the Elletson Company, bankrupt, in bankruptcy, whereby the said court adjudged to be void a certain trust deed under which the appellant claimed to hold a preferred lien upon the bankrupt's estate. This decree has been reviewed and affirmed in another proceeding pending in this court under the provisions of the bankruptcy law, providing for the superintendence and review in matters of law of the decisions of the District Court. Ritchie County Bank et al. v. R. L. McFarland, Trustee, etc., 183 Fed. 715.

This court in that case held that the proper remedy was by petition for review, as distinguished from an appeal; consequently it follows that this appeal should be dismissed.

WARREN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1910.)

No. 3,294.

1. POST OFFICE (§ 1*)—USE OF MAIL—CONSTITUTIONAL LIBERTY.

The unrestricted use of the mails is not one of the fundamental rights guaranteed by the Constitution.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 1.*]

2. POST OFFICE (§ 1*)—POSTAL SYSTEM—REGULATION.

Under the power of Congress to regulate the entire postal system of the country, it may prescribe what shall be carried in the mails and what shall be excluded. It may also prescribe the size, weight, shape, and character of the contents of every mailable package, limit the super-scription, and declare a violation of its regulations a public offense, and fix punishment therefor.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. CONSTITUTIONAL LAW (§ 90*)—FREEDOM OF SPEECH—USE OF MAILS.

Act Cong. Sept. 26, 1888, c. 1039, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2661), forbidding deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, threatening, or calculated and obviously intended to reflect injuriously on the character or conduct of others, is not objectionable as denying or abridging freedom of speech.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 90.*]

4. CONSTITUTIONAL LAW (§ 90*) —“FREEDOM OF SPEECH” —“LIBERTY OF SPEECH.”

Liberty and freedom of speech guaranteed by the Constitution does not mean the unrestricted right to do and say what one pleases at all times and under all circumstances.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4131-4133.]

5. POST OFFICE (§ 33*)—NONMAILABLE MATTERS—IMPUTATION AGAINST CHARACTER.

Where accused deposited in the post office a stamped envelope, on the face of which was printed in large red letters, “\$1,000 Reward will be paid to any person who kidnaps Ex. Gov. Taylor and returns him to Kentucky authorities,” such deposit constituted a violation of Act Cong. Sept. 26, 1888, c. 1039, 25 Stat. 496 (U. S. Comp. St. Supp. 1901, p. 2661), making it an offense for any person to mail an envelope on the outside of which is printed any scurrilous, defamatory, or threatening language calculated and obviously intended to reflect injuriously on the character or conduct of another.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 53; Dec. Dig. § 33.*]

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

6. EXCEPTIONS, BILL OF (§ 56*)—SETTLEMENT—CERTIFICATE.

Where a purported bill of exceptions in the record is not authenticated by the certificate of the trial judge, the proceedings at the trial are not open to review.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

7. POST OFFICE (§ 33*)—REGULATIONS—VIOLATION—NONMAILABLE MATTERS—INTENT.

In a prosecution for sending nonmailable matter through the mail, in violation of Act Cong. Sept. 26, 1888, c. 1039, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2661), it is not material whether the objectionable language is true or false, or whether accused was actuated by public spirit or private malice.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 53; Dec. Dig. § 33.*]

In Error to the District Court of the United States for the District of Kansas.

Fred D. Warren was convicted of sending nonmailable matter through the mail, and he brings error. Affirmed.

Fred D. Warren, Clarence S. Darrow, Boyle & Howell, J. I. Shepard, and J. S. Brooks, for plaintiff in error.

J. S. West, Asst. U. S. Atty. (Harry J. Bone, U. S. Atty., on the brief), for the United States.

Before HOOK and ADAMS, Circuit Judges, and REED, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOOK, Circuit Judge. The plaintiff in error was indicted for depositing in the post office of the United States at Girard, Kan., for mailing, nonmailable matter, contrary to the act of September 26, 1888 (Act Sept. 26, 1888, c. 1039, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2661]). Among other things the act prohibits the deposit for mailing of all matter, otherwise mailable, upon the envelope or outside cover or wrapper of which is written, printed, or otherwise impressed any language of a scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another. The envelope described in the indictment was properly stamped and addressed to another, but on its face there was printed in large red characters the following:

"\$1,000 Reward will be paid to any person who kidnaps Ex. Gov. Taylor and returns him to Kentucky authorities."

The indictment also charged that the words so printed were of a scurrilous, defamatory, and threatening character, and were calculated and obviously intended to reflect injuriously upon the character and conduct of William S. Taylor, a former governor of the state of Kentucky. There was a verdict of guilty as charged, and sentence followed.

When the case arose in this court, the accused appeared in his own behalf, dispensed with counsel who had filed a brief, asserted his right to use the mails in the way described in the indictment, and said the only question he desired considered was whether the printed indorsement on the envelope could make his conduct a public offense. But aside from this concession, an examination of the record and briefs discloses no other question that requires consideration. The other objections to the indictment urged in the brief are, we think, without merit. What purports to be a bill of exceptions in the record is not authenticated by the certificate of the trial judge, and the proceedings at the trial are therefore not open to review.

There is no substantial question of liberty or freedom of speech involved in this case. The unrestricted use of the mails is not one of the fundamental rights guaranteed by the Constitution. *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092. No one has a natural or constitutional right to send what he pleases through the mails or to write anything he pleases upon the exterior cover of that which would otherwise be mailable. The power of Congress extends to the regulation of the entire postal system of the country. It may prescribe what can be carried in the mails and what shall be excluded. It may in its wisdom confine the use of the mails to sealed letters, excluding everything else, or it may extend it to papers, periodicals, and books and to large packages of merchandise as in the parcel post systems of other countries. It may even prescribe the size, shape, weight, and character of contents of every mailable packet, and limit the superscription to the bare name and address of the person for whom intended; and it may also declare a violation of its regulations a public offense and fix the punishment therefor. Its power over the particular subject is almost without limit except

as respects unreasonable searches and seizures and the duty to treat all alike under the same circumstances and conditions. With this comprehensive control over the subject which Congress undoubtedly possesses, it is idle to say the liberty of the citizen and his freedom of speech in the proper sense of those terms are denied or abridged by a statute forbidding the deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, or threatening, or calculating and obviously intended to reflect injuriously upon the character or conduct of others. Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, and certainly they do not mean that contrary to the will of Congress one may make of the post office establishment of the United States an agency for the publication of his views of the character and conduct of others, as distinguished from the carriage of the mails. The very idea of government implies some imposition of restraint in the interest of the general welfare, peace, and good order. The statute under consideration is a part of a body of legislation which is being gradually enlarged, and which is designed to exclude from the mails that which tends to debauch the morals of the people, or is contrived to despoil them of their property or is an apparent, visible attack upon their good names. The competency of Congress is beyond question, and the courts have uniformly upheld the legislation and applied it in the light of its evident purpose.

The verdict of the jury confirms the averment in the indictment that the accused deposited the envelope in the post office or caused it to be done, which legally is the same thing, and that the printed indorsement on the face of the envelope was of the character charged, and referred to William S. Taylor, a former governor of Kentucky. Congress having ample power to enact the statute, the only question remaining is whether the indorsement described in the indictment could as matter of law be within its prohibitions. It has been frequently held the statute covers mail matter from creditors and collection agencies addressed to debtors and bearing externally visible charges or imputations of habitual refusal to pay just debts, threats of suit, etc., not alone because of a threatening character, but because calculated and obviously intended to reflect injuriously upon the character and conduct of others. *United States v. Davis* (C. C.) 38 Fed. 326; *United States v. Bayle* (D. C.) 40 Fed. 664, 6 L. R. A. 742; *United States v. Brown* (C. C.) 43 Fed. 135; *United States v. Simmons* (D. C.) 61 Fed. 640; *United States v. Smith* (D. C.) 69 Fed. 971; *United States v. Dodge* (D. C.) 70 Fed. 235; *United States v. Burnell* (D. C.) 75 Fed. 825. Aside from the question whether the language employed by the accused is scurrilous, defamatory, or threatening, it was clearly calculated and obviously intended to reflect injuriously on the character and conduct of the person named. It was an offer of reward in prominent characters for the kidnapping and return of Mr. Taylor to the Kentucky authorities. The common understanding of men has its place in law as in the other affairs of life and according

to it the accused plainly asserted that Mr. Taylor was charged with crime, and was a fugitive from the justice of the state of Kentucky. It needs no discussion to show that such a charge is calculated to reflect injuriously upon one's character and conduct. And, as a prosecution under the statute does not proceed as one for libel, it is immaterial whether the objectionable language be true or false, or whether the accused was actuated by public spirit or private malice. The exterior surface of mail matter is not a lawful place for its publication. Were this not so, then every one might with equal right bulletin upon the outside of his letters, etc., deposited in the mails such charges as "Mrs. A. is wanted by the customs officers of New York," or "Mr. B. has so far eluded the authorities of Illinois," and so on. Such a practice would be intolerable. Again, an injurious reflection on the character and conduct of Mr. Taylor naturally and necessarily followed from the indorsement on the envelope. It was an obvious, unavoidable consequence, and the accused is presumed to have intended it. It does not appear that the accused was a public officer charged with the enforcement of the laws and acting in the performance of his official duties. Nor were the words on the envelope designed to inform or assist the postal officials in the discharge of their functions. They had no relation whatever to the transmission of the envelope and contents through the mails or their return to the sender if not delivered to the person addressed, nor to the business of the accused and its permissible advertisement. The indorsement was entirely foreign to the customary matter on envelopes, wrappers, etc., and nothing appears to deny or contradict the intention palpably evidenced by its context and manner of display. If there was an undisclosed and admissible purpose in the mind of the accused, as was argued at the hearing, an unlawful method was adopted to accomplish it.

The judgment is affirmed.

ERIE R. CO. v. RUSSELL

(Circuit Court of Appeals; Second Circuit. December 2, 1910.)

No. 62.

L. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION—CARS BEING "USED."

Under the safety appliance act of March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), which makes it unlawful for any railroad company engaged in interstate commerce to haul or permit to be hauled or used on its lines, any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), which provides that the provisions of the original and amendatory acts relating to couplers, etc., shall be held to apply to all cars used on any railroad engaged in interstate commerce, a car with a defective coupler, billed for the repair shop, but which was not sent there but was left on a track in ordinary use in a switch yard, to be repaired by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

switchmen and then coupled to other cars, was being "used," within the meaning of the statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7228-7237; vol. 8, p. 7825.

Duty of railroad companies to furnish safe appliances, see note to 37 C. C. A. 8.]

2. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CARS "USED" IN INTERSTATE COMMERCE.

A car with a defective coupler which, although empty, was brought into a station in an interstate train, left in the switch yards over night, and the next day taken out in another interstate train, was being used in interstate commerce within the meaning of the safety appliance act of March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), not only while being moved in the trains, but also while in the yards.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

3. MASTER AND SERVANT (§§ 285, 289*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—PROXIMATE CAUSE OF INJURY.

Plaintiff's intestate, who was a switchman employed by defendant railroad company in its yards, while engaged in repairing a defective coupler on a car standing on a switch track, was caught between such car and others which moved against it, and killed. *Held*, in an action to recover for his death, that the question whether the defective coupler was a proximate cause of his injury, so as to bring the case within the safety appliance act of March 2, 1893, c. 196, § 8, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3176), was properly submitted to the jury, as was also the question of the contributory negligence of deceased under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1016, 1089; Dec. Dig. §§ 285, 289.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Blanche Russell, administratrix of the estate of Harry Russell, deceased, against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Writ of error to review a judgment in favor of the plaintiff in an action to recover damages for injuries resulting in the death of the plaintiff's intestate, Harry Russell, while employed by the defendant railroad company. There was evidence in the case sufficient to warrant the jury in finding the following facts which are especially relevant to the questions considered in the opinion:

The defendant railroad company is engaged in interstate commerce and owns a railroad extending from Port Jervis, N. Y., to Newburgh, N. Y., and also running into other states. Port Jervis is two or three miles east of the state line between New York and Pennsylvania. The defendant operates a local freight train between Newburgh and Port Jervis which, when running westerly, carries freight to stations on the road and picks up freight going to all points west, including points in other states. On the easterly trip western freight is carried to local points, and local freight is picked up for eastern points. On the afternoon of June 21, 1907, the car in question in this case was brought into Port Jervis in this train billed to the repair shops there. It had a defective coupler, the knuckle being gone. It was empty, and had been picked up at Greycourt, a station between Port Jervis and Newburgh. This train on said day carried freight going west of Port Jervis and to different states, and one of the cars bore the initials of the Boston & Maine Railroad. There was another car in the train which was also in a crippled

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

condition. The train, including the crippled cars, was left standing on a switch in the Port Jervis freight yard. Russell, the plaintiff's intestate, was one of the night switching crew in the yard. On this afternoon this crew had begun work drilling out and switching the cars from the different trains which had come into the yard from east and west. Before supper three cars had been placed on the No. 6 switch in the yard and left standing there. This switch had a slight grade. After supper the switching crew continued work and after some time ran the car in question attached to other cars upon said No. 6 switch. The intention of the switching crew was to repair the defective coupler and after repairing it to couple the train containing this car to the three cars aforesaid which had previously been left upon the switch. In backing up the train this car came in contact with the other three cars but was subsequently pulled away from them some five or six feet. The switching crew then started to look for a knuckle with which to repair the defective coupler. Knuckles were kept in various places in the yard, and the switchmen were accustomed to replace those found missing. Russell, the plaintiff's intestate, was the first to find one, and he went in between the cars and attempted to adjust it in the coupling apparatus, but the pin would not fit and one of the other men went to look for another pin. Russell was holding the knuckle in place with his back to said three standing cars when, without any apparent cause, they moved silently down and caught and crushed him, inflicting the injuries from which he died. The car in question was taken the next day on the easterly trip of said local freight train and hauled to Goshen, N. Y.

F. B. Jennings, for plaintiff in error.

George A. Clement, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The first question in the case is whether the acts of the defendant constituted a violation of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), the relevant sections of which are printed in the footnote.¹

The first phase of this question is whether the car with the defective coupler was, at the time of the accident, in use within the meaning of the amended act. It is pointed out that the car was not being hauled at the time of the accident, but was standing upon a switch track for the insertion of the knuckle in the coupling apparatus, and it is contended that it was not then being used within the contemplation of the statute. We think upon the authority of *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, that this contention is not well founded. The car with the defective coupler was not withdrawn from use. Although billed to the repair shop it was

¹ Act of 1893, § 2: "That * * * it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Amendment of 1903, § 1: "* * * The provisions of * * * [the safety appliance act] * * * shall apply in all cases, whether or not the couplers brought together are of the same kind, mark or type and the provisions and requirements hereof and of said act relating to train brakes, automatic couplers, grabirons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce. * * *"

not sent there, nor was it sent to any place used especially for making repairs. The insertion of the knuckle was a simple matter. The car was stopped only temporarily, and it was intended to couple it to the other cars as soon as repaired. These facts seem clearly to distinguish this case from those cases cited in the defendant's brief where accidents occurred when cars had been sent to repair shops or placed upon dead tracks used for repair purposes.

The second phase of the question of the application of the act is whether the car at the time of the accident was employed in interstate commerce. The car itself does not appear to have been used in any interstate business at the time in question. It was hauled empty from a New York point to Port Jervis in the same state, and the following day in like condition was hauled to another New York point. But the test of the application of the statute is the train rather than the car and we are of the opinion that there was evidence warranting a finding that the train in which this car moved into Port Jervis included other cars loaded with interstate shipments, and that the train in which it moved out of Port Jervis was of a similar character. Upon these facts it is held that the safety appliance act applies. *U. S. v. International, etc., R. Co.*, 174 Fed. 638, 98 C. C. A. 392; *Chicago, etc., R. Co. v. U. S.*, 165 Fed. 423, 91 C. C. A. 373, 20 L. R. A. (N. S.) 473; *U. S. v. Wheeling, etc., R. Co. (D. C.)* 167 Fed. 198; *U. S. v. Erie R. R. Co. (D. C.)* 166 Fed. 352. The fact that the accident occurred during switching operations, and not during either the regular western or eastern movement of the freight train, does not affect the application of the statute. *Johnson v. Southern Pacific Co.*, *supra*; *Wabash R. Co. v. U. S.*, 168 Fed. 1, 93 C. C. A. 393. Certainly if the car came into Port Jervis in the afternoon in an interstate train, and moved out of Port Jervis the next morning in another interstate train, the character of its use was not changed during the switching operations at night. *Rosney v. Erie R. Co.*, 135 Fed. 311, 68 C. C. A. 155, is distinguished from the fact that in that case there was no proof of use in interstate commerce.

The second question of importance in the case is whether the trial court properly submitted to the jury the question whether the presence of the defective coupler was a proximate cause of the accident. It is urged with much force that that which caused the injury to the plaintiff's intestate was the unexpected movement of the three cars—an act unrelated to, and independent of, the act of repairing the coupler. Indeed, were the question to be decided free of authority, a majority of the court would have difficulty in holding that the repair of the coupler was a part of a coupling operation, and bore such a relation to the impact of the cars that the necessity for such repairs was an efficient cause of the accident. But still the reason why Russell went to the place where he was injured was the defective coupler, and if he had not gone there the accident would not have occurred. Moreover, it appears that it was intended to couple the car with the defective coupler to the standing cars as soon as the coupler should be repaired. This being true, and in view of the desirability of uniformity in the decisions of the courts of the different circuits in interpret-

ing this act, we feel it our duty to follow the decision of the Circuit Court of Appeals for the Eighth Circuit in Chicago, etc., *R. Co. v. Voelker*, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264. The facts in that case are very similar to those appearing here. The person injured went upon the track to adjust a defective coupler in a car when, without warning, another car was shoved down upon him, inflicting the injuries complained of. It was held that the defective coupler was a proximate cause of the accident. In *Chicago Junction R. Co. v. King*, 169 Fed. 372, 94 C. C. A. 652, the facts even more closely resembled those appearing here, and a judgment for a person injured by reason of a defective coupler was affirmed, although the question of proximate cause does not appear to have been particularly considered. See, also, the decision of this court in *Donegan v. Baltimore, etc., R. Co.*, 165 Fed. 869, 91 C. C. A. 555.

The third question in the case is whether the plaintiff's intestate was, as a matter of law, guilty of contributory negligence. An affirmative answer to this question requires the assumption that the cars which moved down and against Russell moved because he had failed in his duty to brake or block them. But this assumption cannot be made. The cars may have been properly blocked and the blocks loosened by the impact with the car in question shortly before the accident. The question of contributory negligence was one for the jury.

The remaining questions raised by the defendant disclose no prejudicial error.

The judgment of the Circuit Court is affirmed.

UNITED STATES, to Use of GIBSON LUMBER CO., v. BOOMER et al.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1910.)

No. 3,306.

1. LIMITATION OF ACTIONS (§ 130*)—NEW ACTION—ACTION ON CONTRACTOR'S BOND—JURISDICTION.

Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), requiring contractors for government work to give bonds, and giving persons furnishing labor or materials a right of action on the bond to recover therefor, expressly requires such action to be brought "in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed * * * and not elsewhere," and that it shall be commenced "within one year after the performance and settlement of said contract and not later." *Held*, that the jurisdiction of such court to enforce the remedy given is exclusive, and that the commencement of an action on such a bond in a state court of Colorado, which was afterward dismissed, did not extend the time for bringing a new action in the federal court by virtue of Mills' Ann. St. Colo. § 2917, which in certain cases of dismissal permits a new action to be brought within one year thereafter.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 130.*]

2. COURTS (§ 375*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

It is only where the Constitution, treaties, or statutes of the United States do not otherwise require or provide that the laws of the several states are to be taken as rules of decision in trials at common law in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

the federal courts in cases where they apply, under Rev. St. § 721 (U. S. Comp. St. 1901, p. 591); and where a statute of the United States giving a remedy imposes a limitation on an action thereunder, the statute of limitations of the states have no application.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 375.*

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

In Error to the Circuit Court of the United States for the District of Colorado.

Action at law by the United States, for the use of the Gibson Lumber Company, against L. E. Boomer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Allen M. Lambright, for plaintiff in error.

H. L. Lubers and C. E. Sydner, for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. This action was commenced to recover the sum of \$439.35 from defendants in error as principal and sureties upon a bond given by them to the United States in order to secure the faithful performance of a contract made between the United States and L. E. and E. R. Boomer for furnishing labor and materials for the construction and completion of additions to officers' quarters at the New Ft. Lyon Naval Hospital grounds at New Ft. Lyon, Colo., and dated June 30, 1907. The bond was given and conditioned in accordance with the requirements of Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948). There was a demurrer to the complaint, which was sustained, and, plaintiff in error electing to stand upon the complaint, a final judgment dismissing the action was entered.

One of the grounds of the demurrer was that it appeared from the complaint that the action had not been commenced within one year after the performance and final settlement of the contract above mentioned. The law which authorizes the present action, so far as is material to the questions raised on this record, reads as follows:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It appears from the complaint in this action that it was not commenced within one year after the performance and final settlement of the contract between L. E. and E. R. Boomer and the United States, and therefore not within the time fixed by law above quoted. It does appear from the complaint that a similar action was commenced April 4, 1908, in the district court of Colorado in and for the county of Bent, which was within the time provided by law. This last-mentioned action was dismissed by the state court April 13, 1909. The present action was commenced June 19, 1909.

Section 2917, vol. 2, Mills' Ann. St. Colo. provides as follows:

"If in any action duly commenced within the time herein limited, and allowed therefor, the process shall fail of a sufficient service or return, by any unavoidable accident or by any default or neglect of the officer to whom it was committed, or if the process shall be abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form, or if, after the verdict for plaintiff, the judgment shall be reversed on writ of error the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein."

Section 721, Rev. St. U. S. (U. S. Comp. St. 1901, p. 581), which is familiar law, reads as follows:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It is contended by plaintiff in error: First, that chapter 778, 33 Stat. 811, herein quoted, does not limit the right of action thereby conferred to the United States Circuit Court for the District of Colorado; second, that the commencement of the action in the district Court of Colorado in and for the county of Bent was a compliance with the conditions imposed by the law giving the right of action; third, that section 2917, vol. 2, Mills' Ann. St., herein quoted, permitted the commencement of a new action within one year after the dismissal of the action in the state court.

We do not stop to discuss the question as to whether the cause or causes for the dismissal of the action in the district court for Bent county would bring plaintiffs in error within the provisions of the state statute, for we are satisfied that it has no application to the case at bar. We think the first contention of plaintiff in error is unsound. Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), is an amendment of Act Aug. 13, 1894, c. 280, 28 Stat. 278, (U. S. Comp. St. 1901, p. 2523), and one purpose of its enactment was to settle disputed questions which had arisen under the former law. It had been held under chapter 280, 28 Stat. 278, that the action therein provided for could be brought in a state or federal court, and that when brought in the federal court the amount in controversy must be over \$2,000, exclusive of interest and costs. *United States, to the Use of Edward Hines Lumber Company, v. Henderlong et al.* (C. C.) 102 Fed. 2. It had also been held under the same law that the action therein provided for could not be brought in any other district than the one of which the defendant was an inhabitant.

United States, to the Use of Brady et al., v. O'Brien et al. (C. C.) 120 Fed. 446. In *United States Fidelity & Guaranty Company v. United States, to the Use of Kenyon*, 204 U. S. 349, 27 Sup. Ct. 381, 51 L. Ed. 516, it was held that in the action provided by the former law, the United States was the real party in interest, and that the United States Circuit Court had jurisdiction without regard to the value of the matter in dispute. The case of *Davidson Bros. Marble Company v. U. S. ex rel. Gibson*, 213 U. S. 10, 29 Sup. Ct. 324, 53 L. Ed. 675, was an action brought under the former law in the United States Circuit Court for the Northern District of California, against the Marble Company, a citizen of Illinois. Justice Moody, in delivering the opinion of the court, said:

"The decision of the court below proceeds upon the erroneous assumption that Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), was retrospective. That act amended the act of 1894, in several important particulars, which it is not necessary to state, and provided specifically that a suit upon the bond should be brought by one furnishing labor and materials, in the name of the United States, in the Circuit Court of the United States, in the district where the contract with the United States was to be performed, and not elsewhere. As this suit was brought after the passage of the amending act, it was brought in the only district where it could be maintained if the amending act were retrospective."

In the cases of *Hill v. American Surety Company*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, and *United States Fidelity & Guaranty Company v. United States, to the Use and Benefit of Struthers Wells Company*, 209 U. S. 307, 28 Sup. Ct. 537, 52 L. Ed. 804, it was assumed that chapter 778, 33 Stat. 811, herein quoted, limited the right to sue to the United States Circuit Court of the district where the contract was to be performed. It is very evident to us that the purpose of the amendment contained in the later law was to fix definitely where the action provided for therein should be brought, and we think Congress in express terms has limited the right to bring the action to the United States Circuit Court of the district where the contract is to be performed and executed. We also think that the Supreme Court expressly so decided in *Davidson Bros. Marble Company v. United States ex rel. Gibson*, *supra*. It results from this view of the law that the action commenced in the district court of Bent county was in no sense a compliance with the terms of the statute which created the right of action.

Plaintiff in error further contends that if the law be as above stated that it is entitled to invoke the provisions of Section 2917, vol. 2, *Mills' Ann. St. Colo.*, by reason of section 721, Rev. St. U. S., above quoted. As we have before stated, we do not think the law of Colorado applies in this case, first, because for reasons hereinbefore stated there was no action duly commenced within the time limited by law within the meaning of chapter 778, 33 Stat. 811, and, second, because, when the United States have enacted a statute of limitation as to a cause of action created by them, there is no room for the application of a statute of limitation prescribed by another sovereignty. It is only where the Constitution, treaties, and statutes of the United States do not otherwise require or provide that the laws of the several states

shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. In *Hawkins et al. v. Barney's Lessee*, 5 Pet. 457, 8 L. Ed. 190, it was said:

"It is not to be questioned that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country. They are laws for the administering justice—one of the most sacred and important sovereign rights and duties—and a restriction which must materially affect both legislative and judicial independence."

The fixing of a period of one year in chapter 778, 33 Stat. 811, within which the action created by that statute should be commenced, was an exercise of the sovereign power of the United States, and may not be repealed or modified by state legislation. It is true that the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states and give them the same construction and effect which are given by the local tribunals. But in the case at bar Congress chose to enact its own statute of limitation, and hence section 721, Rev. St. U. S. does not apply. We are also of the opinion that the limitation prescribed by chapter 778, 33 Stat. 811, is not merely a limitation on the remedy but on the liability itself. The statute created a new legal liability, with a right to a suit for its enforcement, provided the suit was brought within one year after the performance and final settlement of the contract and not later. The time within which the suit must be brought operates as a limitation of the liability itself, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitation of the remedy is therefore to be treated as a limitation of the right. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358.

The judgment of the Circuit Court was for the right party, and should be affirmed; and it is so ordered.

UNITED STATES, to Use of TOM J. GARDNER LUMBER CO., v. BOOMER
et al.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1910.)

No. 3,305.

In Error to the Circuit Court of the United States for the District of Colorado.

Action at law by the United States, for the use of the Tom J. Gardner Lumber Company, against L. E. Boomer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Allen M. Lambright, for plaintiff in error.

H. L. Lubers and C. E. Sydnor, for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. The judgment of the United States Circuit Court for the District of Colorado in this case is affirmed, for reasons stated in the opinion of the court filed in No. 3,306, *United States, for the Use of the Gibson Lumber Company, v. L. E. Boomer et al.*, 183 Fed. 726.

THE FORT GEORGE.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 74.

1. TOWAGE (§ 4*)—RELATION OF TUG AND TOW—RIGHT OF TUG TO DIRECT MOVEMENTS.

In the absence of an agreement to the contrary, a tug which supplies the motive power to her tow is the dominant mind, and the tow is required to follow directions from the tug.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. COLLISION (§ 71*)—NAVIGATION OF RIVER—TOW^W AND ANCHORED DREDGE—FAULT OF TUG.

The barque Fort George, in tow of the tug Smith, passing down the Delaware river in the daytime at the last of the ebb tide, came into collision with one of three dredges anchored in a line up and down the river, near the middle, and engaged in deepening the channel. In the condition of the tide the barque had only six inches of water under her, and for that reason would not answer her helm, and sheered against the dredge. *Held*, that the fault was solely that of the tug, which was bound to know of the danger, and should have waited for the rising of the tide; that the tow had the right to assume that the tug was able to perform safely the duty she had undertaken, and was not in fault for allowing her to proceed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Maryland Dredging & Contracting Company, as owner of the dredge Vim, against Frank L. Neall, trustee, owner of the tug Sommers N. Smith, and the barque Fort George for collision. Decree (172 Fed. 1008) against both vessels, and claimants appeal. Affirmed as to the Smith; reversed as to the Fort George.

W. S. Montgomery and Roderick Terry, Jr., for the Sommers N. Smith.

Frederick M. Brown, for the Fort George.

Harry N. Abercrombie, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The facts are fully stated in the opinion of the District Judge and need not be repeated here. He found the Smith liable for towing the Fort George, which drew 22 feet, into water only 22½ feet deep. With but 6 inches between her keel and the bottom of the river, she refused to answer her helm and collided with the Vim which was anchored near the center of the river, engaged in deepening the channel. The tendency of vessels to steer badly, in such circumstances, is well known and the Smith was found at fault for proceeding in so dangerous a locality when all danger from bad steering would have been averted had she waited for the rising of the tide. We are in entire accord with this ruling. The tug knew or should have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

known every danger to be encountered in the navigation of the Delaware river. Her master was required to know the depth of the channel, the rise and fall of the tide, the dredging operations at Deep Water Range, the location of the three dredges there and all the usual dangers to be encountered from Philadelphia to the breakwater. It was for the master of the tug to decide whether he could take the barque to her destination in safety; if he could not do so, or if there were risk in the undertaking, he should not have attempted it. If the situation at Deep Water Range made the trip unusually hazardous—and the presence of the three dredges anchored near the center of the river, together with the shallow water existing there, unquestionably had that effect—he should have waited for the flood tide or procured the services of another tug to assist him. Clearly the Smith was negligent in permitting the barque to collide with the Vim, which was at anchor and helpless. After condemning the tug the District Judge says:

"The situation was also known to the barque. Her pilot was aware that the dredges were lying in the channel, of the state of the tide and the draft of the barque. It was evidently the duty of the pilot on board of the barque, or of her master, to warn the tug of the facts and that it was not safe to proceed. In allowing the tug to go on, the barque participated in the risk and must bear a part of the consequences."

These faults are not charged against the barque in the pleadings, but, assuming that they are, we are unable to concur in the conclusions reached by the judge. The rule thus enunciated imposes too severe obligations upon the tow and makes her responsible for the failure to perform duties which the law places upon the tug. It is obvious that the expedition down the river could not have been taken under the joint command of the masters of the tug and the pilot of the barque. There can be no divided responsibility in such cases. Conference, discussion and agreement as to what course to pursue when danger threatens, between two vessels separated by a 70-fathom hawser, is out of the question. Some one must be in command. We understand the rule to be, in the absence of an agreement to the contrary, that when the tug supplies the motive power she becomes the dominant mind, and the tow is required to follow directions from the tug. An absurd situation would have been created had the pilot of the barque attempted to guide the tug down the winding channel of the Delaware river to the breakwater. It is probable that no sane tug master would accept a service so commanded, but if he had done so, it is more than likely that disaster would have occurred much sooner than it did. The employment of a pilot familiar with the navigation of the Delaware river to assist in steering was a wise precaution for the barque to take, as she was on a long hawser, and he would unquestionably know of eddies, shoals and cross-currents of which an ocean helmsman would be entirely ignorant. If the rule be established that a pilot so employed becomes the directing mind of both vessels and that it is his duty to stop the tug when in his judgment it is unwise for her to proceed, it is probable that such precautions as the barque took in order to insure safe steering will be seldom taken in the future, unless compelled by law. There was nothing to indicate to those on the barque that there was any special danger to be encountered in passing the dredges. They

did not know how much power the tug could exert in case any difficulty in steering was encountered. For aught that appeared to the contrary, the barque was justified in thinking that the tug felt herself fully able to cope with the situation, even if the barque "sucked the bottom." Those on the barque had a right to assume that the tug knew her own business and would pass the dredges safely.

The other faults alleged against the barque have not been established. After the tug cut the hawser she was helplessly adrift and did all that was possible to avoid the collision. She was justified in not dropping her anchor; first, because it was too late, and, second, because, in the shallow water, it might have torn a hole in her bottom. It follows that the decree must be affirmed as to the Sommers N. Smith and reversed as to the Fort George with costs, and the cause is remanded to the District Court with instructions to enter a decree against the Sommers N. Smith with costs.

In re CATTUS.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 42.

BANKRUPTCY (§ 140*)—PROPERTY PURCHASED BY BANKRUPT—TRANSFER OF BILLS OF LADING AS SECURITY FOR ADVANCES—TRUST RECEIPTS.

A bankrupt, desiring to import goods, obtained credit from a foreign bank against which he drew for the price to the order of the seller. The draft with bill of lading indorsed in blank or to the order of the bank was forwarded by the seller and accepted payable a certain time after sight. The bank then forwarded the bill of lading indorsed in blank to its agent in New York, who delivered the same to the importer, who signed trust receipts, agreeing to sell the goods for the account of the bank and pay it the proceeds to put it in funds to take up the acceptance at maturity; the receipts reciting that the bankrupt had received from the bank described merchandise which he agreed to hold in trust for the bank as its property with liberty to sell the same, and to pay over the proceeds as soon as received as security for any and all indebtedness of the bankrupt, and, in case the goods were not sold, to insure for the bank's benefit, authorizing it at any time to terminate the trust and recover possession of the goods or the proceeds, and that in case of insolvency all obligations should mature without demand. *Held*, that such trust receipts were effective except as against bona fide purchasers for value, or creditors protected by statute, to retain title to the goods in the bank enforceable against the bankrupt's trustee for the amount of the purchase price.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. § 140.*]

Petition to Revise an Order of the District Court of the United States for the Southern District of New York.

In the matter of John V. A. Cattus, bankrupt. Petition by James H. Hickey, as trustee, to revise an order confirming a report of a special master in reclamation proceedings awarding certain goods and the proceeds thereof to the London & Hanseatic Bank, Limited. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hastings & Gleason (Mervyn MacKenzie, of counsel), for petitioner.
G. A. Strong, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a petition of a trustee in bankruptcy to revise an order of the District Court confirming the report of the special master in reclamation proceedings awarding to the London & Hanseatic Bank, Limited, certain goods and proceeds of certain goods now in the hands of the trustee, covered by trust receipts given it by the bankrupt, Cattus, and authorizing the bank to sell certain other goods covered by bills of lading in its hands and to apply the proceeds to repayment of advances made by it on account of the bankrupt. The course of dealing between the bank and the bankrupt is according to commercial usage of long standing, under which by a loan of credit a vast amount of business is rapidly and safely done. The particular steps of the method followed are not always the same, but the substantial feature which makes the banker the owner of the goods until the purchase price of them advanced by him is paid is always present. One common method, which seems to have been adopted in this case, is as follows: A merchant who wishes to import goods for which he has not funds to pay obtains credit from a bank to a fixed amount, against which he draws for the price of the goods to the order of the vendor or the vendor draws for the price to his own order. The draft with bill of lading indorsed in blank or to the order of the bank is forwarded by the vendor to the banker for acceptance. The banker accepts the draft payable in one, two, three, or four months, as the case may be, forwards the bill of lading indorsed in blank to his agent in New York, who delivers the same to the importer against a receipt called a trust receipt, whereby he agrees to sell the goods for account of the banker, to pay him the proceeds and so put him in funds to take up the acceptance at maturity.

In this case the bank had accepted drafts to the amount of some £5,000, had delivered the bills of lading for most of the goods to Cattus against his trust receipts before his adjudication as a bankrupt, and still has in its hands bills of lading for other goods not so delivered.

The form of the trust receipt in this case is as follows:

"New York,, 190..

"Received from through their representatives Messrs. G. Amsinck & Co., of New York, the following goods and merchandise, their property, specified in the bill of lading per shipped by under credit No. and in consideration thereof, we hereby agree to hold said goods in trust for the above named bankers, and as their property, with liberty to sell the same for their account, and in case of sale to give Messrs. G. Amsinck & Co. the name of the buyers, and to hand them the avails, as soon as received, as security for due provision for the acceptance of the said bankers, on our account, noted at foot; and we further pledge to them said goods and the proceeds of such as security for the payment of any and every other indebtedness of ours to the aforesaid bankers, whether matured or unmatured according to its terms. In case the above mentioned goods are not sold we agree to store and fully insure the same, and hand the storage and insurance papers to Messrs. G. Amsinck & Co., of New York. It is also understood that of Messrs. G. Amsinck & Co., as their representatives, may at will cancel this trust at any time, and repossess themselves of their said prop-

erty in whatever condition it may then be, or of the proceeds of such of the same as may then have been sold, wherever the said goods or proceeds may then be found, and in the event of any insolvency, suspension, or failure, or assignment for benefit of creditors on our part, or of the non-fulfillment of any obligation, or of the non-payment, either at maturity or upon previous demand by the said Messrs. G. Amsinck & Co., of any acceptance made for us under said credit or any other credit issued by or G. Amsinck & Co., on our account, or of any indebtedness on our part to either of them, all obligations, acceptances, indebtedness and liabilities whatsoever shall thereupon (with or without notice) mature and become due and payable.

"We further agree to keep said property fully insured against fire, payable in case of loss to Messrs. G. Amsinck & Co., as representatives of said bankers, we to pay any expenses incurred thereon, the intention of this arrangement being to protect and preserve unimpaired their lien on said property as security for any and all obligations on our part then outstanding.

"£.....

"Due"

The structure of the instrument indicates that it has grown gradually, being altered to meet new exigencies, just as we find in many commercial documents like charter parties, masters' drafts, and riders on policies of fire and marine insurance in artistic and inconsistent provisions. This trust receipt contains clauses some of which describe the right of the banker in the goods as property or title and others as a lien. But the inconsistency is apparent rather than real, because, as Judge Hough pointed out in the court below, it admits easily of division into two parts: First, an acknowledgment that the bankers are owners until payment of the acceptance for the purchase price of the specific goods and thereafter they are lienors for any other balance of indebtedness due from the bankrupt, however arising. Inasmuch as the proceeds of all the goods as well as all the goods in specie now in the hands of the trustee and of the banker are insufficient to pay the acceptances for the price of the specific goods covered by the bills of lading attached to the acceptances, we need not consider the clauses of the trust receipt relating to liens for general indebtedness or determine whether such pledge or lien would be good against the trustee.

The purpose of the parties, describe the trust receipt as you will, was to keep the title to the goods in the bankers until their acceptances for the price of the goods were paid. The courts, without always defining exactly what the relation between the parties is or always defining it in the same way, still are astute to protect the rights of the banker in such case. *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Drexel v. Pease*, 133 N. Y. 129, 30 N. E. 732; *National Bank v. Rogers*, 166 N. Y. 380, 59 N. E. 922; *Moors v. Drury*, 186 Mass. 424, 71 N. E. 810; *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

It would be most inequitable that the bankrupt or his trustee should escape from the performance of this obligation for the benefit of any one except a bona fide purchaser for value or creditors protected by statute. Extended discussion of the authorities is not necessary. They are considered in the report of A. L. Everett, Esq., as special master, in the case of *Charavay & Bodvin v. York Silk Mfg. Co.* (C. C.) 170 Fed. 819.

The order is affirmed, with costs.

TRESCA v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 79.

1. CRIMINAL LAW (§ 422*)—EVIDENCE—STATEMENTS BY CODEFENDANTS.

Where two persons were jointly indicted for passing and uttering counterfeit money with intent to defraud, conversations between one of them and detectives in the employ of the United States, not in the presence of the other, were inadmissible against the absent defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984, 990; Dec. Dig. § 422.*]

Admission on joint trial of evidence competent only against one or part of defendants, see note to Sprinkle v. United States, 73 C. C. A. 295.]

2. COUNTERFEITING (§ 18*)—PASSING AND UTTERING COUNTERFEIT MONEY—KEEPING AND CONCEALING—EVIDENCE.

Evidence *held* insufficient to sustain a conviction of accused for passing and uttering counterfeit money with intent to defraud, or for keeping and concealing such money with intent to utter and pass the same, knowing it to be counterfeit.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 44, 45; Dec. Dig. § 18.*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Simone Tresca was convicted of passing and uttering a counterfeit \$5 note with intent to defraud, knowing the same to be counterfeit, and of keeping and concealing 10 counterfeit \$5 notes with intent to utter the same, knowing the same to be counterfeit, and he brings error. Reversed.

L. W. Thompson, for plaintiff in error.

L. R. Bick, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. One Canella and Simone Tresca were jointly indicted on two counts: First, for passing and uttering a counterfeit \$5 note with intent to defraud, knowing the same to be counterfeit; and, second, for keeping and concealing 10 counterfeit \$5 notes, with intent to utter and sell the same, knowing same to be counterfeit. The jury found both defendants guilty. Canella did not appeal.

There was evidence that one Costanza, an agent of the United States Secret Service, on July 8, 1909, had a conversation with Canella, who offered to sell him some counterfeit notes, which Costanza expressed a willingness to buy. An appointment was made for the next day; Canella stating that he was to get the counterfeit notes from a tailor in Greenpoint (Brooklyn). On the 9th Canella told witness that he had an appointment with this man for the 11th, a Sunday. On the 11th Costanza met Canella in a pool room, 206 Johnson avenue, and the latter told him that, being Sunday, the tailor shop was closed, so they might go some other day. The two next met on July 15th at the pool room and agreed for the purchase of 10 \$5 counterfeit notes, Costanza

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paying \$15 in good money, which had been furnished him by his superiors, and of which the various identifying marks and numbers had been carefully noted. It was agreed that the counterfeits should be delivered outside the Broadway Theater after the first act of an opera which was being sung there that evening. When he made this appointment, Canella stated that he expected to meet the tailor in the theater. Costanza and another Secret Service agent, Rubano, went to the theater, and before the act was over saw Simone Tresca sitting on the end seat of the orchestra in the last third line seat and Canella sitting or standing alongside of him. At the close of the act Canella came out, followed by two young men, turned over a package of 10 \$5 counterfeit notes and agreed to furnish \$50 more of the same. The next day Costanza called for Canella at the pool room, and, not finding him, left a message there for him. About 2 p. m. Canella came to witness' house, was asked to get \$50 more in counterfeits, and was given \$15 more in bills, the numbers of which had been noted. He then stated that the man who gave him the counterfeits had one of the best tailor shops in Brooklyn. Canella then left, and Costanza did not see him again until after his arrest.

During these two days Canella's movements were watched by the detectives. After his interview with Costanza on July 15th he went to 148 Noble street. At that place there are two shops side by side, with a partition between—one occupied by the plaintiff in error as a tailor shop; the other occupied by his brother, Anthony Tresca, as a shoemaker shop. Canella entered the shoemaker shop, and after remaining there a short while came out and went away. On July 16th a watch was kept on 148 Noble street. Canella arrived about 6:30 p. m. and entered. One of the detectives says he went into the tailor shop; the other, that he went into the shoemaker shop. He came out a little before 8 p. m., walked towards the corner, when he was arrested, brought to the tailor shop, and there searched. They found on him a roll of good money—seven \$1 and two \$2 bills, of which some, at least, were the marked bills. The record is much confused as to the number of marked bills thus found. Apparently no counterfeit bills were found either on Canella, or on the others, or on the premises. On Simone Tresca was found \$12 in good bills, of which one \$5 bill corresponded with the numbers which had been noted. The bills found on Canella were part of the \$15 given him on July 16th; the bill found on Tresca was part of the \$15 given to Canella on July 15th.

Rubano testified: That, upon his asking Canella if he had given Tresca any money, he stated that he had called there July 15th for a pair of pants, and again on July 16th to fit them, and that he had not paid Tresca one penny. Apparently this statement was not made in Tresca's presence. Also that, upon being asked, Tresca stated that he did not take any measurements, because he knew Canella and had his measurements. It was further testified that the following conversation took place between the arrested persons. Simone said to Toni: "Do not weep. They have got nothing on me. They can't do anything to us." Canella said: "I wish I was as sure as you two are." And later (to Simone): "Remember, they asked me if I gave you any money."

To which the latter replied: "Why, he took it." This was after the searching. Canella further said: "They saw we were together at the theater." To which Simone said: "They know that." The other agents corroborated Rubano's statement that Canella said he came to be measured for the pants and that he had not paid Tresca any money. It does not appear whether or not Tresca was present when Canella made this statement.

Simone Tresca testified in his own behalf: That about five months before he had made a suit of clothes for Canella out of cloth which the latter brought. It was not paid for when made, Canella promising to settle when he got some money. That on July 15th he came, said he would pay the next day, and ordered a pair of pants. The next day he came and gave defendant \$11.50.

Canella testified that Tresca had made him a suit of clothes in May, for which he did not pay until July 16th, when he gave Tresca \$11.50. The charge was \$12, but he paid only \$11.50, saying to Tresca that with the odd 50 cents they would buy some cigars to smoke.

During Costanza's examination counsel for defendant Tresca moved to strike out the testimony as to statements made by Canella to witness in relation to Tresca, the latter not being present when they were made, which motion was quite properly granted "so far as the defendant Tresca is concerned." This took out of the case all statements that he got the counterfeits from a tailor in Brooklyn. Subsequently, during Rubano's examination, the point being again raised, the court instructed the jury that "the statement of one of the defendants to one of the agents at that time is not evidence against the other defendant," which correctly states the law.

If, however, this rule is applied in marshaling the testimony on which the verdict was asked for, there will be found to be very little left. Disregarding entirely the testimony of both defendants, whom the jury evidently discredited, all that remains is that on the evening of July 15th, at the Broadway Theater, the opera being "Rigoletto" and many Italians present, Canella was seen sitting or standing next to Tresca for a part of one act; that Canella went to Tresca's tailor shop the next afternoon; and that, Tresca being thereupon seized and searched, there was found on him a single marked \$5 bill, which had been given to Canella the day before in exchange for a batch of counterfeit money. No other marked bills, no counterfeit money, was found on Tresca's person or on his premises, nor on his brother's person or premises. Three witnesses testified to his good reputation.

Upon this record we are of the opinion that the government has not shown enough to entitle it to go to the jury on the proposition, either that Tresca uttered a counterfeit \$5 note, or had had 10 counterfeit \$5 notes in his possession with intent to utter the same. There was error, therefore, in the denial of the motion to discharge him on the ground that there was no evidence to connect him with a crime.

O'HARA V. CENTRAL R. CO. OF NEW JERSEY.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 95.

1. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In the federal courts, contributory negligence is an affirmative defense, the burden of establishing which rests on defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 229; Dec. Dig. § 122.*]

2. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—PROOF.

Where the undisputed facts in a negligence case might reasonably support an inference concerning the injured person's conduct, which would leave it doubtful whether he was or was not negligent, whether the defense of contributory negligence is proved is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 291, 296; Dec. Dig. § 136.*]

3. RAILROADS (§ 350*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Decedent, while attempting to cross a railroad track at a private crossing, early on a foggy morning, was struck and killed by an approaching train. She looked before crossing the track in both directions at a time when she could easily have avoided the approaching peril, and could have seen the train 150 feet away. At their relative speeds the train advanced 35 feet while she advanced at least 3, and during the four seconds required for the train to reach the crossing she would have advanced 12 feet and been safely beyond the track. There was also evidence that no bell or whistle was sounded, giving earlier warning of the approach of the train. *Held* that, since something might have happened which delayed her course across the track after seeing the train, she was not necessarily negligent as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166, 1169-1173; Dec. Dig. § 350.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Dennis O'Hara, administrator, etc., of the estate of Rose O'Hara, deceased, against the Central Railroad Company of New Jersey, for wrongful death. From a judgment for defendant, plaintiff brings error. Reversed.

M. S. Bevins, for plaintiff in error.

H. L. De Forest, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The decedent was struck by a train on defendant's railroad at a private crossing near the residence of a Mr. Fleitman, near Seabright, N. J. His house was on the easterly side of the railroad track, and his stable and cottages for his servants on the westerly side. The railroad runs about north and south, and there are two tracks. The tracks are straight, there are no obstructions to the vision, and trains can be seen for a long distance in both directions. At the time of the accident there was no other train or engine

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at or near the crossing, and no vehicles on the crossroad, nor anything apparently to divert or distract the attention of decedent. She had been a laundress in the Fleitman household for some months and was entirely familiar with the locality. On September 14, 1908, about 7 a. m., she came out of the stable above which was her room, walked north along a pathway which runs parallel with the railroad for about 75 feet, then turned east on the driveway crossing to proceed to the house, and when upon the north-bound (easterly) track was struck by a train and killed.

The plaintiff gave testimony showing these facts and others herein-after set forth. He also proved that it was a foggy morning; that it was customary on foggy days for trains to ring a bell and blow a whistle as they approached Fleitman's Crossing; that this train, on that morning, did neither. At the close of plaintiff's case, motion was made to dismiss the complaint, which was granted, on the ground that "deceased was already proved to have been guilty of contributory negligence as matter of law."

In the state courts it is incumbent on the plaintiff, in actions of this kind, to satisfy the jury as part of his case that the person injured was free from contributory negligence. Evidence to establish this proposition is not always direct. The exercise of proper care may be inferred from facts showing what occurred, even though death or other cause may prevent the introduction of any proof as to the mental processes of the person injured.

In the federal courts contributory negligence is an affirmative defense. The burden of establishing it rests on the defendant. This rule does not require defendant to establish contributory negligence by witnesses whom defendant calls to the stand. If the plaintiff's own witnesses testify to undisputed facts from which that inference must be drawn, defendant may rest on their testimony and ask for a dismissal; but if the undisputed facts might reasonably support an inference as to the injured person's conduct which would leave it doubtful whether he was or was not negligent, the question whether or not the defense is proved will be one for the jury to determine.

The narrative of what took place is given by the single eyewitness, Voorhees, the man in charge of Mr. Fleitman's country place. He was mowing a lawn in front of the stable over which Rose O'Hara's room was. The stable was between him and north-bound trains. The morning was so foggy one could not see over 150 feet. Decedent came out of the house, they exchanged a few words, and he continued with his occupation. He looked towards her as she was going on the west track, and saw that she was looking towards Seabright, the direction from which trains on that track would come. The crossing place was about 120 feet from where the witness stood. He looked away from her attending to his work, when he saw a north-bound train clearing the stable, and he turned around and again looked towards her. She was then on the east (north-bound) track looking towards the approaching train, and he thought two steps would take her over. She seemed to be hurrying to get across. He looked away again, and did not see the train actually strike her; but when he did look the train

had passed her, and she was "rolling—the last roll"—120 feet beyond the crossing. The train was going about 35 miles an hour.

Here we have it established by positive proof that she did what the law imperatively required her to do. She looked before crossing the railroad track in both directions from which danger was to be apprehended. Moreover, she looked at a time when she could easily avoid the approaching peril, because, looking, she could see its approach when it was 150 feet away. At their relative speeds the train advanced 35 feet while she advanced at least 3, and during the four seconds required for the train to reach the crossing she would have advanced 12 feet and been in safety beyond the track. It cannot be held as matter of law that, no bell or whistle giving any earlier warning, a person is guilty of contributory negligence who, just stepping on a track, sees through fog a train approaching 150 feet away, and hurries on, calculating that within the time necessary for it to travel that space she can take the three steps necessary to place her beyond the track. Especially so when the only alternative is to turn back and cross another track, also obscured by fog, which, although safe when she had crossed it, may have become dangerous by the approach of another train out of the obscuring fog, into which, in that direction, she had not been peering. We do not understand that defendant contends that she was negligent in not turning back. Its proposition is that she did not carefully look towards the south; that although she turned her head that way, as Voorhees testifies, she looked without seeing what was visible; that if the nerves carried notice of the impending danger from the eyes to the brain the warning was unheeded. Authorities are cited in support of the proposition that the duty of a traveler in crossing a railroad track, to look and listen, must be performed by doing those things which will make its performance reasonably effective, which is a correct proposition. The theory is that, receiving warning while she was looking south, she failed to avoid the danger, because she did not heed the warning.

The difficulty with this theory is that it discards other inferences from the testimony, which would relieve the decedent from fault. The facts, so far as we have them, are entirely consistent with another theory. Decedent, although not warned by bell or whistle, which past experience indicated was to be expected in a fog, looked carefully towards the south for an approaching train, and saw one 150 feet away just as she was stepping on the track. Three steps more, for which there was ample time, would have placed her in safety. She started to take them, quickening her pace; but at the very first step the heel of her shoe caught in some hole in the ballast of the track, or between the ballast and a tie, or her skirt caught on the projecting head of a spike, or she turned her ankle, the loss of equilibrium and intense pain bringing her to her knees, from which position, incumbered by her skirts, she could not rise in time to reach a place of safety. Now, it may be that, when there is some testimony as to what took place between the time when Voorhees looked away after seeing decedent watching the approach of the train till it struck her, these inferences as to what took place may be found to be without foundation. But

they are certainly not impossible, nor even unreasonable, and so long as the proved facts admit such inferences, we cannot find as matter of law that the defendant has established its defense of contributory negligence.

The judgment is reversed.

LOBOSCO v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 96.

1. ARMY AND NAVY (§ 40*)—MILITARY CLOTHING—SANCTION—TITLE.

Under Rev. St. §§ 1242, 3748 (U. S. Comp. St. 1901, pp. 876, 2527), prohibiting the purchase, sale, pledge, loan, or gift by a soldier of any of his clothing, arms, military outfit, and accouterments, the government in supplying the soldier or recruit with equipments suitable and necessary for the discharge of his military duties retains title to the same; it being regarded as public property, whether remaining in a public depot or in the possession of the individual soldier, and this notwithstanding the soldier is allowed to retain such articles of clothing as he has then in use on the expiration of his term of service.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 40.*]

2. ARMY AND NAVY (§ 40*)—EQUIPMENT—CLOTHING—SALE—OFFENSES—STATUTES—CONSTRUCTION.

Rev. St. §§ 1242, 3748 (U. S. Comp. St. 1901, pp. 876, 2527), prohibits the barter, sale, or exchange or purchase of the clothing, arms, military outfit, and accouterments of a soldier or sailor, and section 5438 (page 3674) declares that every person who knowingly purchases or receives in pledge for any obligation or indebtedness of any soldier, officer, or sailor or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, such person not having the lawful right to pledge or sell same, shall be imprisoned, etc. *Held*, that the offense denounced is committed if the person purchases clothing or equipment knowingly from a soldier or sailor employed in military service; the government not being required to show, in addition, that defendant had knowledge that the soldier or sailor selling the articles in question did not have the lawful right to do so.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 40.*]

3. ARMY AND NAVY (§ 40*)—PURCHASE OF EQUIPMENT—CLOTHING—CLOTHING ALLOWANCE.

Under Rev. St. § 5438 (U. S. Comp. St. 1901, p. 3674), making it an offense for any person to knowingly purchase or receive in pledge from a soldier or sailor any arms, equipment, ammunition, clothing, stores, or other public property, it is not material that the clothing purchased by accused from certain marines was not a part of their equipment, but was furnished to them under their clothing allowance.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 40.*]

4. CRIMINAL LAW (§ 370*)—EVIDENCE—OTHER OFFENSES—SCIENTER.

Since in a prosecution for knowingly purchasing clothing from certain marines in the government service, in alleged violation of Rev. St. § 5438 (U. S. Comp. St. 1901, p. 3674), prohibiting any person from knowingly making such purchases, etc., the government was required to prove guilty knowledge, evidence of the commission of other similar offenses by accused than those charged in the indictment was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825-829; Dec. Dig. § 370.*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Carmana Lobosco was convicted of knowingly purchasing and receiving certain uniform clothing of persons engaged in the marine service of the United States, and he brings error. Affirmed.

Thomas C. Whitlock, for plaintiff in error.

William J. Youngs, U. S. Atty. (W. P. Allen, Asst. U. S. Atty., of counsel).

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The section (Rev. St. § 5438 [U. S. Comp. St. 1901, p. 3674]) reads as follows:

"Every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor or other person, called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, such person not having lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one, or more than five years, or fined not less than one thousand, nor more than five thousand dollars."

The defendant kept a saloon on Flushing avenue about five or six blocks from the Brooklyn Navy Yard. The evidence warranted the jury in finding that on December 12, 1909, he purchased from Thomas Murphy, a marine in the naval service of the United States, a regular marine blanket with the letters "U. S. M. C." marked upon it, and on the next day purchased six khaki shirts, two from each of three other marines also in the naval service. These garments were the uniform shirts which form part of the equipment of a marine, and the blanket is also a regular part of such equipment, being considered an article of clothing. All these men were in uniform when defendant made his purchases. When a recruit for the marine corps arrives at the navy yard he is supplied with his equipment, which he is forbidden to part with during the period of his enlistment.

This prohibition is not merely a regulation of the articles of war. Congress has deemed it of sufficient importance to be the subject of two separate sections of the Revised Statutes. Section 1242 (page 876, U. S. Comp. St.) provides:

"The clothing, arms, military outfits and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned or given away; and the possession of any such property by any person not a soldier or officer of the United States shall be prima facie evidence of such sale, barter, exchange, pledge, loan or gift. Such property may be seized and taken from any person not a soldier or officer of the United States, by any officer, civil or military of the U. S., and shall, thereupon, be delivered to any quartermaster or other officer authorized to receive the same."

Under the title "Public Property," section 3748 (page 2527) provides:

"The clothes, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned or given away; and no person not a soldier, or duly authorized officer

of the United States, who has possession of any such clothes, arms, military outfits, or accouterments, so furnished, and which have been the subjects of any such sale, barter, exchange, pledge, loan or gift, shall have any right, title or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits or accouterments by any person not a soldier or officer of the United States shall be presumptive evidence of such sale, barter, exchange, pledge, loan or gift."

It seems entirely clear from these sections that in supplying the recruit with an equipment suitable and necessary for the discharge of his military duties the government has been very careful to retain title to the same. It would seem to be public property, whether it remains in depot or is put in the possession of the individual soldier. The circumstance that, when his term expires, he is allowed to retain such articles of clothing as he has then in use, does not change the character of his holding while he is in the service of the government. Three points are presented in appellant's brief.

First. It is contended that the court erred in failing to charge the jury that, in order to convict, it must be shown that defendant had knowledge that the soldier or sailor selling the article did not have the lawful right to sell the same. But the statute is not so phrased as to require such a construction. A person commits the offense when he purchases equipments knowingly from a soldier or sailor employed in the military service. It must be shown, of course, that defendant knew that what he bought was military equipment, and that the person he was purchasing from was a soldier or sailor employed in the military service. But, when that is shown, the offense of buying equipment from a soldier or sailor is made out, although defendant may show, if he can, that the particular article purchased was not issued to the soldier or sailor, but was otherwise acquired by him, and was an article which he had a right to sell, and to which the government had no claim. In the case at bar the court charged that, in order to convict, "you must consider whether the government has proved beyond reasonable doubt that the defendant knew that he was dealing with a man or men in active service, and that he knew that they were selling him a part of their equipment, and that it is also shown to you from the testimony that the articles in question had not been procured from any other source." We do not find any error in this charge, and do not find it at all in conflict with that in the authority cited by defendant (*U. S. v. Smith* [C. C.] 156 Fed. 860), where the jury was charged that, to warrant a verdict of guilty, it was necessary for the jury to find "that the evidence convinces beyond a reasonable doubt that this defendant did knowingly purchase or receive in pledge the blanket specified in the indictment from a person who was then in the service of the United States."

Second. It is assigned as error that the court did not dismiss the indictment on the ground that the goods purchased were not a part of the equipment of the marines, because they were furnished to them under their clothing allowance. There are two conflicting decisions, both in District Courts, as to the status of articles issued to the soldier or sailor under his clothing allowance, viz., *U. S. v. Michael*, 153

Fed. 609, and *U. S. v. Hart*, 146 Fed. 202. We concur with the conclusion in the *Hart Case*, for reasons which are sufficiently set forth in the earlier part of this opinion. The circumstance that in re-enacting section 5438 or part of the federal Penal Code (section 35) Congress has added the words, "whether furnished to the soldier, sailor, officer or person under a clothing allowance or otherwise," is not important. It was a mere matter of precaution in view of the two conflicting decisions last above cited.

Third. It is further assigned as error that the court admitted evidence of other similar offenses than those charged in the indictment. But it is conceded by plaintiff in error that such testimony may be admitted where the government has to establish guilty knowledge, and in this case it had to establish such guilty knowledge that the purchases were from persons in active service of part of their equipment furnished for use in that service.

The judgment is affirmed.

In re COE et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 8.

1. BAILMENT (§ 7*)—OWNERSHIP OF GOODS—TRUST RECEIPT.

Where a banker advances the purchase price of goods, the buyer taking possession under a trust receipt, agreeing to sell the property for the account of the bank, collect the proceeds of the sale, and deposit the same to the bank's credit, with authority to the bank to cancel the trust receipt and reclaim the unsold goods on demand, the bank is the owner of the goods, as against the buyer and his creditors.

[Ed. Note.—For other cases, see *Bailment*, Dec. Dig. § 7.*]

2. BANKRUPTCY (§ 387*)—PARTNERSHIP—RIGHTS OF CREDITORS AGAINST INDIVIDUAL PARTNERS.

Bankrupts as a firm purchased ostrich feathers in South Africa under an arrangement by which claimant bank loaned its credit for the price, taking receipts of the bankrupts by which they agreed to sell the feathers for the bank's account, collect the proceeds, and deposit the same to the credit of the bank or its representatives. Instead of doing so, however, the bankrupts deposited the proceeds to their general account, and both the firm and the individual partners were declared bankrupts in involuntary proceedings before the proceeds were paid over. The bank filed proof of claim against the firm, and accepted a composition of 20 per cent. offered by one of the members to the creditors of the firm, and to his individual creditors for a release from individual liability. *Held*, that since the bank's claim arose out of the firm's conversion of the proceeds of the goods, for which the partners were liable jointly and severally as tort-feasors, acceptance of such composition did not bar the bank's right to file a claim for the balance against the individual estate of the other partner.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 387.*]

3. PARTNERSHIP (§ 172*)—LIABILITY TO THIRD PERSONS—PROPERTY CONVERTED.

Where a firm converted certain property belonging to a bank and the firm and the individual partners were then adjudged involuntary bankrupts, the bank could prove a claim against the partners jointly on their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

acceptances for the price of the goods and another against the partners jointly and severally on an implied contract to repay moneys, to wit, the proceeds of the goods wrongfully converted by them; the doctrine of election between inconsistent remedies on the same claim being without application.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 172.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of Edward P. Coe and William H. Knox, individually and as members of the bankrupt firm of Cadenas & Coe. From an order of the District Court (169 Fed. 1002) reversing a referee's order expunging the claim of the Sovereign Bank of Canada against the individual estate of Edward P. Coe, the trustee appeals. Affirmed.

White & Case (J. Du Pratt White and J. M. Hartfield, of counsel), for appellant.

Rounds, Hatch, Dillingham & Debevoise (R. S. Rounds, of counsel), for appellee Sovereign Bank of Canada.

Benjamin F. Jones, for bankrupt Coe.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. We hand down with this an opinion in the matter of J. V. A. Cattus, a bankrupt, holding that under the trust receipts in common use the banker who advances the purchase price of the goods is the owner of them, and what is there said on this subject need not now be repeated. The course of dealing in this case was that the Sovereign Bank of Canada issued to Cadenas & Coe letters of credit under which their agents in South Africa were authorized to value on the National Bank of South Africa, correspondents of the Sovereign Bank, up to a certain amount for the price of ostrich feathers. Under this credit the South African bank discounted drafts drawn upon Cadenas & Coe by their South African agents for the price of the goods, with bills of lading indorsed in blank attached, which drafts and bills of lading it forwarded to the agents of the Sovereign Bank in New York, which delivered the bills of lading to Cadenas & Coe against their acceptances of the drafts and trust receipts in the following form:

"Drawn against L/C 538-2050. 1-8 Due in London, Mar. 2, 07.

"Bailee Receipt.

"Received from the Sovereign Bank of Canada. Bill of Lading and Invoices for seven cases (311 pounds) Ostrich Feathers,—and we hereby undertake to sell the property therein specified, for account of the said Bank, and to collect the proceeds of the sales thereof, and to deposit the same immediately on receipt thereof in the said Bank at New York to the credit of thereby acknowledging ourselves to be Bailee of the said property for the said Bank.

"The Bank may at any time cancel this Bailment of Trust, and, in such event, we hereby undertake and agree to return all unsold goods at once on demand, or to pay the value of the said goods at the Bank's option.

"Dated at New York the 30th day of November, A. D., 1906.

"Cadenas & Coe."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Cadenas & Coe collected the price of the feathers, deposited the same in their general account, applied it in their business, and then failed. The firm, as well as Edward P. Coe and William H. Knox, the partners composing it, were all subsequently adjudicated bankrupts in involuntary proceedings. The Sovereign Bank filed no proof of claim against the firm, but accepted a composition of 20 per cent. offered by the bankrupt Knox to the creditors of the firm and to his individual creditors. The bank then filed a claim against the individual estate of the bankrupt Coe for the balance of the advance (deducting the 20 per cent. received in composition) which they allege was wrongfully converted by him. This claim the referee expunged, which decision was reversed by Holt, Judge, upon a petition to review. We concur in the opinion of Judge Holt. The referee regarded the acceptance of the composition as a bar to any claim of the bank against the individual estate of Edward P. Coe, and so it would have been if the liability asserted against his estate were for his contractual liability on the acceptances as to which the partners were jointly liable. But it is not. It arises out of his liability for converting the proceeds of the feathers instead of paying them over to the bank, to whom they belonged. It makes no difference that the partners acted without evil intent, nor that the firm got the benefit of what they did. It remains a wrongful conversion for which all the partners are liable, not jointly as partners, but jointly and severally as tort-feasors, whether they each actively participated in it or not; the acts of every one being imputed to every other. *Re Baxter*, 18 N. B. R. 62, Fed. Cas. No. 1,119; *Re Jordan* (D. C.) 2 Fed. 319; *Re Blackford*, 35 App. Div. 330, 54 N. Y. Supp. 972; *Blyth v. Fladgate*, L. R., Ch. Div. (1891) 337. The bank could prove two claims, one against the firm—i. e., the partners jointly on the acceptances—and the other against the partners jointly and severally upon an implied contract (the tort being waived) to repay moneys of the bank wrongfully converted by them. The doctrine of election between inconsistent remedies on the same claim has no application.

The order is affirmed with costs.

HICKMAN et al. v. CABOT.

(Circuit Court of Appeals, Fourth Circuit. December 20, 1910.)

No. 1,003.

CONTRACTS (§ 156*)—CONSTRUCTION—EJUSDEM GENERIS—"OTHER CAUSE."

Defendant contracted to use natural gas from plaintiffs' wells for a specified time at specified prices, the contract providing that, if by reason of fire, explosion, or other cause defendant's factory should be closed down, plaintiffs might during the time dispose of gas elsewhere, and, if the nonuse extended over a month, plaintiffs should have the right to cancel the contract. *Held*, that the words "other cause," following "fire and explosion," should be construed to mean other cause similar to fire or explosion under the rule of ejusdem generis, and did not therefore

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entitle defendant to shut down his factory for any cause whatsoever without a liability for breach of such contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 737; Dec. Dig. § 156.*

For other definitions, see Words and Phrases, vol. 6, pp. 5070-5102; vol. 8, pp. 7741-7743.]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Action by William Floyd Hickman and others against Godfrey L. Cabot. Judgment for defendant, and plaintiffs bring error. Reversed.

William Beard, for plaintiffs in error.

B. M. Ambler (Van Winkle & Ambler, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The plaintiffs in error here are all citizens of West Virginia. They were plaintiffs below. They will be called plaintiffs. The defendant in error is a citizen of Massachusetts. He was the defendant below, and will be so referred to in this opinion. The plaintiffs had a gas well or wells. They wanted to sell their gas. The defendant had a carbon factory. All agreed that the defendant should construct a pipe line from his factory to plaintiffs' well, that he should take about 1,200,000 feet of gas a day, and should pay plaintiffs 2 cents a 1,000 feet for it. The plaintiffs were to care for the wells and keep them in good order and free from water, so far as this should be feasible. The agreement was to bind the parties, their heirs, personal representatives, and assigns for a term of three years, and thereafter until terminated by one month's notice from either party to the other. In case all the wells on plaintiffs' land should not be sufficient to furnish the required amount of gas, the defendant might buy elsewhere.

The contract between the parties also contained the following paragraph:

"If by reason of fire, explosion or other cause, the factory of [the defendant] shall be closed down, the [plaintiffs] may during such time, dispose of the gas elsewhere, and if such nonuse extends over one month, the [plaintiffs] shall have the right to cancel the contract. No claims for damages shall be made by the [plaintiffs] for nonuse of the gas, by reason of the shutting down of the factory nor by the [defendant] for the failure to supply, due to natural causes."

The defendant constructed his pipe line, and connected it with the well of the plaintiffs. After taking the gas for something like 30 days in all, he shut down his factory, and disconnected his pipe line from plaintiffs' well. Some months later the plaintiffs brought suit, among other things, for the \$24 a day which the defendant would have owed them had he taken 1,200,000 feet of gas from them at the price of 2 cents per 1,000 feet.

There were many controverted questions raised upon the trial. There are a number of exceptions and of assignments of error. In

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

our view, we need consider none of these, except such as relate to the construction placed by the court below upon the paragraph of the contract between the parties, which provided what their respective right should be in the event that the factory should be shut down by "reason of fire, explosion or other cause." That clause has already been quoted in full.

The court instructed the jury that:

"The plaintiffs are not entitled to recover any damages or money from the defendant, by reason of his shutting down his factory. Cabot had a right to shut down his factory under the contract without liability to the plaintiffs on that account."

The learned judge further told the jury that the defendant, "if he operated his carbon factory, would have to take the gas tendered by the plaintiffs to the extent and subject to the conditions prescribed by the contract. If, however, he did not operate his factory, but determined to wholly shut it down, he had the right to do so, and by the terms of the contract no claims for damage could be made for the nonuse of the gas by the plaintiffs while the factory was so shut down; they, on their part, having the right to sell the gas while the factory was shut down and to cancel the contract, if the nonuse by Cabot of the gas extended beyond 30 days." Under this construction of the contract, the defendant by operating his factory 1 day in every 30 could have for 3 years prevented the plaintiffs from canceling the contract. It is true that they could have sold their gas elsewhere during the other 29 days, provided they could have found some one who was willing to take it whenever the defendant did not want it, without either such purchaser or the plaintiffs ever being able to know in advance when and for how long the defendant would want it. It does not seem probable that the parties could have intended to make such a bargain. Moreover, if the construction placed by the court upon the contract is correct, there was no possible reason for the parties to have said anything about fire or explosion. As the agreement was construed below, it means the same thing that it would have meant had it read "if by reason of any cause" the factory shall be closed down, instead of reading as it does "if by reason of fire, explosion or other cause." To our mind the words "other cause" must be limited to causes of the same general nature as are fire and explosion, the causes of shutting down specially mentioned. They cannot be held to include a shutting down directed by the defendant purely for his own profit or convenience. We fully agree with the principle cited by the counsel for the defendant from *United States v. Mescall*, 215 U. S. 31, 30 Sup. Ct. 19, 54 L. Ed. 77, that Lord Tenderden's rule is one of construction only. "It is not a cast iron rule, it does not override all other rules of construction, and is never applied to defeat the real purpose * * * as that purpose may be gathered from the whole instrument." As we read the entire contract, it seems clear to us that the parties did not intend that Cabot reserved the right to refuse to take gas whenever for any purpose of his own it seemed to him desirable to shut down the factory. The contention that fire and explosion exhaust the whole genus, so that "other cause" must refer to

something radically unlike, does not seem persuasive. We imagine that wind or water would have been regarded by the parties as causes which from their standpoint were of the same kind as fire and explosion. It is clear to us that they did not regard the purely voluntary act of the defendant as one of the other causes which, like fire and explosion, would justify the defendant in refusing to take gas.

To hold otherwise would, by rendering the words "fire" and "explosion" superfluous, offend against the other rule of construction approved by the Supreme Court and cited by the defendant, viz., that an interpretation is incorrect that would obliterate one portion of a contract in order to enforce another part thereof. *Burdon Company v. Payne*, 167 U. S. 127, 17 Sup. Ct. 754, 42 L. Ed. 105. The phrase "other causes" has usually received a construction which confines it to "other causes" of the same general nature as those specifically mentioned. *State v. McGarry*, 21 Wis. 496, 498; *Stemmer v. Scottish Union National Insurance Company*, 33 Or. 65, 49 Pac. 588, 53 Pac. 498. *King v. Thompson*, 87 Pa. 365, 369, 30 Am. Rep. 364.

The learned counsel for the defendant argues that the "shutting down" spoken of in the sentence, "No claims for damages shall be made by the" plaintiffs "for nonuse of the gas by reason of the shutting down of the factory, nor by the" defendant "for the failure to supply due to natural causes," is not limited to the kinds of shutting down referred to in the preceding sentence, "If by reason of fire, explosion, or other cause, the factory of the" defendant "shall be shut down, the" plaintiffs "may during such time dispose of the gas elsewhere; and if such nonuse extends over one month, the said" plaintiffs "shall have the right to cancel the contract." The contention is ingenious, but to our minds not convincing. Indeed, the employment of the phrase "natural causes" in the sentence limiting the liability of the plaintiffs is at least suggestive that the parties felt that "fire, explosion, or other cause" mentioned in the other sentence were of the same general character as natural causes, to the extent at least that in neither case were they under the control of the parties.

From the fact that we feel constrained to put another construction upon this material provision of the contract from that which commended itself to the judge below, it follows that the judgment must be reversed, and the case sent back for a new trial.

Reversed.

GRAND TRUNK RY. CO. et al. v. PARKS.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 82.

CARRIERS (§ 306*)—LIABILITY FOR INJURY TO PASSENGER—JOINT LIABILITY—CONNECTING CARRIERS—DANGEROUS CONDITION OF CARS.

A through passenger train was operated from Chicago to New York, by the Grand Trunk Railway Company to Suspension Bridge and from there eastward by the Lehigh Valley Railroad Company. On reaching Niagara Falls, Ontario, the train was boarded by car cleaners, employed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and paid by the Lehigh Company, who, while the train was passing from there to Suspension Bridge, cleaned the cars. The arrangement between the two companies under which this was done did not appear. Plaintiff, who was a customs inspector riding between such two points in the performance of his duties, without negligence on his part, slipped on a banana peel, which had been negligently left with other sweepings in the aisle of one of the cars by a cleaner, and was injured. *Held*, that both companies were liable for the injury as joint tort-feasors; the Grand Trunk Company for allowing its cars to become dangerous while passing over its own line, and the Lehigh Company because the negligence which created the dangerous condition was that of its servants, for which it was responsible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249-1251; Dec. Dig. § 306.*]

Liabilities of connecting carriers for injuries to passengers, see note to Lehigh Valley R. Co. v. Dupont, 64 C. C. A. 485.]

In Error to the Circuit Court of the United States for the Western District of New York.

Action at law by Douglas J. Parks against the Grand Trunk Railway Company and the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendants bring error. Affirmed.

This cause comes here upon appeal from a judgment in favor of defendant in error, who was plaintiff below. The action was brought to recover damages for personal injuries sustained by plaintiff, while engaged in his duties as United States customs inspector on board a train of the Grand Trunk Railway Company between Niagara Falls, Ontario, and Suspension Bridge, N. Y. He slipped upon a banana peel in the aisle of the car, claimed to have been deposited there with other sweepings by a car cleaner, who was engaged in cleaning the car preparatory to the surrender of the train to the Lehigh Valley Railroad Company at Suspension Bridge. It was a through train from Chicago to New York, operated to Suspension Bridge by the Grand Trunk, and from that point on by the Lehigh. The jury found a verdict against both defendants, as joint tort-feasors.

J. W. Ryan, for plaintiff in error Grand Trunk Ry. Co.

L. M. Bass, for plaintiff in error Lehigh Valley R. Co.

A. J. Thibaudeau, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The plaintiff boarded the train at Niagara Falls, Ontario, and proceeded along the aisles of the several cars from the rear to the front. When he had reached the first car, and was by the doorway with his right foot on the iron threshold of the door, he saw an object ahead of him that looked like newspapers lying on the floor right ahead of him, making a little pile. He stepped with his left foot over this pile, slipped and fell, and then, after being picked up, looked again at the pile, and saw it was made up of papers and dirt, with banana peeling and apple cores.

There was evidence showing that this pile was produced by the car cleaner when sweeping up the car; that it was left in the passageway; that on previous occasions the dirt and debris, when swept up, had been stowed away under the seats, or in some place which was not a thoroughfare for persons moving through the train. There was conflicting evidence as to some of the facts; but it seems too plain for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

argument that, if the jury accepted the narrative of events relied on by the plaintiff, they were warranted in finding that the accident happened through some one's negligence. Indeed, that proposition seems not to be disputed, for the main reliance of each defendant is that the other defendant was alone responsible for the carelessness of the car cleaner. Both of them contend that the evidence affirmatively established that the plaintiff was guilty of contributory negligence; but there is no force in this contention. Upon the testimony that question was plainly for the jury, who were properly instructed by the court on that branch of the case, and whose finding thereon is conclusive.

The testimony showed that the car cleaners, one for each car of this train, were selected, employed, and paid by the Lehigh. They came aboard the train while it was still on the Grand Trunk's road for the purpose of having the cars cleaned before the Lehigh took possession of them at Suspension Bridge. This had been the practice for years. The Grand Trunk crew had nothing to do with the cleaning. How this arrangement between the two companies came about, or whether there was some contract between them regulating the matter and fixing the status of the cleaners, did not appear.

Upon this testimony we are satisfied that the Grand Trunk was responsible for the condition in which the cars were maintained while operated on its own road. If it allowed a car to become dangerous by accumulating dirt and banana peelings in its passageway and leaving it there, it is immaterial whether the individual whose carelessness put it in such a condition was one of its regular employes, or was one whom it temporarily borrowed from another road, in whose general employment he was, or was the employe of another road, whom it was accustomed to allow to come on its cars and there conduct operations which, if they were carelessly conducted, would make the car unsafe.

The car cleaner was selected, employed, and paid by the Lehigh, and was its servant. It might have made some arrangement with the Grand Trunk whereby he might have been temporarily turned over exclusively to the service of the latter; but the jury, who were charged on that branch of the case, found against the Lehigh on that proposition. Upon the testimony it is difficult to see how they could reach any other conclusion. The method of car cleaning followed by the two companies apparently was devised to benefit both. By beginning the operation before the train reached Suspension Bridge, the Lehigh secured clean cars the moment the train was turned over to it, without having to wait for that work to be done afterwards. It would seem that for some reason it undertook to do this cleaning itself, since it paid the cleaner's wages, and there is nothing to show that the Grand Trunk was to reimburse it for such expenditure when the work of cleaning was done on the Grand Trunk's road. The cleaner, when engaged in that occupation, was, for all that appears, still the servant of the Lehigh, and for his negligence his master should respond.

We do not find error in the medical testimony which was admitted over objection, and we need not consider any of the exceptions to the charge, in view of the statement, *supra*, as to the legal obligations of defendants.

The judgment is affirmed.

MILLAN v. EXCHANGE BANK OF MANNINGTON et al.
(Circuit Court of Appeals, Fourth Circuit. November 22, 1910.)

No. 977.

1. BANKRUPTCY (§ 84*)—AMENDMENT—EFFECT.

Amendments relating to the number of petitioning creditors in bankruptcy, the amount and nature of their claims, the occupation of the debtor, and to errors and deficiencies in the verification of the original petition, can be made more than four months after the commission of the act of bankruptcy, and, when so made, relate back to the date of the filing of the original petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 84.*]

2. BANKRUPTCY (§ 85*)—PLEADING—INVOLUNTARY PETITION—"DUPLICATE."

Within four months subsequent to the commission of an act of bankruptcy, an involuntary petition was filed. On the same day the clerk of the district court made and certified a copy of such petition, which was delivered to the marshal with the summons, and was by him given to the defendant contemporaneously with the service of the summons. Held, that such copy made under such circumstances was a "duplicate" within the requirement that such petition must be filed in duplicate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 85.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2265-2266; vol. 8, p. 7645.]

On Petition to Superintend and Revise, in Matter of Law, proceedings of the District Court of the United States for the Northern District of West Virginia, at Philippi.

In Bankruptcy. In the matter of involuntary bankruptcy proceedings against A. F. Millan. An order was entered for an adjudication which the alleged bankrupt sought to have reviewed on a petition to superintend and revise in matter of law. Affirmed.

L. S. Schwenck, for petitioner.

E. M. Showalter, for respondents.

Before PRITCHARD, Circuit Judge, and McDOWELL and ROSE, District Judges.

ROSE, District Judge. On July 9, 1909, a petition asking that A. F. Millan be adjudged a bankrupt was filed in the court below by the Exchange Bank of Mannington and three other creditors. The act of bankruptcy alleged was the making of a conveyance while insolvent with intent to prefer one H. R. Furbie. It is not denied that the petition aptly charges the commission of the second act of bankruptcy. The objections made to it raise questions of form and of practice rather than of substance. It is said by the respondent: That the petition did not say that the debtor was not a wage-earner, nor that he was not principally engaged in farming or the tillage of the soil. The amended petition makes these allegations. It is objected that the petition is not properly verified. The verification of the amended petition seems in all respects sufficient. Walker v. Woodside (9th Circuit) 164 Fed. 680, 90 C. C. A. 644; 1 Remington on Bankruptcy, § 278.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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It is asserted that two of the creditors who united in the original petition were not creditors at the time the act of bankruptcy was committed. The amended petition says that both at the time the original and at the time the amended petition was filed the respondent had fewer than 12 creditors. One creditor, who was such at the time of the commission of the act of bankruptcy and of the filing of the original and of the amended petition, was a party to both petitions. It is therefore unnecessary to determine whether a creditor at the time of the filing of the petition is qualified to unite in it, although he was not a creditor when the act of bankruptcy was committed. The decisions are in conflict on this point, and we express no opinion upon it. *Re Callison* (D. C.) 12 Am. Bankr. Rep. 344, 130 Fed. 987, affirmed sub nomine in *Brake v. Callison*, 11 Am. Bankr. Rep. 797, 129 Fed. 201, 63 C. C. A. 359; *Re Brinckmann* (D. C.) 4 Am. Bankr. Rep. 551, 103 Fed. 65; *Beers v. Hanlin* (D. C.) 3 Am. Bankr. Rep. 745, 99 Fed. 695; *Matter of David I. Hanyan*, 24 Am. Bankr. Rep. 72, 180 Fed. 498.

The amended petition charged the same act of bankruptcy as that charged in the original petition and in substantially the same words. It is true that the amended petition was not filed until more than four months had elapsed after the commission of the act of bankruptcy charged. The law is well settled, however, that amendments relating to the number of the petitioning creditors, the amount and nature of their claims, to the occupation of the debtor and to errors and deficiencies in the verification of the original petition can be made more than four months after the commission of the act of bankruptcy. When so made they relate back to the date of the filing of the original petition. *State Bank v. Haswell* (Eighth Circuit) 23 Am. Bankr. Rep. 330, 174 Fed. 209, 98 C. C. A. 217; *Ryan v. Hendricks* (Seventh Circuit) 21 Am. Bankr. Rep. 570, 166 Fed. 94, 92 C. C. A. 78; *In re Plymouth Cordage Co.* (Eighth Circuit) 13 Am. Bankr. Rep. 665, 135 Fed. 1000, 68 C. C. A. 434; *In re Bellah* (D. C., Dist. of Del.) 8 Am. Bankr. Rep. 310, 116 Fed. 69.

The objection most seriously pressed upon us is that the original petition was not filed in duplicate, and that no duplicate original was filed within the four-month period. The record shows that the four months began to run from the 11th day of March, 1909, when the deed making what is alleged to be the preferential transfer was recorded. On the 9th of July, two days less than four months thereafter, the original petition was filed, and on the same day the clerk of the district court made and certified a copy of such petition which was delivered to the marshal with the summons and was by him given to the defendant contemporaneously with the service of summons. *Collier on Bankruptcy* (7th Ed.) 637, says that the law means by the word "duplicate" "two petitions, each an original, and not an original and a copy. This requirement is mandatory and failure to observe it is jurisdictional defect." *Remington*, § 283, more cautiously contents himself with saying that the law requires originals. These statements rest upon the supposed authority of two cases: *In re Stevenson* (D. C.) 2 Am.

Bankr. Rep. 66, 94 Fed. 110; In re Dupree (D. C.) 97 Fed. 28. In neither was the precise point involved. In each of them a single paper had been filed within the four-month period. In each of them an application was made after the four months had expired to permit the filing *nunc pro tunc* of a copy or a duplicate original. In the earlier case Judge Bradford allowed the copy to be filed, but subsequently upon full consideration held that the failure to file the petition in duplicate within the four months period was fatal and could not after the expiration of that period be cured. In the latter case Judge Purnell, having Judge Bradford's ruling before him, refused to let the copy be filed. In the case now before this court the original and a certified copy of the original were on the same day filed in the clerk's office and that day was less than four months from the date upon which the act of bankruptcy was alleged to have been committed. It is true that Judge Bradford made a very careful study of the question and reached the conclusion that the statutory requirement that the petition should be filed in duplicate would not be satisfied by filing an original and a copy. He, however, pointed out that such conclusion was not necessary to the decision of the case before him. Congress intended that creditors who seek to exercise the power given to them to throw debtors who have done certain things into bankruptcy shall act very speedily or not at all. Four months, and no more, is allowed them. If they take their debtor into the bankruptcy court they are bound to see that he shall have at once and without trouble or expense to him a duplicate of the petition they have filed against him in the clerk's office. It may be that they have no right to wait until after the four-month period before putting into the hands of the clerk the paper which the law says they shall file with the clerk that he may have it delivered to the alleged bankrupt. If that be true Judges Bradford and Purnell rightly decided the cases before them, the facts being as they were.

In the case now under consideration the original petition and the copy were both filed before the four months had expired. As the act itself declares; the only purpose of requiring duplicates of the petition to be filed is to provide what the Supreme Court in Official Form 4 refers to as a "copy" for the debtor, it could not be doubted that the law in any construction of it would be satisfied, although the body of one of the duplicate originals was written by one hand and the body of the other by another. The same judge who decided that "duplicate" as used in the statute did not mean an original and a copy, subsequently decided that the jurat or verification was no part of the petition. In re Bellah (D. C.) 8 Am. Bankr. Rep. 321, 116 Fed. 69.

If the creditors in person signed one petition and had some one else by their authority sign their names to the other, it is by no means clear on general principles that each would not be a validly executed original. If the body of the petition, the signatures to it, its jurat and verification may all be written in one duplicate original by the pen of one man and in the other by the pen of another, what difference can it make to the debtor whether the paper served on him purports to be a duplicate original or is a copy of the original certified under the hand of the clerk and the seal of the court?

In holding that the statute is fully satisfied when an original and a copy are both filed in the clerk's office before the expiration of the four-month period, we are satisfied that no violence is done to the letter of the law, and that every purpose which Congress intended by the provision in question is fully served. In re Plymouth Cordage Co., 13 Am. Bankr. Rep. 665, 135 Fed. 1000, 68 C. C. A. 434.

Affirmed.

NOTE.—Certiorari refused by Supreme Court January 9, 1911.

CONSOLIDATED RUBBER TIRE CO. v. FERGUSON.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 63.

1. COURTS (§ 274*)—FEDERAL COURTS—JURISDICTION—SUIT BY ASSIGNEE.

Act Cong. March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 806, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), provides that the federal Circuit Court shall have jurisdiction of civil suits, where the amount in controversy exceeds \$2,000 exclusive of interest and costs, between citizens of states and citizens of foreign states and between citizens of different states, but that no such court shall take cognizance of any suit to recover the contents of any chose in action in favor of any assignee, unless such suit might have been prosecuted in such court to recover such contents if no assignment or transfer had been made. It also declares that no civil suit shall be brought before either of such courts against any person, or by any original process or proceeding in any other district than that whereof he is an inhabitant, but that when jurisdiction is founded only on the fact of diversity of citizenship and that the action is between citizens of different states, the suit shall be brought only in the district of the residence of the plaintiff or the defendant. *Held* that, where plaintiff, a citizen of New York, brought an action in the Circuit Court of the Southern district of New York, as assignee of a British corporation against defendant corporation, a citizen of New Jersey, the court had no jurisdiction to entertain the suit over defendant's protest.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

2. COURTS (§ 96*)—DECISIONS—EFFECT.

That the Supreme Court denied a writ of prohibition to restrain the federal Circuit Court from taking jurisdiction of a suit by one as assignee of a foreign corporation in the Southern district of New York against a New Jersey corporation did not constitute a determination that the court had jurisdiction to entertain the suit over defendant's protest; the inference being that the writ was denied on the theory that since the question of jurisdiction should be determined on a writ of error to final judgment, extraordinary relief was unnecessary.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 96.*]

3. COURTS (§ 324*)—FEDERAL COURTS—JURISDICTION—ASSIGNMENT OF CAUSE OF ACTION.

Where it appears that a cause of action has been assigned in order to confer jurisdiction on a federal court, it is the court's duty to dismiss or remand a suit sua sponte.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 882, 884; Dec. Dig. § 324.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by William A. Ferguson, a citizen of New York, as assignee of the Reilloc Tyre Company, a British corporation, against the Consolidated Rubber Tire Company, a New Jersey corporation, to recover semiannual installments of royalty brought in the Circuit Court of the Southern District of New York. Judgment for plaintiff, and defendant brings error. Reversed, with instructions to dismiss.

See, also, 169 Fed. 888.

Charles W. Stapleton (J. E. Bowman, of counsel), for plaintiff in error.

Charles Stewart Davison (Henry W. Hardon and George W. Phillips, Jr., of counsel), for defendant in error.

Before COXE and WARD, Circuit Judges, and MARTIN, District Judge.

WARD, Circuit Judge. Ferguson, the plaintiff, a citizen of New York and assignee of the Reilloc Tyre Company, a British corporation, brought this action against the Consolidated Rubber Tire Company, a corporation of the state of New Jersey, upon an alleged agreement to pay a minimum royalty of \$5,000 per annum in equal semiannual installments for an exclusive right to manufacture and sell under a patent for elastic tires for the year 1908 with an option to be exercised within that year of an exclusive right for the life of the patent. The defendant appeared specially to object to the jurisdiction of the court and moved to set aside the service of the summons. Its motion being overruled, the defendant, still protesting against the jurisdiction, answered. The jury rendered a verdict for the plaintiff and the defendant sued out a writ of error to the judgment entered thereon to this court.

The first question to be considered is that of jurisdiction. The act of March 3, 1875, c. 137, 18 Stat. 470, as amended in 1887 (Act March 3, 1887, c. 373, 24 Stat. 552) and 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), provides that the Circuit Courts of the United States shall have jurisdiction of all suits of a civil nature where the matter in dispute exceeds \$2,000, exclusive of interest and costs, between citizens of states and citizens of foreign states and between citizens of different states, but that no such court shall take cognizance of any suit to recover the contents of any chose in action in favor of any assignee "unless such suit might have been prosecuted in such court to recover said contents if no assignment or transfer had been made."

The act also provides that:

"No civil suit shall be brought before either of said courts against any person or by any original process or proceeding in any other district than that whereof he is an inhabitant, but when the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

These provisions of the act are of course to be read together. All the statutory conditions are satisfied provided the plaintiff's assignor could itself maintain the action. The plaintiff's assignor, the British corporation, could not have brought suit in the Southern district of New York against the defendant, because it cannot be an inhabitant of any place outside of the state of New Jersey, which incorporated it. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. The cases relied upon by the plaintiff to the contrary were decided before the words "or in which he shall be found" were struck out of the act by amendment in 1887 and depended upon those words. Of course the privilege in question may be waived, but the defendant from the beginning has persistently claimed it.

It is said that the defendant applied for a writ of prohibition to the Supreme Court, which was denied, and therefore the jurisdiction of this court was sustained. This does not follow. No court will give extraordinary relief when it is unnecessary, as in this case, where any error in the interlocutory order denying the motion to set aside the service of the summons could be corrected upon writ of error to the final judgment.

The plaintiff next contends that the clause in question was only intended to prohibit fraudulent assignments made for the purpose of creating jurisdiction of the court. But the provision applies to assignments without reference to their intent. The assignee has only the qualifications of his assignor for the purpose of giving jurisdiction. Collusive assignments—that is, such as give the bare legal title only for the purpose of creating jurisdiction, arise in connection with assignments otherwise valid, as, for example, of foreign bills of exchange and choses in action payable to bearer made by corporations. When the fact appears that even such assignments are made collusively, it becomes the duty of the court under section 5 of the act to dismiss or remand the suit sua sponte.

It is contended finally that the court, having jurisdiction generally between aliens and citizens, the privilege might have been waived if the British corporation had brought suit, and therefore the provision as to assignees does not apply. We think this clause of the act cannot be nullified because of something which might have happened had no assignment been made. The general purpose of the provision is to restrict the jurisdiction of the Circuit Court. The judgment is reversed, with costs, and the court below directed to dismiss the complaint for want of jurisdiction.

UNITED STATES v. BANK OF NORTH WILKESBORO.

(Circuit Court of Appeals, Fourth Circuit. December 19, 1910.)

No. 1,001.

PENSIONS (§ 10*)—FRAUDULENT PENSIONS—PENSION CHECKS—PAYMENT—GOVERNMENT'S RIGHT TO RECOVER.

Act Cong. Dec. 21, 1893, c. 3, 28 Stat. 18 (U. S. Comp. St. 1901, p. 3270), provides that any pension granted under any law of the United States shall be deemed by all officers of the United States to be a vested right in the grantee to the extent that payment thereof shall not be withheld or suspended until after due notice to the grantee of not less than 30 days, the Commissioner of Pensions after hearing all evidence shall decide to annul, vacate, modify, or set aside the decision on which the pension was granted. *Held*, that where a fraudulent pension was granted to W., and while the same was in full force, and before cancellation on the notice prescribed by such act, defendant bank cashed a number of pension checks drawn to her order, which on presentation were paid by the government, it could not recover the money from the bank on the theory that the pension was fraudulent and invalid.

[Ed. Note.—For other cases, see Pensions, Dec. Dig. § 10.*]

In Error to the Circuit Court of the United States for the Western District of North Carolina at Greensboro.

Action by the United States of America against the Bank of North Wilkesboro. Judgment for defendant, and plaintiff brings error. Affirmed.

A. L. Coble, Asst. U. S. Atty. (A. E. Holton, U. S. Atty., on the brief), for the United States.

W. M. Hendren (Manly & Hendren, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and McDOWELL, and ROSE, District Judges.

ROSE, District Judge. The United States, as plaintiff below, sued the Bank of North Wilkesboro, which will be called the "defendant," to recover \$744.87, the aggregate amount of a number of pension checks drawn by the government to the order of Mary M. Webster, cashed by the defendant, and paid by the government to the defendant.

One Webster served as a soldier in the Cherokee War. He was married. His wife's name was Elzira. Both of them died at some time prior to the year 1900. In March of the last-mentioned year a certain Mary M. Marley made an application for a pension as the widow of Webster. She said her name was Mary M. Webster. She filed various forged and fraudulent affidavits in support of this application. Her claim was allowed, and the name of Mary M. Webster was placed upon the pension rolls. It was not until 1903 that the government discovered the fraud which had been perpetrated upon it. Until then the pension checks had been regularly issued to Mary M. Webster. As regularly Mary M. Marley indorsed them Mary M. Webster. She lived about 10 miles from North Wilkesboro. Her son-in-law, who appears to have been the planner of the fraud and its principal bene-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ficiary, deposited these checks so indorsed in his account in the defendant bank, or had it cash them for him. It knew nothing about Mary M. Marley or Mary M. Webster or any of the other circumstances.

At the trial below the facts above summarized were found as a special verdict. The government says the court erred in entering upon such verdict a judgment for the defendant. It rests its contention upon the recent decision of the Supreme Court in *United States v. National Bank of Providence*, 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006. In that case it appeared that certain persons whose names had been entered upon the pension roll had died. In other cases widows on that roll had remarried and their right to remain on it had ceased. A certain Munson forged quarterly vouchers in the names of these deceased and remarried persons. He obtained possession of the checks mailed to them. He forged their indorsements and induced the National Exchange Bank to cash them for him. The bank presented them to the government. They were paid. The court held that as the bank by presenting them had guaranteed the indorsements upon them it was bound to refund the money to the government. All that the case decided was that the government in such matters as the payment of pension checks is not charged with knowledge of the signatures of the vast numbers of pensioners and is not negligent in paying those checks upon forged indorsements. It was not therefore estopped when the fraud was discovered from insisting that the bank should repay the money the latter had obtained upon such checks.

This decision has, in our judgment, no relation whatever to the case at bar. Here the very person whom the government put upon its pension roll indorsed the checks and received the money. It is true that such person in order to get upon the roll had assumed a name not her own and had pretended to a past which was not hers. She had, however, succeeded in inducing the government to believe that her story was true. Her application had been made and investigated. The Commissioner of Pensions had adjudicated that she was entitled to a pension and had thereupon entered her name upon the pension roll. By the express enactment of Congress any pension granted "under any law of the United States authorizing the granting and paying of pensions on application made and adjudicated upon shall be deemed and held by all officers of the United States to be a vested right in the grantee to that extent that payment thereof shall not be withheld or suspended until after due notice to the grantee of not less than 30 days, the Commissioner of Pensions after hearing all the evidence shall decide to annul, vacate, modify or set aside the decision upon which such pension was granted." Act Dec. 21, 1893, c. 3, 28 Stat. 18 (U. S. Comp. St. 1901, p. 3270).

The contention of the government, when carried to its last analysis, is that every one who cashes a pension check must satisfy himself at his peril not only that the check is indorsed by the very human being who applied for the pension, but must go further and make sure that such person had not made the Commissioner of Pensions believe that her name was something different from what it was, or that she

had once been the wife of a man to whom she had in fact never been married. Each individual when asked to cash a pension check, if the law be as the government says it is, must conduct for himself a partial revision of the pension roll and must summarily decide whether the name of the payee of the check was or was not entitled to be placed upon that roll. The claim of the government involves the consequence that, while no individual could safely cash a pension check for one whose name had been fraudulently placed upon the roll, that person so long as his name was on the roll could compel the Pension Agent or the Commissioner of Pensions to pay him his pension, although those officials might then know all about the fraud and be engaged in prosecuting him for it.

On February 24, 1894, Attorney General Olney advised the Commissioner of Pensions that the statute above referred to, and in substance quoted, "applies to every certificate that has been lawfully granted by the Pension Office, whether the evidence upon which the office acted was complete or incomplete, honest, fraudulent, or forged. Such certificate may still, of course, be canceled upon charges made; but until the 30 days' notice is given, the evidence received and a decision reached, the money must continue to be paid, even though the crime has been confessed and the criminal may already be serving his term of sentence. In fact, the statute practically abolishes the right to suspend payments *pendente lite* in these cases." 20 Op. Atty. Gen. 735, 736.

The defendant cannot be cast in damages because innocently and without knowledge of any fraud it has cashed a check, which, according to Attorney General Olney, the Commissioner of Pensions must have cashed even though he knew all about the fraud.

We have dwelt upon the statute because it makes so plain the unreasonableness of the position for which the government here contends.

When the law gives such effect to the presence of a name upon the pension roll, it becomes unnecessary to inquire whether if there was no such act upon the books the result in this case would not be the same.

The money was paid to the very individual who asked the government for it, and to whom the government decided to give it.

A learned and interesting discussion of the various principles involved in the general question and of many of the cases which have dealt with them will be found in the opinion of Chief Justice Shepard of the Court of Appeals of the District of Columbia in the case of *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. 391, 17 L. R. A. (N. S.) 520.

The judgment below was right and must be affirmed.

SPINELLO v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 47.

1. COURTS (§ 366*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATUTE.

A decision of the highest court of a state interpreting a statute of that state is conclusive on the federal courts as to the meaning of such statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. DEATH (§§ 19, 57, 75*)—ACTIONS FOR WRONGFUL DEATH—STATUTORY DEFENSES—NOTICE OF CLAIM.

Gen. St. Conn. 1902, § 1130, which provides that no action shall be maintained against any railroad company to recover damages for the injury or death of a person caused by negligence, unless a written notice stating the time, place, and general facts of the injury shall have been served on the defendant within four months after it was received or unless the action is commenced within that time, as construed by the Supreme Court of the state, imposes a condition subsequent, and not a condition precedent, to the right of action, and the plaintiff is not required to plead or prove the giving of the notice, but the failure to give it is a defense to be pleaded and proved by the defendant, and where the defendant admittedly had actual notice, and investigated the occurrence, and the defense is therefore purely technical, the proof to sustain it must be clear and explicit.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 13; Dec. Dig. §§ 19, 57, 75.*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Action at law by Raffaello Spinello, administratrix, against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

This action was commenced in the Supreme Court of the State of New York, January 11, 1907, to recover damages of the defendant for negligently causing the death of plaintiff's husband, at New Haven, Connecticut, February 2, 1906. The defendant removed the action to the United States Circuit Court for the Eastern District of New York where it was tried; the trial resulting in a verdict for the defendant, directed by the court upon the sole ground that there was no proof that the plaintiff had complied with the law of Connecticut requiring notice to be given to the defendant. The statute as pleaded in the defendant's answer is as follows:

"No action to recover damages for an injury to, or for the death of, any person, or for an injury to personal property, caused by negligence, shall be maintained against any electric, cable, or street railway company, or against any steam railroad company, unless written notice containing a general description of the injury, and of the time, place, and cause of its occurrence, as nearly as the same can be ascertained, shall have been given to the defendant within four months after the neglect complained of, unless the action itself is commenced within said period of four months. Such notice may be given to the secretary, or to any agent or executive officer of the company in fault." Gen. St. 1902, § 1130.

The answer pleaded the nonreceipt of such notice as a defense.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Jonathan Deyo, for plaintiff in error.

Frederick J. Moses, for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The Supreme Court of Connecticut has construed the statute regarding the written notice required to be given to the defendant within four months after the neglect of which the plaintiff complains, in *Bulkley v. Norwich Railway Co.*, 81 Conn. 284, 70 Atl. 1021, 129 Am. St. Rep. 212. The court, in overruling the demurrer to a complaint which contained no allegation that the notice had been served, says:

"An action may be maintained against this defendant upon the facts set up in this complaint. A written notice is not prerequisite. Section 1130 simply places a limitation, analogous to the general statute of limitations, upon the right of an injured party to prosecute such an action without further proceedings. This limitation is to be regarded as creating a condition subsequent, by which an existing right is cut off by the nonperformance of the condition, rather than a condition precedent to a continuing right. Such being its essential character, a defense predicated upon it, as upon conditions subsequent and limitations generally, need not be anticipated and negated by the plaintiff, but may properly be left to be pleaded by the defendant."

The decision is by the highest court of Connecticut interpreting a statute of that state and is conclusive as to the meaning of the statute. It must be followed by the Circuit Court and by this court. As was said by Mr. Justice Swayne in *Leffingwell v. Warren*, 67 U. S. 599, 17 L. Ed. 261:

"The construction given to a statute of a state, by the highest judicial tribunal of such state, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." *Morley v. Lake Shore R. Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907.

The *Bulkley Case* decides that it is unnecessary for the plaintiff in a negligence cause to allege a compliance with the statute. Consequently it is unnecessary for the plaintiff to prove it. If the plaintiff in the *Bulkley Case* had proved the allegations of his complaint, which contained no allusion to the notice required by section 1130, he would have been entitled to recover. The notice is not a prerequisite to the maintenance of the suit but a condition subsequent. The plaintiff's right to sue is not destroyed by a failure to give the notice unless the defendant alleges and proves it as a defense. If the defendant makes no mention of it in his pleading, the presumption is clear that he does not intend to reply upon it. We think the Circuit Court was correct in holding that it was incumbent upon the defendant to prove that this notice was not given.

After this ruling the defendant assumed this burden. It called William L. Barnett, a lawyer, who testified that on February 1, 1906, and until four months thereafter, he was the claim attorney of the defendant and that in the ordinary course of business all papers relating to an accident received by the railroad company would be referred to the claim attorney where the files are kept. He was asked:

"Q. Did you ever receive any notice of an intention to sue in the case of Raffaello Spinello against the New York, New Haven & Hartford Railroad Company? A. No, sir.

"Q. If such a paper had been served, in the regular course of business it would have come to you, would it? A. In the regular course of business all papers received there would be referred to me relating to this accident. I heard of this accident and I investigated it."

The difficulty with this testimony is that it may have been entirely true and still the notice required by the statute may have been received by the secretary or other "agent or executive officer of the company in fault." It may even have been received by the witness himself. The notice required by law is not a notice of "an intention to sue," but a notice containing a general description of the injury and of the time and place of its occurrence. It is not required to state the intention of the sender, but it must give certain data which will enable the railroad company to investigate and pay the damages if it sees fit to do so. It is suggested that this is an exceedingly technical criticism. This is true, but it must be remembered that we are dealing with an exceedingly technical defense, in meeting which the plaintiff is justified in holding the defendant to the strictest proof, especially so where it appears that the claim attorney of the company had actual knowledge of the accident and had investigated it and therefore was in possession of all the information which the written notice could have given him.

The testimony upon the main issue has not been returned, but it must be assumed that the plaintiff would, or might, have recovered a verdict had the cause been permitted to go to the jury. Where, in such circumstances, the defendant relies upon a defense based upon the failure to give it notice of facts which concededly were already within its knowledge, we think the proof should be clear and explicit and that the present proof is neither clear nor explicit.

The judgment is reversed.

MORRIS & CO. v. WHITLEY et al.†

(Circuit Court of Appeals, Fifth Circuit. January 3, 1911.)

No. 2,123.

ACCOUNT (§ 17*)—JURISDICTION—BILL.

Where a bill for an accounting alleged that for more than two years defendant had been complainant's confidential agent and broker for the sale of packing house products, under an arrangement whereby defendant was to add profits to minimum prices fixed by complainant, which profits were to be divided equally between complainant and defendant, that defendant had made sales, the amount of which was not known to complainant, and could not be known, as the buyers were unknown, and defendant refused to divulge the same, and that the amount in controversy was more than sufficient to give the court jurisdiction, and praying an account and settlement, it sufficiently alleged a fiduciary or trust relation between the parties, and was not demurrable on the ground that complainant had an adequate remedy at law.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 77-88; Dec. Dig. § 17.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 31, 1911.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Bill in equity by Morris & Co. against C. R. Whitley and others for an accounting. From an order sustaining a demurrer to the bill (182 Fed. 286), complainant appeals. Reversed and remanded.

Geo. S. Jones and M. P. Callaway, for appellant.

Jno. R. L. Smith and W. P. Wallis, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. This is a bill seeking an accounting between the parties thereto. It is, in substance, that during a period of over two years the respondents were the confidential agents and brokers of complainant for the sale of packing house products on certain terms and conditions set out in the bill and exhibits. The minimum price of the articles intrusted to the respondents were fixed by complainant. The bill avers that respondents were authorized and expected to add to said minimum prices such profits as they saw fit, which profits were to be divided equally between complainant and respondents. The bill avers that there has been no final settlement of accounts, and there has been no account stated. The bill avers that there were sales made by the respondents at prices in excess of those fixed by complainant, the amount of which is not known to the complainant, and cannot be known to complainant, as the persons to whom the sales were made are not known to complainant, and the respondents refuse to give him such information, and that the aid of a court of equity is necessary to secure an accounting and settlement; that large quantities of merchandise intrusted to respondent had been disposed of by them, and that in the absence of accurate or correct information as to sales made at prices greater than the minimum prices fixed by complainant as to quantity, prices, etc. (which can only be obtained from respondents), the complainant is unable to state the account between them, but avers that it is more than sufficient in amount to give the court jurisdiction.

It sufficiently appears that there was a fiduciary or trust relationship of the parties. The facts alleged establish a joint interest in a specific undertaking which involves unsettled accounts, and that a court of law cannot afford a complete and adequate remedy in the premises. *Fost. Fed. Prac.* (3d Ed.) 30. In cases for an accounting the United States courts have jurisdiction in equity, certainly in cases of discovery (involved, though not specifically prayed for, in this case), where there are complicated accounts, and a fiduciary or trust relationship exists between the parties. *Empire Circuit Co. v. Sullivan* (C. C.) 169 Fed. 1009, and cases there cited; 1 *Pom. Eq.* § 186.

The Circuit Court erred in holding that there was no equity in the bill and in dismissing the same. The other grounds urged in the demurrers are not well taken.

Decree reversed, and cause remanded.

CAMPBELL et al. v. BALCOMB.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910.)

No. 1,673.

BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCES—KNOWLEDGE OF CREDITOR'S AGENT.

Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), which makes a preference voidable if the creditor "or his agent acting therein shall have had reasonable cause to believe" that a preference was intended, states the whole law on that subject, and it is immaterial how or when the agent obtained his knowledge, or that he had confidential relations with the bankrupt, or personal interests which prevented him from disclosing his knowledge to his principal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 258; Dec. Dig. § 166.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action at law by F. W. Balcomb, trustee in bankruptcy of the Lawrence Manufacturing Company, bankrupt, against Albert Campbell and Harry A. Dubia, doing business as the Industrial Savings Bank. Judgment for plaintiff, and defendants bring error. Affirmed.

Hugh L. Burnham, for plaintiffs in error.

F. W. Balcomb, pro se.

Before BAKER and SEAMAN, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge. Defendant in error instituted this action to recover an alleged preferential payment made by the insolvent to the plaintiffs in error.

At the conclusion of plaintiff's evidence the defendants moved for a directed verdict in their favor. This motion was overruled, and the defendants, determining to stand on the record, introduced no evidence.

An assignment that the declaration is insufficient to support the judgment has not been very seriously urged, and we pass it with the statement that on examination we find each count adequate to withstand objections which were not made until after verdict.

Plaintiff's evidence showed that the defendants on February 6, 1906, being then the owners of a promissory note maturing on February 16, 1906, made by the Lawrence Manufacturing Company (the bankrupt herein), forwarded the note to the Oak Park Savings Bank for collection; that the Lawrence Manufacturing Company was then insolvent, had ceased to do business, was collecting its receivables, and was negotiating a sale of its plant; that this state of affairs was known to the Oak Park Bank; that a sale was consummated on February 10, 1906, and out of the proceeds of this sale and of collections enough was turned over to the bank to cover in full its own claim and that of the defendants; that on February 16, 1906, the bank remitted to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the defendants the full amount of the note; that for a long time the bank had been a creditor of the Lawrence Manufacturing Company and the company had been a creditor (depositor) of the bank; that on a petition filed June 9, 1906, the company was adjudged bankrupt, and later the plaintiff was elected trustee. There was no proof that the defendants had any actual notice of the condition and doings of the company.

One contention for reversal is that the knowledge of the bank was not chargeable to the defendants because it was not obtained "during and as a part of the transaction of demanding and receiving payment of the note." The asserted limitation is too narrow, for the principal is bound by the knowledge of the agent acquired within the scope and during the continuance of his employment. 31 Cyc. 1587, 1593. When the bank on February 6th received the note for collection, agency was then established and authority at once accrued to represent the defendants in securing the note so that payment should be made at or before maturity on the 16th; and the knowledge acquired and the steps taken by the bank during the intervening 10 days were assignable as much to the protection and enforcement of the defendants' claim as of the bank's own claim.

Further grounds for reversal are predicated on the proposition that:

"The rule that notice to an agent is notice to the principal being based upon the presumption that the agent will transmit his knowledge to his principal, the rule falls when the circumstances are such as to raise a clear presumption that the agent will not perform his duty." 31 Cyc. 1595.

It is urged, first, that the relations between the bank and the company were so confidential that it was not the duty of the bank to impart its knowledge to the defendants. But the relations proven were only those of borrower and lender; there was no evidence that the bank obtained any information that would not have been readily accessible to any creditor who was on the ground to look after his claim. It is urged, secondly, that the self-interest of the bank in holding its own preferential payment would prevent it from making a disclosure to the defendants. But the defendants, when told, would have the same self-interest in keeping the condition and doings of the company secret. We are of the opinion, however, that the decision should not be rested on the alleged exceptions' inapplicability to the evidence, or on an inquiry into the validity and scope of the alleged exceptions to the rule regarding the agent's knowledge as a matter of general jurisprudence, for we conceive that this part of the case is clearly governed by the statutory law. Section 60b provides:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee." Act July 1, 1898, c. 541; 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

The statute purports to give the whole law on the subject. In it we find no exceptions to the effect that a preferred creditor may hold his advantage provided his agent and the insolvent have confidential

relations, or provided his agent has self-interests antagonistic to a disclosure to his principal. To interpolate such exceptions we deem beyond the proper sphere of statutory construction and violative of the spirit of the act wherein equality of distribution of the bankrupt's inadequate assets is a prime object.

The judgment is affirmed.

CITY OF MINOT et al. v. WALTON.†

(Circuit Court of Appeals, Eighth Circuit. December 19, 1910.)

No. 3,406.

MUNICIPAL CORPORATIONS (§ 821*) — EXCAVATIONS IN STREETS — ACTION FOR INJURIES — QUESTIONS FOR JURY.

In an action against a city to recover for an injury to plaintiff from falling into an excavation in a street at night, where the controlling issues were whether the excavation was properly guarded and that of contributory negligence, and there was substantial evidence on both in support of the verdict, the case was one for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

In Error to the Circuit Court of the United States for the District of North Dakota.

Action at law by Ernest L. Walton against the City of Minot and David Dinnie. Judgment for plaintiff, and defendants bring error. Affirmed.

George A. Bangs (R. H. Bosard, on the brief), for plaintiffs in error.

John E. Greene (L. J. Palda, Jr., on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. This is a writ of error to review a judgment obtained by Ernest L. Walton against the city of Minot, in North Dakota, and David Dinnie, for personal injuries caused by falling into an excavation in a street. The liability of the city arose from neglect of its duty with respect to the condition of its thoroughfares. The excavation was made by and was in charge of Dinnie, a contractor, and, though mainly in private property, it extended into the sidewalk space along which pedestrians traveled. The accident occurred at night.

A motion by defendants at the close of the evidence for a directed verdict was denied by the trial court. The controlling issues of fact were: Was the excavation properly guarded at the place where plaintiff fell; and was he guilty of contributory negligence? A thorough examination of the record shows there was substantial evidence on both these matters to support the verdict. Some minor objections are urged, but we think it plain no error was committed.

The judgment is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 24, 1911.

In re CRAVE & MARTIN CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 85.

BANKRUPTCY (§ 317*)—CLAIMS—CREDITORS' COMMITTEE—CLAIMS OF ATTORNEY.

Where an agreement between the bankrupt and a committee of its creditors, more than four months before the filing of a bankruptcy petition, provided that the committee should take charge of the bankrupt's business, and made its expenses a first lien on the assets of the company, an attorney employed by the committee to advise and act for it, in the absence of a showing that the members of the committee were insolvent, had no claim or lien against the bankrupt's assets for the value of his services, but his rights should be worked out through the committee which employed him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 317.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of the Crave & Martin Company. Petition of Ferdinand E. M. Bullowa to review in matter of law the order of the United States District Court for the Southern District of New York, denying petitioner's application for an allowance for services as attorney prior to the institution of bankruptcy proceedings, rendered to a creditors' committee and claimed to be a lien on the assets of the bankrupt.

Early in 1907 Willard Haas & Co., then represented by petitioner, were among the largest creditors of the bankrupt, and were pressing them for payment; but not desiring to obtain an individual preference, and to preserve the assets of the bankrupt for ratable distribution, Haas & Co. called a consultation with several of the other creditors, and as a result a creditors' meeting was called and a committee appointed to take charge of the affairs of the bankrupt, preserve its assets, and liquidate its business. On March 21, 1907, more than four months prior to the filing of a bankruptcy petition, an agreement was made and signed by the Crave & Martin Company, ratifying the appointment and acts of the creditors' committee and making its expenses a first lien on the assets of the company. The committee employed petitioner to advise it, and attend to such legal matters as would arise in the conduct of the business of the company, and to secure the consent of the minority of the creditors to the appointment of the committee. Petitioner, acting under this retainer, secured the consent of all the minority creditors, and attended to numerous legal matters arising during the conduct of the business, covering a period of over five months, and rendered services in numerous instances requiring legal action and negotiations to preserve the assets of the estate and prevent its dissipation. Petitioner claims that his services were reasonably worth in excess of \$1,000, of which he had received a total of \$500, leaving a balance of an equal amount. The value of the services rendered was disputed, and the referee declined to allow the petitioner's claim, which on writ of review was affirmed by the District Court in an opinion of Mr. Justice Hand, from which petitioner brought the claim to the Circuit Court of Appeals on a petition to review, where the decision of the District Court was affirmed on the opinion below, which is as follows:

"It appears that the petitioner was employed by the committee of creditors, who reserved a lien on the estate for their expenses. The petitioner was not the lienor, but the committee, and they are not asserting it. I concede that this lien would inure to the petitioner's benefit if the committee were all insolvent, for he would be entitled then to his debtor's security; but that is not the case. He has neither a claim as a creditor nor as a lien-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or, and must work out his rights through the creditors' committee which employed him.

"Decision affirmed."

Ferdinand E. M. Bullova (Raymond Reubenstein, of counsel), for petitioner.

Robinson, Biddle & Benedict (W. F. Allen, of counsel), for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Order affirmed, on the opinion of Judge Hand.

ST. LOUIS SOUTHWESTERN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1910. On Rehearing, January 10, 1911.)

No. 1,941.

1. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—SEVERAL VIOLATIONS.

Where several cars, each without the requisite appliances required by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), are hauled by a carrier in interstate commerce at one and the same time, there are as many distinct violations of the act as there are cars hauled not properly equipped, for every one of which the statutory penalty is recoverable.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

2. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—VIOLATIONS—NATURE OF PROCEEDINGS.

Since proceedings against a railroad company to recover penalties for violations of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), are civil in their nature, the government is only required to establish its case by a preponderance of the evidence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

In Error to the District Court of the United States for the Western District of Texas.

Action by the United States against the St. Louis Southwestern Railway Company. Judgment for the United States, and defendant brings error. Affirmed. Petition for rehearing denied.

Before PARDEE and SHELBY, Circuit Judges.

S. P. Ross, for plaintiff in error.

Chas. A. Boynton and P. J. Doherty, for the United States.

PER CURIAM. The judgment of the District Court is affirmed.

On Rehearing.

The hauling by any carrier engaged in interstate commerce of a car not furnished with the safety appliances required by the laws of the United States is a violation of the statute, which entitles the United States to recover a penalty of \$100; and as this penalty attaches for each and every such violation, it is recoverable for each and every car

not furnished with the requisite safety appliances hauled in violation of the act.

Whether the hauling be of several cars by one act or by several acts is immaterial, so that if several cars, each without the requisite appliances, are hauled by the carrier at one and the same time, there are several distinct violations, for each and every of which the penalty is due and recoverable. See *United States v. St. Louis & S. W. Ry.* (No. 1,895 of this court, recently decided) 184 Fed. 28.

On reason and weight of authority it is considered that actions to recover the statutory penalties for violation of the safety appliance law (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) are so far civil in their nature that the strict construction applicable in criminal proceedings is not required, and the United States may recover upon the preponderance of evidence, and the trial judge may in proper cases direct a verdict.

The petition for rehearing herein is denied.

COLUMBIA WAGON CO. v. EAGLE WAGON WORKS.†

(Circuit Court of Appeals, Third Circuit. November 28, 1910.)

No. 1,419.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DUMP WAGON.

The Van Wagenen patent, No. 699,262, for a dump wagon, was not anticipated, and covers an improvement on prior devices of such merit and usefulness as to evidence patentable invention; also *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by the Eagle Wagon Works against the Columbia Wagon Company. Decree for complainant (181 Fed. 148), and defendant appeals. Affirmed.

Hector T. Fenton, for appellant.

Arthur E. Parsons, William F. Hall, and Frederic G. Bodell, for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. Admittedly the patent in suit describes a very useful device. It is the Van Wagenen patent, No. 699,262, for new and useful improvements in dumping wagons. The material question is: Does it disclose any patentable novelty over the prior Lawrence patent, No. 645,816, for a dumping car?

The elements of the combination in claim 4 of the patent in suit, which is the only claim in controversy, are (1) movable bottom sections hinged to the side walls of the wagon (which shows that the movable sections run longitudinally of the wagon); (2) a rotary drum at one end of the movable sections (which shows that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

drum is either at the front or the rear of the wagon, and not on one of its sides); (3) a rocking member at the other end (which also shows that it is at one end of the wagon, and not on either of its sides); (4) a cable or chain connected to the drum, and also to the rocking member at opposite sides of the rocking member's pivot, the intermediate portion of the cable being connected to the bottom sections (which shows that the cable or chain runs longitudinally of the sections and the wagon body, and not transversely across them); and (5) means for rotating the drum. In the prior Lawrence patent the chain in claim 1 extends transversely across the dumping doors, and in each of its other claims transversely across the dumping doors and car body. It is plain, therefore, that the combination of the patent in suit is not the combination of the Lawrence patent.

But are the differences such as to involve invention in the patent in suit? We think they are. When the chain of the Lawrence dumping car is loosened, the doors drop and hang down transversely across the car body, and the contents of the car drop between the doors upon and below the cable or chain. When the chain of the Van Wagenen wagon is loosened, the doors drop and hang down longitudinally of the wagon body, and, as the chain is fastened to the doors, and swings with the doors out of the way of the falling contents of the wagon, the contents fall between the doors in such manner that the wagon may be moved on without disturbance of the unloaded contents by hanging doors or chain. In dumping wagons it is a great convenience to have the doors hinged to the side of the wagon body, and to have the chain out of the way of the falling contents. To have the doors so hinged that, when the chain is loosened, they hang transversely across the car body, with the chain directly in the pathway of the falling contents, as in the Lawrence patent, doubtless does well for a car unloading its contents on a trestle; but such a device for a dumping wagon is far inferior to the Van Wagenen device. We think the combination described in the Lawrence patent is not an anticipation of the Van Wagenen combination, and that the case is not one of double use.

As to the defense of noninfringement, it is sufficient to say that it is not relied on by the appellant. It is clear to us that, if the claim in controversy is valid, the defendant infringes it. We think it is valid.

Consequently the decree of the Circuit Court, entered in conformity with its opinion in 181 Fed. 148, is affirmed, with costs.

TOMPKINS v. INTERNATIONAL PAPER CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 84.

PATENTS (§ 301*)—INFRINGEMENT—EXPIRATION OF PATENT—BILL—ADEQUATE REMEDY AT LAW.

Complainant filed a bill for infringement of a patent, praying for an injunction and for an accounting of profits and damages. The bill was filed the day prior to the expiration of the patent, and averred that during the six years next prior to the filing of the bill complainant had not made, used, nor sold his process, nor any part thereof, that he had obtained no financial advantage from his invention, nor had he sustained any actual damage during such period by the enjoyment of the invention by others. *Held* that, since the bill was sufficient to sustain an ad interim restraining order, and complainant had no adequate remedy at law, the bill was not demurrable, because filed so short a time before the expiration of the patent that no motion for an injunction could have been regularly made.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 491; Dec. Dig. § 301.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Bill by John D. Tompkins against the International Paper Company. From a decree sustaining a demurrer to the bill, and dismissing it, plaintiff appeals. Reversed.

Prindle & Wright (E. J. Prindle and Arthur Wright, of counsel), for appellant.

J. C. Pennie, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The bill is the usual one for infringement of a patent, praying that defendant be enjoined and be decreed to account for profits and damages. The bill was filed August 15, 1908, subpoena served August 17th, and the patent expired the following day, August 18th. The bill was demurred to as without equity, because complainant had a plain adequate and complete remedy at law, and because the bill was filed so shortly before the expiration of the patent that no motion for an injunction could have been regularly notified to the defendant and heard by the court (Circuit Court, Southern District of New York), under its rules, before the expiration of the patent. The rule referred to is No. 36, which provides that:

"Notices of * * * motions, argument or hearing shall be served at least four days before the time of hearing."

It was held in *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975, that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

joyment of his specific right by injunction against a continuance of the infringement. In that case the bill was filed after the expiry of the patent sued on, and was dismissed because it recited no circumstances which would render an action at law for the recovery of damages an inadequate remedy for the wrongs complained of, and that no ground for equitable relief was presented.

In *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, the Supreme Court held that, if the suit be begun in such time that an injunction can be obtained before the expiration of the patent, it is within the discretion of the court to take jurisdiction, and, if it does so, it may, without enjoining the defendant, proceed to grant the other incidental relief sought for. Although there was not sufficient time to give four days' notice of motion for injunction, it was within the power of the court upon the filing of the bill to issue an order to show cause returnable in some shorter time and grant an ad interim restraining order, which would have been in substance and effect an injunction. It seems immaterial to inquire whether or not complainant could have sustained an application for injunction or restraining order on the merits. If before the expiration of the patent he is actually in court with a bill upon which he could ask for an immediate injunction, and there was time enough to make such injunction operative if it were granted, it is not easy to see why, under the decision in *Clark v. Wooster*, the court would not be entitled to take jurisdiction.

Nevertheless there are authorities the other way. *Miller v. Schwarner* (C. C.) 130 Fed. 561; *American Cable Co. v. Chicago* (C. C.) 41 Fed. 522; *Bragg v. Hartford* (C. C.) 56 Fed. 292; *Davis v. Smith* (C. C.) 19 Fed. 823; *Diamond Machine Co. v. Seus* (C. C.) 159 Fed. 497. We prefer, therefore, to rest our decision on the other proposition contended for by the appellant, viz.: That complainant has not a plain, adequate, and complete remedy at law.

In *Root v. Railway Company*, *supra*, immediately after the passage which has been already referred to, the court says:

"Grounds of equitable relief may arise other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule."

The bill of complaint avers:

"That during the six years next previous the filing of this bill of complaint your orator has not made, used, nor sold his process, nor any part thereof, he has obtained no financial advantage from said invention, nor has he sustained any actual damage in said period from the enjoyment of said invention by others."

Assuming that these are the facts, as we must assume on demurrer, it is manifest that complainant in an action at law could recover nominal damages only. He could not prove loss of license fees, because

he had no established license fee; nor could he show that he lost sales, because he was not in fact selling at all; nor could he show reduction in prices through competition, because there was no competition; nor that his market was destroyed by the infringer, because he was not undertaking to establish a market. In these particulars the case differs from *Suffolk Company v. Hayden*, 70 U. S. 315, 18 L. Ed. 76, where the statement of facts indicates merely that:

"No sales had been made of the patent right by the plaintiff, or of licenses for the use of it, so as to establish a patent or license fee as a criterion by which to ascertain the measure of damages."

For aught that appears in that case, plaintiff may have sold or tried to sell the patented machine, and failed to do so because of the infringement, and, being thus deprived of his market, the jury was allowed to assess the damages, as best they could, on general evidence. We are unable to concur with the Court of Appeals in the Third Circuit, who in *McCune v. Baltimore & Ohio R. R.*, 154 Fed. 63, 83 C. C. A. 175, give a construction to this opinion broader, as it seems to us, than the facts in *Suffolk Company v. Hayden* call for.

In a later decision of the Supreme Court, *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263, which was an action of trespass on the case brought to recover damages for infringement of a patent, the court states the rule as we have understood it, namely, that when the evidence not only fails to disclose the existence of a license fee, but also indicates that there has been no impairment of the plaintiff's market, the jury should be "instructed, if they found for the plaintiff at all, to find nominal damages only."

The patentee's remedy at law would seem to be inadequate, if because of his failure to establish a license fee, or to endeavor to market his invention, he has lost the right to recover more than nominal damages, while under a suit in equity there could be recovered the actual profits, possibly large, which defendant made by his unlawful piracy of plaintiff's invention. The case stated in the bill seems to bring it within the category set forth in *Root v. Railway Company*, as one where "the remedy in a legal tribunal is difficult, inadequate, and incomplete."

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to overrule the demurrer.

AUTOMATIC SWITCH CO. et al. v. J. L. SCHUREMAN CO

(Circuit Court, N. D. Illinois, E. D. December 10, 1910.)

No. 28,566.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—REGULATOR FOR ELECTRIC MOTORS.

The Whittingham patent, No. 499,769, for a regulator for electric motors covers a new combination of old elements which was not anticipated, and discloses patentable invention, claims 4, 5, 6, 7, and 8 construed, and *held* infringed.

In Equity. Suit by the Automatic Switch Company and the Otis Elevator Company against the J. L. Schureman Company. On final hearing. Decree for complainants.

Brown & Hopkins (Frank T. Brown, Charles M. Nissen, and A. L. Sprinkle, of counsel), for complainant.

Jones, Addington, Ames & Seibold (W. Clyde Jones and Robert Lewis Ames, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainants file their bill to restrain infringement of claims 4, 5, 6, 7, and 8 of patent No. 499,769, granted to G. H. Whittingham June 20, 1893, for a regulator for electric motors. These claims read as follows, viz.:

"4. The combination of a solenoid of low resistance and a conductor of high resistance connected thereto, a reciprocating iron core within the solenoid, means for holding the core at any predetermined point within the solenoid when it reaches it, until the current is shut off and which will automatically release the core when this occurs, a circuit closer controlling the conductor of high resistance, and means operated by the reciprocating core for closing the circuit and throwing the conductor of high resistance into circuit with the solenoid of low resistance, substantially as described.

"5. The combination of a solenoid of low resistance, a conductor of high resistance connected to the solenoid, means for short-circuiting the conductor of high resistance or throwing it into circuit with the solenoid, a reciprocating core within the solenoid which co-operates with the short-circuiting device of the conductor of high resistance so as to throw said conductor into circuit with the solenoid when the core reaches any predetermined position within the solenoid, substantially as described.

"6. The combination of a solenoid of low resistance, a conductor of high resistance connected to one of the terminals of the solenoid, a short-circuiting device for short-circuiting the conductor of high resistance, an iron core reciprocating within the solenoid, an iron cap upon the solenoid, and means connected with the short-circuiting device of the high resistance conductor which is operated by the reciprocating core to break said short-circuit, and throw the conductor of high resistance into circuit.

"7. The combination of a solenoid of low resistance, a conductor of high resistance connected to one of the extremities thereof, an iron cap located upon the top of the solenoid, a short-circuiting device for short-circuiting the conductor of high resistance, an iron core reciprocating within the solenoid, means operated by the reciprocating core to break the short-circuit of the high resistance conductor and throw it into circuit with the solenoid and a governor connected to the core and controlling its motion.

"8. The combination of a solenoid of low resistance, a conductor of high resistance connected to one of its extremities, an iron cap upon the solenoid a portion of which protrudes within the solenoid, an iron core reciprocating

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within the solenoid, two terminals mounted upon the top of the solenoid in which the conductor of high resistance terminates, and a bridge connecting said terminals, and means whereby said bridge is lifted and a short-circuit between the terminals of the coil of high resistance broken when the core reaches the desired point within the solenoid."

"Broadly stated," say complainant's counsel (page 22 of first brief) "the Whittingham invention may be stated to consist in the combination with a motor of a solenoid having a movable core controlling the removal and introduction of the starting resistance into the armature circuit of the motor, respectively, by its rise and fall, and in conjunction with an automatic switch also controlled by this core, which at the end of the stroke of the core cuts a high resistance into the solenoid circuit and thereby reduces the magnetic attraction upon the core or for the core to such an extent that when the main line current is broken and the counter electromotive force begins to be reduced, it will produce a quick release of this core and thus cause the latter to drop and reinstate the artificial resistance into the armature circuit to protect it while the motor is still running." It is the theory of the patentee that the device of the patent in suit "will automatically introduce the artificial resistance into the armature circuit just in proportion as it is required by the reduction of the counter electromotive force of the armature, and the resistance be again automatically removed from the circuit when the current is turned on again from the generator."

It is claimed by complainants that the devices of the prior art protect the motor from burning out by providing for the introduction of artificial resistance only after the motor had practically come to a standstill, and that the invention of the claims in suit consists in a device for the introduction of artificial resistance before the motor comes to rest, and at a time when its counter electromotive force had been so reduced as not to constitute a sufficient protection to the motor even while it is still rotating under the influence imparted by the electric current prior to the cessation thereof, thus making the introduction of artificial starting resistance automatically dependent upon the fall of the counter electromotive force while the armature is still rotating. The end attained, so complainant insists, is a quick or sensitive release of the core. The arrangement of the patent, it satisfactorily appears from the record, has the effect of producing a quick release of the core whenever the electric current has been broken and the counter electromotive force has been reduced to a degree which would make it scant protection to the armature, should the current suddenly be restored. The release of the core would then cut out the high resistance solenoid and reinstate the starting resistance with all necessary promptness, although the fall of the core would be sensibly affected and slowed up by the influence of the low resistance solenoid as well as by the governor when used.

None of the elements of the combination are new in themselves. The device, independent of its connection with a motor, is complete and may be used in various other relations. In such case, the artificial resistance might be, and defendants insist, has been, used for the purpose of economizing the current. If that be so, it cannot be

claimed as new even though the complainants make it serve another end, provided the combination be the same. The artificial resistance solenoid of the patent in suit certainly does economize the current, while at the same time it makes the hold upon the core sensitive. But the combination is not the same in all respects. No one of the devices of the prior art containing the high resistance feature could be employed as a regulator for electric motors without serious changes which may or may not in themselves constitute invention. It will be noted that none of the claims in terms include a motor as a part of the combination, nor are they stated to be used in connection with an armature. Defendants maintain that such being the case, the motor cannot be considered. The specification and drawings, however, and the whole trend of the patent, limit the invention to use with a motor, and the facts seem fairly to bring the case within the reasoning of the Circuit Court of Appeals for this circuit in *Benbow & Brammer Mfg. Company v. Richmond Cedar Works et al.*, 170 Fed. 965, 96 C. C. A. 101. Although defendant insists that there were only two claims to the patent there involved, neither one of which set out the whole invention in terms or purported on its face to be construed in connection with a washing machine, whereas claims 1 and 2 of the patent in suit specifically claim the motor as an element, while the claims before the court relate in terms wholly to subcombinations consisting of the electromagnet, the economizing resistances and the short-circuiting switch, regardless of the particular machine with which the engine is used. The doctrine of the *Benbow-Brammer Case* is enforced in *Morgan Engineering Company v. Alliance Machine Co.*, 176 Fed. 100, 100 C. C. A. 30, where the word "traveling" of the specification, with reference to a crane, was read into the claims. The gist of the patent in suit is a device which shall adjust the cutting out and insertion of starting resistance to the rise and fall of counter electromotive force. This necessarily implies the presence of a motor. It seems plain that the whole genius, so to speak, of the invention, would be wanting, should this adaptation to the rise and fall of the counter electromotive force be barred from consideration. Therefore complainants are entitled to whatever advantage would accrue to them had the several claims in suit specifically made reference to use in connection with armatures or motors. (Complainants record p. 548: Answer of Smith to cross-interrogatory, 130 et seq.)

"There are," says the patentee (page 1, col 2, line 59) "several features of the invention. The solenoid is wound with a coil of low and also with one of high resistance, connected to one another so as to form a continuous circuit, but the solenoid of high resistance may be short circuited and cut out of the circuit by a suitable mechanism at a predetermined period. The introduction of the resistance into the circuit when the current is shut off is carefully governed so as to be approximately equal to the decrease of the electro-motive force of the armature. The core of the solenoid is lifted by the force of the solenoid of low resistance alone, consuming, while lifting it say four amperes at one hundred and ten volts, but when the armature reaches its highest point the high resistance coil is thrown into circuit and the consumption of current reduced to one-tenth of an ampere at the same voltage. The solenoid is provided with an iron cap which under the influence of induction becomes magnetized sufficiently to hold the armature at its highest point within the solenoid when the current is passing, but will release it

when the current is shut off and let it gradually descend under the influence of the governor."

Fig. 1 serves to illustrate the mode of operation:

When the current is turned on, a portion thereof passes to the shunt in which the solenoid is included.

"The bridge 8 being in contact with the blocks 10,10, the high resistance coil will be short circuited and the current will flow freely through the low resistance coil, thereby exerting a large amount of power upon the core so as to lift it freely and easily. The solenoid and core are considerably longer than the rheostat so that the core may rest at all times a considerable distance within the solenoid, far enough to cause the core to be saturated with the magnetic force of the solenoid as soon as the current is turned on, after which the motion of the core will be regular and uniform. As the core rises toward the top of the solenoid it is attracted by the magnetic force of the iron cap, 4, which has itself become magnetized under the influence of the induction of the solenoid, and the last half inch of its motion will therefore be much stronger and faster than the preceding portion. This rapid motion serves an important function. The end of the rod, 7, protrudes below the inner side of the cap, 4, and when the core, 14, rises to the top of the solenoid it will strike this rod and force it upward and break the contact between the bridge piece, 8, and the blocks, 10, 10. To do this properly and perfectly requires more force than the solenoid alone will exert. Hence the attraction of the cap is important to the successful operation of the device."

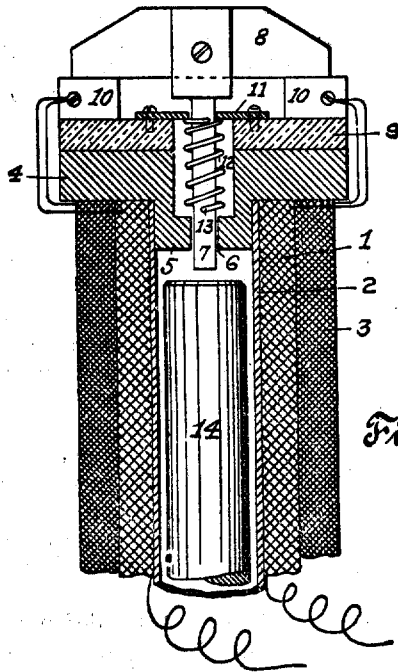


Fig. 1.

The breaking of the contact between the bridge and blocks, 10, 10, short-circuits the solenoid of low resistance and cuts in the high resistance, which economically and sensitively holds the core against the cap, 4, until by reason of the cessation of the electrical current and the weakening of the counter electromotive force the attraction of the cap, 4, is no longer sufficiently strong to hold the core, when it drops and inserts the starting resistance. The patentee does not limit his invention to the use of a cap, but claims any equivalent thereof.

The claims in suit were held valid by Judge Townsend of the Second circuit in *Automatic Switch Company of Baltimore City v. Cutler-Hammer Mfg. Co.* (March 3, 1905) 139 Fed. 870. On appeal this suit was reversed, but on grounds not involving validity. In the present case the prior art is somewhat more fully discussed than in the *Cutler-Hammer Case*.

The nearest approach, strictly in the prior armature or motor protection art, to the device of the patent in suit cited by defendant, is the patent to Blades, No. 453,032, dated May 26, 1891. This patent was granted for an automatic electric switch mechanism. It calls for a horseshoe magnet and not a solenoid. It has a hinged armature and no core. It has no high resistance. It has no means for holding the hinged contact arm at a predetermined point. It has no cap or its equivalent. It lacks the sensitive release feature. It requires a very strong pull at the end to lift the contact arm and, as complainants insist, holds the arm very tightly, so as to prevent a release until both the impressed and counter electromotive force have practically ceased.

While a solenoid is a magnet, its form is such as to permit of an entirely different application from that of a horseshoe magnet, one in which invention might conceivably be predicated. This is apparent in the Blades patent. The armature is under the influence of the electro magnets which attract it when magnetized and release it when the current is cut out, as in the Whittingham patent, but the whole adjustment of the parts is radically different, so much so that the mere arrangement of the patent in suit, in the absence of anticipatory devices in the prior analogous arts, might well be held to constitute invention. Aside, however, from the difference in the magnets used, the Blades patent fails to anticipate the claims in suit, as above stated, in many ways and especially in the absence of resistance in the solenoid circuit.

Much reliance is placed by defendant upon the Pope patents of 1872 and 1873 as anticipating the claims in suit, as well as upon the various Timmis & Currie British and American patents and publications. These were before Judge Townsend in the Cutler-Hammer suit. They cover devices for operating railway signals and semaphores.

The earlier Pope patent has no means for automatic insertion of resistance. It does not take into consideration means for protection of the motor, or attempt to make any adjustment with regard to the counter-electromotive force. Indeed the rotary motor was then unknown. The release of the semaphore is effected by the manual introduction of a current of opposite polarity. Pope makes no provision for the predetermined point set out in the claims in suit. The core is not released until the current of opposite polarity is manually introduced. As in the later Pope patent, so in this, speedy release is not a feature. The semaphore is not a device requiring the delicate and accurate release of the core that is necessary in protecting motors. Moreover, whatever cap this device has is a part of the core, and not, as in the patent in suit, separate from and independent of the core, unless we consider the lower segment of the cores, respectively, as shown in Fig. 2, as caps. They may serve the purpose of mutual drawing towards each other. If so, they must come into exact contact and thereby become separated with difficulty—the very objection which complainant's counsel claims the patentee has cured by the so-called predetermined point to which the core can be lifted.

The high resistance of Pope's later patent was introduced to weaken the magnet, M, which in time weakened the magnet, C, in order to bring into play the drawing power of magnet, F, in operating a secondary signal. In the Pope patents, when the circuit is broken and the current of opposite polarity is inserted, the signals return at once to resting position, while the core of the claims in suit follow the counter electromotive force, so long as it can be thereby sustained. Neither of the Pope patents deal with a governor. Giving full effect to all the characteristics of each of the Pope patents, it is practically impossible to trace either of them upon the claims in suit. They lack so many of the features of Whittingham's invention that any attempt to do so involves practical reconstruction of the former to a degree not compatible with patent construction, especially construction of electrical inventions which necessarily turn upon slight differences.

The Timmis & Currie patents and publications may be considered together. Those are particularly designed with reference to railroad signals and do not in any way suggest a self-starter for electric motors. Their resistance coil is adapted to the economizing of current. This involves a different association of parts, and does not involve its use with self-starters for protection purposes. Its high resistance is, in part at least, introduced manually. It neither has nor requires the dash-pot of claim 7. It has no reciprocating core within the solenoid, if it may be called a solenoid, co-operating with a short-circuiting device. It lacks the solenoid cap. It obtains no quick release by means of the falling of the core. It contains no means for holding the core at a predetermined position. Its cap, if it may be so termed, is a part of its sliding rod, and not on its so-called bobbin. Like the Pope devices, quick insertion of starting resistance is not one of its aims, and was not in the inventor's mind. This would seem to be shown by the fact that the frame upon which the solenoid or magnet is wrapped consists of a soft iron tube or lining, which can hardly fail to become highly magnetized, and thereby act with strong magnetic attraction upon the core. These devices cut in resistance manually, though the directions suggest, but do not disclose, automatic introduction thereof. There are many other differences which differentiate these devices from the device of the patent in suit, not the least of which is that they are employed in a different art.

A number of other patents in the prior art are in evidence, such as Mordey & Watson patent of 1885, Whittingham patent of 1899, referred to in the patent in suit, Smith patent of 1872, and the Abdank Lamp reference of 1883. These are respectively cited by defendant to show some features of the device of the claims in suit. Complainants do not claim new elements, but old elements in a new combination, and in connection with a self-starter.

Some considerable controversy is raised by defendant's contention that claims 4, 5, 6, and 8 in suit call for no dash-pot and therefore do not cover the whole invention, which, it is insisted, is defined and limited by the language of lines 58 to 65, col. 1, p. 2, of the specification, reading as follows, viz.:

"Such a dash-pot will govern the motion of the armature or core during both its upward and downward motion. This is an important feature as de-

scribed above, as it permits the resistance to be introduced into or removed from the circuit exactly in proportion as the electro-motive force of the armature increases or decreases."

But the patentee was at liberty to omit mention of the dash-pot in the claims in suit if he so desired, since they are a well-recognized feature of every self-starter.

Defendant's witnesses doubt the value of the device of the patent in that it assumes to protect the armature while it is still under considerable headway caused by its own momentum, and the action of the counter electromotive force, when practically no danger is likely to arise. If, however, it is within the range of reasonable possibility that such a condition may arise, and from the evidence such seems to be the case, and such protection being then desirable, the point is not well taken, for then the element of usefulness is sufficiently established.

The claims in suit read in connection with a self-starter are deemed to show invention and are held valid for the purposes of this suit.

Defendant's device is shown in the drawing and offered by complainants, which is stipulated by defendant to be correct. In its operation and general arrangement, it appears to be almost a Chinese copy of the device of the patent in suit. Indeed, defendant makes little effort to differentiate it therefrom. One distinction claimed is that its dash-pot is not a double acting dash-pot. Claim 7 alone calls for a governor. There is no reason disclosed why this should be read as a double-acting dash-pot. It calls for a governor. That may or may not require a double acting dash-pot. This point is not well taken. The further claimed distinction between the two is defendant's insistence that the two terminals shall be mounted upon the top of the solenoid. It appears that those of the patent in suit rest upon an insulated ring while the defendant's are fastened to the back or base plate. In both cases the terminals are located relatively above the solenoid, which is a mere matter of compactness and convenience, and an entirely unessential feature so far as the merits go. If the court is right in sustaining the validity of the claims in suit, it is clear that defendant infringes each of them, and it is so held.

MITCHELL v. STEVENS.

(Circuit Court, N. D. Illinois, E. D. December 10, 1910.)

No. 29,363.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—COMBINED LETTER SHEET AND ENVELOPE.

The Mitchell reissue patent, No. 12,675 (original No. 827,809), for a combined letter sheet and envelope, which comprises, when ready for mailing, a sealed letter open at both ends, but containing an unremovable card or letter, held in place by a slot in one of the flaps and having no outward exposure, thus forming a mailable communication requiring only a one cent stamp, was not anticipated, and discloses patentable invention; also, held infringed by the device of the Stevens patent, No. 892,461.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by John T. H. Mitchell against Roderick G. Stevens. On final hearing. Decree for complainant.

Charles Gilbert Hawley, Sol., and of counsel, for complainant.
Cheever & Cox, Sol., and of counsel, for defendant.

KOHLSAAT, Circuit Judge. Complainant files his bill to restrain infringement of claims 1 and 7 of reissue patent No. 12,675, granted July 23, 1907, to complainant for a combined letter sheet and envelope, having particular reference to advertising devices of the class known as postal letters or cards and envelopes. The claims in suit read as follows, viz.:

"1. A combined letter sheet and envelope, comprising a transversely scored sheet of thick paper or cardboard, having upper and lower flap portions and an intermediate portion, said portions adapted to be folded together, and when folded, forming an open-ended envelope and one of said flap portions being formed to receive an inclosure and hold it against endwise movement in the envelope thus formed, substantially as described."

"7. A device of the class specified, comprising a folded letter-sheet provided with a cross-slot, a postal inserted in said slot, and a sticker holding said letter in closed condition."

The cause is now before the court on final hearing. "My invention," says the patentee, "consists generally in a sheet of thick paper or cardboard, of substantially the size of a commercial letter and bearing a personal letter or communication on its inner face, said sheet being transversely scored and thereby formed into upper and lower flaps and an intermediate portion and said lower flap being formed or adapted to retain a postal card or the like when folded between the other parts or portions, suitable means being provided for fastening the free edges of the folded device." The whole constitutes, when ready for mailing, a sealed letter open at both ends, but containing an unremovable communication, thus forming a mailable communication requiring only a one cent stamp. The card is held in position by a slot in the lower flap of the cardboard which is somewhat less in length than the cardboard, and into which the card is thrust, co-operating with the other parts of the device at their lines of folding. Thus the slot keeps the card or communication from movement toward the open ends, and the folded parts keep it from moving in any other direction. The whole is exceedingly simple. The prior art discloses patents for combined envelope and letter sheets arranged so as to hold inclosures in position, as, for instance, double slots for holding a letter stamp, as in Lugin patent of 1890; a similar device for holding coin, as in the Crabb coin carrier of 1899; the Duden coin carrier of 1899; and the Stimpel coin mailer of 1904. All of these, however, are for entirely closed envelopes. The record discloses no device of the prior art for an open mailable letter, adapted to hold in place any communication, or, indeed, any article. There are a number of combined letter sheet and envelope devices in evidence. This feature of the claims in suit is therefore old. But in all the wide field of advertising mediums no one had ever, before Mitchell, hit upon this feature, which, according to the evidence of a number of skilled and practical advertising men, was a distinctively

successful advance in the advertising media. Anything which will attract the attention of the public in the shape of mail matter is entitled to consideration. Having in mind the pertinacity and ingenuity of those whose life task seems to be the discovery of some way in which to penetrate and quicken the indifference of the public, it certainly is persuasive that any one should hit upon the device in suit after so many years of aggressive effort in that line, especially in view of the effective commendations of those posted in the advertising line. The record considered, I am of the opinion that the patent should be held valid.

Defendant operates under patent No. 892,461, granted to him on July 1, 1908. The difference between his and complainant's device consists in the location and manner of location of the inclosure or card. Mitchell makes his retaining slit in the lower flap of the folder, and is thus enabled to (1) use only one slit; and (2) to provide a letter which gives no outward exposure of the card. Stevens, by the use of two slits, as in the postage stamp holder made in the middle section of the folder, exposes a section of the inclosed card. This would be a drawback except for the fact that Stevens utilizes this exposed portion of the card for the address.

It is contended that complainant is limited to his one slit in the lower flap. The genius, if it be such, of the Mitchell patent, is found in the combination of the letter effect with the ordinary one cent mail matter. The arrangement of defendant's device in no way adds to its effectiveness as an advertising medium over complainant's. The card could be securely held on the main or middle sheet of the folder by means of incisions in the sheet only in the manner adopted by defendant. It seems entirely likely that complainant should have considered that method, but preferred his own entirely inclosed card; his main purpose being to provide a one cent mailable folder which should, while open at the ends, still retain much of the advantages of an ordinary letter. This was his invention. Given that idea, the location on the middle section of the folder cannot be said to involve invention. Infringement seems to be clearly established.

The injunction may go as prayed.

D. & W. FUSE CO. v. TRUMBULL ELECTRIC MFG. CO. (SACHS CO., Intervener).

(Circuit Court, S. D. New York. December 17, 1910.)

EQUITY (§ 419*)—DECREE PRO CONFESSO—DEFAULT—RIGHT TO ANSWER.

Complainant filed a bill for patent infringement against the T. Co., which was only the seller of the article complained of, and, it having appeared, a pro confesso was taken against it for failure to plead. The S. Co., by which the article was manufactured, was permitted to intervene and defend, by a stipulation that proceedings against the T. Co. would be stayed pending a determination of the S. Co.'s defense. The T. Co. was not a party to this agreement, and, the S. Co. becoming a bankrupt, a decree was assented to in favor of complainants against it, whereupon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant applied for final decree against the T. Co. *Held*, that the T. Co., having relied on the S. Co.'s defending the suit, would not be deprived of any defense it might have by the S. Co.'s failure to do so, and was therefore entitled to leave to answer on terms.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. § 419.*]

In Equity. Suit by the D. & W. Fuse Company against the Trumbull Electric Manufacturing Company; the Sachs Company, intervening. Application for a decree absolute on a bill taken pro confesso. Denied conditionally.

Ralph L. Scott, for complainant.

Raymond G. Guernsey, for defendant.

Bartlett, Brownell & Mitchell, for intervener Sachs Co.

WARD, Circuit Judge. This is an application for a decree absolute upon a bill which has been taken pro confesso.

Judge Wallace held, in *Bennett v. Hoefner*, 17 Blatchf. 341, Fed. Cas. No. 1,320, that, notwithstanding the provision of Supreme Court equity rule 18 that after the bill is taken pro confesso the case may be proceeded in ex parte, a defendant who had appeared was entitled to notice of entry of decree absolute. Obviously this is to give him an opportunity to ask for any relief he may think himself entitled to.

The bill in this case was filed June 5, 1908, against the Trumbull Company, which entered its appearance July 6, 1908, and, not having filed a plea, demurrer, or answer by the next rule day, was taken pro confesso August 4, 1908.

The Trumbull Company was only the seller of the articles complained of in the bill as infringements, and September 16, 1908, a stipulation was entered into between the complainant and the Sachs Company, the manufacturer, permitting the Sachs Company to intervene and defend, and providing that proceedings against the Trumbull Company should be stayed and await the result of the defense of the Sachs Company. The Trumbull Company was no party to this agreement. November 9, 1910, after proofs had been taken on behalf of the complainant and of the Sachs Company, the latter, having gone into the hands of a receiver, consented to a final decree in favor of the complainant.

It is quite clear that the Trumbull Company was relying on the Sachs Company to defend the suit, and it should not be deprived of any defense it has by the failure of the Sachs Company to do so. Upon condition that it stipulate that testimony taken on behalf of the complainant as against the Sachs Company may be used against it, and upon payment of \$50 to the complainant, the Trumbull Company may, within 20 days after service of a copy of order hereunder, plead, demur, or answer to the bill; otherwise, a decree absolute will be entered against it.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
183 F.—50

HOPPE v. W. R. OSTRANDER & CO.

(Circuit Court, S. D. New York. December 7, 1910.)

WITNESSES (§ 16*)—SUBPŒNA DUCES TECUM—SETTING ASIDE.

A subpœna duces tecum, issued at the instance of complainant in an infringement suit, to require the production of books and records of defendant, set aside as too broad in its requirements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 20, 26; Dec. Dig. § 16.*]

In Equity. Suit by Oscar Hoppe against W. R. Ostrander & Co. On motion by defendants to vacate subpœna duces tecum. Motion granted.

H. Linsly Johnson, for complainant.

Robert Starr Allyn, for defendant.

LACOMBE, Circuit Judge. Some of the objections to the subpœna advanced on the argument have nothing to do with this motion. They go to the merits of the controversy, and will no doubt be raised and disposed of at the proper time.

The court is at a loss to see why the complainant is undertaking to make proof of many sales at this stage of the case. The single sale, already proved, should, it would seem, establish a prima facie case. If it is sought, by defendants' testimony, to excuse or explain away this sale, complainant will have the opportunity on rebuttal to sustain the bill by showing other sales; indeed, it may bring out enough of them on cross-examination of defendants' witnesses. Manifestly, at this stage of the case, complainant should not go into an accounting, and show all sales of the character complained of. Nevertheless, counsel and not the court is trying the case, and if he thinks his duty to his client requires him to show enough sales to establish a course of business, he may do so.

This particular subpœna, however, is too broad. If he will call some one familiar with the business methods and records of defendant, he may ascertain what particular books and papers preserve a record of the transactions, and may then limit his subpœna to what is necessary. When this is done, and new subpœna issued, the court will indicate some way in which the books and papers may be used to prove his case, without throwing them open to his unrestricted inspection.

Motion to set aside this subpœna is granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re HEIM MILK PRODUCT CO.

(District Court, N. D. New York. December 13, 1910.)

1. BANKRUPTCY (§ 114*)—RECEIVERS—AUTHORITY—ADJUSTMENT OF CLAIMS.

Receivers in bankruptcy prior to adjudication cannot adjust claims or properly defend suits thereon; their office being necessarily of short duration, and their duties primarily to care for and protect or preserve the bankrupt's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 114.*]

2. BANKRUPTCY (§ 114*)—RECEIVERS—PETITION TO SUE.

Bankruptcy Act July 1, 1898, c. 541, § 63, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), provides that provable claims shall be proved and presented to the referee or court, with such proof as is required, and shall then be allowed or disallowed, and liquidated if unliquidated, as directed by the referee or the court; and section 11 stays all pending suits against the bankrupt. *Held*, that under such sections suits against the bankrupts or receivers are not to be authorized by the court in any event, and not against any one prior to the appointment of a trustee to represent creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 114.*]

3. BANKRUPTCY (§ 295*)—CLAIMS—LIQUIDATION—STATE COURT.

Claims against a bankrupt's estate are not to be settled or liquidated by a suit in the state court unless the judge or referee so directs.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414; Dec. Dig. § 295.*]

In the matter of bankruptcy proceedings of the Heim Milk Product Company, an alleged bankrupt. On petition of Crandall Pettee Company for leave to sue the alleged bankrupt and the receivers appointed prior to adjudication on a claim provable in bankruptcy. Denied.

Edgar T. Brackett, for petitioner.

Wildman & Gray, for receivers.

RAY, District Judge. A petition in bankruptcy herein has been filed and receivers appointed with leave to continue the business of the corporation. No adjudication has been made. The company, a corporation, and some 80 per cent. of the creditors, have asked delay pending an effort to settle with the creditors and reorganize the company so as to continue the business. The company takes milk from a large number of farmers who are deeply interested in the continuance of such business and who would be greatly injured by its abandonment. About 20 per cent. of the total indebtedness is secured or held by persons not farmers and patrons.

At the Utica term of this court commencing December 6th, to which time the matter had been adjourned, it was ordered, in substance, that a meeting of the creditors be called at Truxton, where one plant is located, and another meeting at Canastota soon thereafter, where the larger plant is located, on notice to all, and after mailing to each creditor a statement showing the condition of the said corporation, and the results of running it under present conditions so that intel-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ligent action might be taken and a satisfactory determination arrived at. These meetings are called for January 7th and 11th, respectively. If a settlement is made, it must include the claim of the Crandall Pettee Company, which asks leave to sue the receivers. If no settlement is reached, an adjudication will at once be made, and the appointment of a trustee will follow in due course to whom all claims must be presented for final action. The acceptance and allowance or adjustment of such claims, including that of the Crandall Pettee Company, will rest with the referee primarily, but ultimately with the trustee and creditors. If this claim be contested, it must be settled and proved before the referee to which the case is referred. If unliquidated, as this claim seems to be, it may be liquidated by agreement or arbitration, if the trustee consents, or suit, as the court, that is, the referee, if the case has been referred, shall direct. See section 63b, Bankruptcy Act, and also section 26. Act July 1, 1898, c. 541, 30 Stat. 553, 563 (U. S. Comp. St. 1901, pp. 3432, 3447).

Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power. They may not compromise claims or admit or reject them. They cannot properly defend, or, if they do, cannot act intelligently, as their office is of short duration, and their province is to care for and protect or preserve the property, not defend suits. In short, the act contemplates that all claims against the bankrupt, which are provable—and this is a provable claim—shall be proved and presented to the referee or court with such proof and then be allowed or disallowed and liquidated, if unliquidated, as directed by the referee or the court. Section 63. All pending suits against a bankrupt are to be stayed. Section 11. This section clearly indicates that suits against a bankrupt and the receivers are not to be authorized by the court in any event and not against any one prior to the appointment of a trustee who is to represent the creditors. Even then claims in controversy are not to be settled or liquidated by suit in the state courts unless the judge or referee so directs. This claim arises on a contract made by the alleged bankrupt and is a claim against the bankrupt, and is not a claim against the receivers for some act or omission of theirs.

The application is denied.

UNITED STATES v. NECHMAN.

(District Court, E. D. Michigan. May 12, 1910.)

No. 5,327.

1. ALIENS (§ 70*)—NATURALIZATION—DECREE—VACATION—FINDING.

Where a decree of naturalization issued by an Ohio court of original jurisdiction recited that the alien naturalized was then 25 years of age, and that it appeared to the court that he had made his declaration of intention to become a citizen of the United States according to law, it should be construed as finding that all other requirements necessary to sustain his application were found to exist; and hence the order could not be attacked on the ground that he had not declared his intention at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

least two years prior to his admission to citizenship, under the rule that a judgment may not be impeached for any facts, whether involving fraud, collusion, or perjury, which were necessarily before the court entering the judgment and passed upon.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 154-160; Dec. Dig. § 70.*]

2. ALIENS (§ 67*)—NATURALIZATION—COURTS—JURISDICTION.

Where a court admitting an alien to citizenship was vested with some common-law jurisdiction, and had a clerk and a seal, it was empowered by Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), to naturalize aliens; it not being essential that the court shall have been invested with general common-law jurisdiction.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 131-137; Dec. Dig. § 67.*]

Petition by the United States to vacate a judgment of naturalization of Charles Nechman. On demurrer to the petition. Sustained.

Frank H. Watson, U. S. Atty., and J. Edward Bland, Asst. U. S. Atty.

Raymond E. Van Syckle, for defendant.

SWAN, District Judge. This petition prays for an order setting aside and annulling an order of the court of insolvency of Cuyahoga county, Ohio, made April 1, 1902, admitting defendant Nechman to citizenship. This application is made under the provisions of section 15 of the act of June 29, 1906 (34 Stat. 601, c. 3592 [U. S. Comp. St. Supp. 1909, p. 485]), which authorizes proceedings "in any court having jurisdiction to naturalize aliens * * * for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that the certificate of citizenship was illegally procured."

The grounds here pressed for the cancellation of defendant's certification are: (1) That defendant was over the age of 18 years at the time of his arrival in the United States; (2) that he had not, at least two years prior to his admission as a citizen of the United States of America, declared his intention to become a citizen of the United States of America, in compliance with the provisions of section 2165 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1329); (3) that the court admitting the said Charles Nechman to citizenship had no jurisdiction in naturalization matters.

While there is some conflict in the testimony as to the age of Nechman, it is not clear that he was over 18 years of age when he arrived in the United States. His father's testimony is positive that he was born September 22, 1877, and came to the United States from Russia at the age of 17 years. Whatever the defendant has stated as to his age is obviously inferior to his father's knowledge. He was naturalized in the court of insolvency of Cuyahoga county, Ohio, April 1, 1902, and was then 25 years of age. If this testimony is credible, his naturalization is not assailable on the ground of fraud or illegality. His certificate of naturalization recites that:

"It appearing to the court that he had made his declaration of intention to become a citizen of the United States, according to law."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This can have but one meaning. All other requirements of the law necessary to sustain his application for naturalization, as the law then stood, are found by the court and recited in its certificate. There is an entire absence of testimony that any fraud was perpetrated upon the court, or that there was any illegality committed by which Nechman's certificate was procured. There is, therefore, nothing in section 15 of the statute of 1906 which would warrant this court in canceling his certificate. The facts were all directly before the court and it passed its judgment upon them. "The judgments of courts may not be impeached for any facts, whether involving fraud or collusion, or not, or even perjury, which were necessarily before the court and passed upon." *The Acorn*, 2 Abb. 435, 445, Fed. Cas. No. 29; *U. S. v. Gleeson*, 90 Fed. 778, 33 C. C. A. 272; *Spratt v. Spratt*, 4 Pet. 393, 7 L. Ed. 897; *Hilton v. Guyot*, 159 U. S. 207, 16 Sup. Ct. 139, 40 L. Ed. 95; *U. S. v. Throckmorton*, 98 U. S. 66, 25 L. Ed. 93.

In the case at bar, the petition of the United States does not allege fraud, and, of course, that is not in the issue. This fact differentiates the case from *U. S. v. Spohrer* (C. C.) 175 Fed. 440, in which fraud was an issue. In *U. S. v. Simon* (C. C.) 170 Fed. 680, 682, the petition did not allege Simon's fraud; "but it was assumed on both sides that the ground of illegality was open to the United States. So far as the United States relied upon fraud, it is bound to prove the fraud." In that case the certificate was canceled, although the court found no fraud to have been committed by the applicant, on the ground that the court which granted the certificate, if it acted with full knowledge of the facts, must have found that applicant's naturalization, as a British subject, within five years prior to his admission to citizenship in the United States did not interrupt the period of five years' residence required by the laws of the United States. Judge Lowell held that:

"If the state court proceeded on this ground, I must hold that it erred in matters of law, and therefore that Simon's naturalization was illegally procured."

The facts in the case at bar take this case out of the reasoning of Judge Lowell, for there is nothing here upon which the correctness of the ruling of the Ohio court in Nechman's naturalization can be impugned.

Had the court of insolvency of Cuyahoga county common-law jurisdiction? It is not denied that it had some common-law jurisdiction. It was therefore, empowered under section 2165, Rev. St. U. S., to hold cognizance of proceedings for naturalization, as it has also a clerk and a seal, as its certificate in this case attests. This is sufficient. "It is not indispensable to the qualifications of a court under this act of Congress that it should have all the common-law jurisdiction, or even that it should have a general common-law jurisdiction." *Levin v. U. S.*, 128 Fed. 826, 832, 63 C. C. A. 476; *Ex parte Cregg*, 2 Carter, 98; *Parsons v. Bedford*, 3 Pet. 446, 447, 7 L. Ed. 732; *U. S. v. Power*, 14 Blatchf. 223, Fed. Cas. No. 16,080.

The demurrer of defendant to the petition of the United States is sustained, and its petition dismissed.

In re PLOYD.

(District Court, M. D. Pennsylvania. December 19, 1910.)

No. 1,702, In Bankruptcy.

1. BANKRUPTCY (§ 123*)—ELECTION OF TRUSTEE—CLAIMS—VALIDITY.

Where certain claims against a bankrupt were unquestionably valid, it was no reason for excluding the holders thereof from their right to vote at an election of a trustee that the claims were due to the bankrupt's counsel and clerk, and that, by reason of that fact, they were likely to be voted in the interest of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 123.*]

2. BANKRUPTCY (§ 126*)—TRUSTEES—ELECTION—ACTIVITY OF BANKRUPT.

Evidence *held* to require a finding that a bankrupt was unduly active in an election of a trustee, and that such election should be set aside at the instance of objecting creditors as violating public policy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 126.*]

In the matter of bankruptcy proceedings of Fletcher W. Ployd. On certificate of the referee sur election of H. M. Bretz, as trustee, to which various creditors excepted. Election set aside, and new election ordered.

Charles L. Bailey, Jr., for excepting creditors.
W. M. Hargest, opposed.

ARCHBALD, District Judge. At a meeting of creditors, held for the purpose of choosing a trustee, two persons were voted for—H. M. Bretz and E. M. Winters—Mr. Bretz being supported by 37 creditors, with claims aggregating \$7,266.80, and Mr. Winters by 29 creditors, with claims aggregating \$7,019.03; in accordance with which Mr. Bretz was declared elected, and his selection was approved by the referee. It is claimed, however, that the election was invalid, Mr. Bretz being the choice of the bankrupt, and put forward in his interest, and also being disqualified because of having solicited and secured numerous claims on information furnished by the bankrupt in advance; also, that the claims of Hargest and Hargest and of David Philips, counsel for the bankrupt, of George E. Schaffner, a brother-in-law, and of E. E. Mansberger, a clerk, all of whom voted for Mr. Bretz, should not, by reason of their close relation to the bankrupt, have been allowed to participate; while, on the other hand, the claims of the Harrisburg National Bank, C. L. Brinser, and C. L. Brinser & Co., which were rejected by the referee as being secured, should have been received and counted for Mr. Winters, the effect of which would have been to reverse the result.

There can be no serious question, however, as to the propriety of the rulings made by the referee with regard to the disposition in the first instance of these controverted claims. Mr. Weiss, who was an indorser on the note held by the Harrisburg National Bank, had a judgment which was a lien on the bankrupt's real estate, and the claim was thus brought within the express terms of the law as being secured. And the same is true as to the claims of C. L. Brinser and C. L. Brin-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ser & Co., both of which were protected by the agreement with the bankrupt, which was produced. Nor, on the other hand, could the trustee disallow the claims of Hargest and Hargest, David Philips, George E. Schaffner, or E. E. Mansberger, for the reasons assigned against them. These, beyond question, were valid debts, and it was no ground for excluding them that they were due to the bankrupt's counsel, his brother-in-law, and his clerk. Nor does it affect this that by reason of these several relationships they were likely to be voted in the interest of the bankrupt, which goes not to the legality, but to the result of the vote. It must therefore be accepted that of the votes legally cast at the meeting Mr. Bretz received a majority in number and amount, so far as that goes.

This does not, however, dispose of the whole case. The question is not whether Mr. Bretz got the necessary votes, but whether, under the showing made, with regard to the way this was brought about, it should be allowed to stand. The trouble is that the bankrupt had too much to do with the result. Undue activity on the part of a bankrupt in the selection of a trustee has always been discountenanced by the courts, and, where it appears, the trustee chosen should not as a rule be approved. In *re Wetmore*, 16 N. B. R. 514, Fed. Cas. No. 17,466; In *re Bliss*, 1 Ben. 407, Fed. Cas. No. 1,543; In *re Lewensohn* (D. C.) 3 Am. Bankr. Rep. 299, 98 Fed. 576; In *re Rekersdres* (D. C.) 5 Am. Bankr. Rep. 811, 108 Fed. 206; In *re Hanson* (D. C.) 19 Am. Bankr. Rep. 235, 156 Fed. 717. "It may be taken as an established proposition upon reason and authority," says Judge Day, in *Re John F. McGill*, 5 Am. Bankr. Rep. 155, 106 Fed. 57, 45 C. C. A. 218, "that interference by the bankrupt, certainly when such as to control the election, will avoid the choice thereby attained, as it is the policy of the law to secure a trustee who is the selection of the creditors, and not of the bankrupt." This is not to say that a person may not be chosen who is acceptable to the bankrupt. In *re Eastlack* (D. C.) 16 Am. Bankr. Rep. 529, 145 Fed. 68. It is the activity of the bankrupt in bringing about the selection that is prohibited, and that it was present here is clear. The bankrupt's petition was forwarded by mail to the clerk, at Scranton, September 5, and almost before it had reached its destination, and certainly before any information about it had got back to Harrisburg, Mr. Bretz was actively engaged in sending out letters to creditors of the bankrupt, soliciting their claims. Solicitation is unprofessional, and not to be encouraged; and, while there may be nothing which absolutely prohibits it, when it is done in the interest of the bankrupt, in order to control the election of the trustee, the court should see that it does not succeed. In the present instance knowledge that the petition had been filed, and who were the general creditors, could only have been obtained from the bankrupt or his attorney, and that it was upon suggestions from that source that Mr. Bretz became a candidate and entered on the solicitation of claims, there can be no doubt. It is testified by F. E. Smith, a creditor, that the bankrupt told him Mr. Bretz was his man, and would "take care of us." And, while this is denied by the bankrupt, his activity and interest in the matter is evident, even if this particular statement was not made. The bank-

rupt's counsel voted for Mr. Bretz, as did his brother-in-law and clerk; and it was on objections of the bankrupt, feebly seconded as creditor by A. B. Tack, that claims which made the election of Mr. Bretz possible were thrown out. The position of the trustee should be an impartial one, and in no case more than the present ought this principle to be maintained. He represents the creditors, and not the bankrupt, except remotely in the contingency that the estate is sufficient to pay every one in full, and no one contends that there is any possibility of that here. Indeed, it is a question whether it will reach beyond the claims that are secured. The election in controversy was a close one; 29 creditors with claims amounting to \$7,000 voting for Mr. Winters, while 37 creditors with claims amounting to \$7,200 voting for Mr. Bretz. This slight preponderance secured by the instrumentality of the bankrupt cannot be sustained. Mr. Bretz is too close to the bankrupt and too dependent upon him for his election to allow it to stand. It may be that Mr. Winters, the candidate of the other creditors, is as far the other way, and that a new man, who will be entirely disinterested, should be taken up. But the only question now is as to Mr. Bretz, and I am decidedly of the opinion, for the reasons given, that his selection should not have been approved by the referee. This is no reflection on the ability or integrity of Mr. Bretz, which are not involved. It is simply that the policy of the law is opposed to the method by which it was brought about.

The election is set aside, and the referee is directed to call a new meeting of creditors for the purpose of choosing another trustee.

BARRETT v. CITY OF NEW YORK et al. PLATT v. SAME. WELLS
FARGO & CO. v. SAME.

(Circuit Court, S. D. New York. December 21, 1910.)

1. COMMERCE (§ 33*)—INTERSTATE COMMERCE—REGULATION—EXPRESS COMPANIES—PACKAGES.

Where an express company takes packages of merchandise coming from other states at a railroad or steamer terminal, and transports them by wagon through the streets and avenues of New York to the addressees, such local transportation of interstate packages constitutes interstate commerce, and is therefore within the exclusive jurisdiction of the federal government.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

2. COMMERCE (§ 61*)—INTERSTATE COMMERCE—TRANSPORTATION BY WAGONS—USE OF PUBLIC STREETS—REGULATION.

That the delivery wagons of express companies operating in New York and using the public streets were engaged in interstate commerce did not make them immune from the operation of general ordinances adopted under Greater New York Charter (Laws 1901, c. 466) § 50, granting to the board of aldermen power to regulate the use of the streets for animals, vehicles, etc., and to make all such regulations with reference to the running of stages, trucks, and cars as might be necessary for the convenient use and accommodation of the streets, etc.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 61.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. INJUNCTION (§ 136*)—PRELIMINARY INJUNCTION—RIGHT TO OBTAIN.

A preliminary injunction will not be granted unless it is apparent that some irreparable damage to complainants will result if it is postponed until final hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

4. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—IRREPARABLE DAMAGE.

Where certain express companies objecting to the enforcement of city ordinances, requiring licenses for use of wagons on the city streets, could pay the license fees required under protest without inconvenience, and file the required bond, and no serious harm would result from marking the wagons with their license numbers as required, nor from allowing the city officials to inspect their premises and vehicles, they would not suffer apparent irreparable damage by the enforcement of the ordinance and could not therefore obtain a preliminary injunction pending a suit to determine the validity of the ordinance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307-309; Dec. Dig. § 137.*]

5. LICENSES (§ 7*)—USE OF STREETS—ORDINANCES—LICENSING EXPRESS DRIVERS—DISCRIMINATION.

New York Code of Ordinances, c. 7, art. 3, § 315, regulating the use of hacks and express wagons on the public street, provides that every person driving a licensed hack or express other than the person named in the license taken out therefor, shall be licensed as such driver, and that every application for such license shall be indorsed in writing by two reputable residents of the city of New York, certifying to the competency of the applicant. *Held*, that such section was not invalid as discriminatory, nor was it objectionable in that the class covered was so restricted as to render the ordinance special, in violation of New York City Charter (Laws 1901, c. 466) § 50, requiring the passage of general ordinances only, relating to street traffic, and was not beyond the scope of the city's police power.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

6. LICENSES (§ 7*)—EXPRESS DRIVERS—CITY ORDINANCE—CONSTRUCTION.

New York City Ordinances, c. 7, art. 3, § 315, provides that every person driving a licensed express other than the person named in the license therefor, shall be licensed as a driver, etc. *Held*, that such section only authorizes the issuance or revocation or refusal of a license by the licensing authority in the honest exercise of a reasonable discretion, and that the section was not therefore fatally defective as leaving the question of the applicant's right to a license to the arbitrary and unqualified discretion of the licensing authority.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

In Equity. Suits by William M. Barrett, as president of the Adams Express Company, and by Edward T. Platt, as treasurer of the United States Express Company, and by Wells Fargo & Co. against the City of New York and others. On motion for preliminary injunction. Denied.

These are three suits, brought each by a separate express company to restrain the city of New York and various public officers therein from seeking to compel the complainants and their drivers to take out licenses and pay license fees under certain ordinances of the city of New York, on the ground that complainant companies and their drivers are engaged in interstate commerce as common carriers regulated by the interstate commerce act. Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154). The situation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of each company is substantially the same as that of the others, and the discussion of the cases will be simplified if it be confined to the facts shown in the case first above entitled. The ordinances in controversy will be found in chapter 7, tits, 1, 2, 3, and 4, of the Code of Ordinances of the City of New York (Edition 1910). Such of them as are germane to the issues here involved are referred to in the opinion, and the full text of the more important sections is reproduced either in the opinion or in a footnote.

Guthrie, Bangs & Van Sinderen, for complainant Barrett.

O'Brien, Boardman, Platt & Littleton, for complainant Platt.

Walker D. Hines, Charles W. Stockton, and Alexander & Green, for complainant Wells Fargo & Co.

Archibald R. Watson and Wm. B. Hale, for defendants.

LACOMBE, Circuit Judge (after stating the facts as above). The fairness and conciseness with which the questions at issue have been presented on the briefs, and the frankness with which each side has conceded what is the result of reported decisions bearing upon the general subject-matter of the discussion, has greatly lightened the labor of the court, and has made it unnecessary to undertake any extended review of those authorities. Practically there is no dispute as to the law of the case.

The express company takes packages of merchandise coming from other states at some railroad or steamer terminal, and transports them by its wagons through the streets and avenues to the addresses of the several consignees. It also collects similar packages addressed to consignees in other states from shippers here, and in like manner transports them to such terminals to be forwarded to their respective addresses. It is conceded that the local part of this transportation is an incident of the entire transportation, and that such transportation is interstate commerce. The company also transports to and from points within this city packages not coming from or addressed to points without this state. It is conceded that so much of its business is not interstate commerce. The amount of this domestic business is relatively very small, averaging less than 1 per cent. of its interstate business. With the interstate business only is this court concerned, and in this discussion it will be assumed preliminarily at least that there is no intrastate business to be considered. Not only is the local transportation of interstate packages interstate commerce, and so within the exclusive jurisdiction of the federal government, but that government has actually taken control and regulated such business by express detailed provisions, and by giving to the Interstate Commerce Commission very broad powers of regulation. See the interstate commerce act as amended June 29, 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1138]), and June 18, 1910. In the course of conducting such business, it is necessary for the express company to make use of the public streets, as a thoroughfare for the passage of the wagons it propels under guidance of its drivers, such wagons becoming a part of the traffic in those streets. That the local authorities have full power, under reasonable regulations, to regulate such traffic is not disputed. The Greater New York Charter (Laws 1901, c. 466) § 50, grants to the board of aldermen power to regulate by general ordinances the use of the streets and sidewalks by foot pas-

sengers, animals, and vehicles; to regulate the speed of vehicles; to make all such regulations in reference to the running of stages, trucks, and cars as may be necessary for the convenient use and accommodation of the streets, etc.

It is conceded by complainants that the circumstance that their wagons, when using the public streets, are engaged in interstate commerce does not make them immune from the operation of such general ordinances, even though the exigencies of traffic in a congested center of population may induce a very liberal interpretation of this grant of power. The local authorities may find it necessary not only to adopt and enforce "rules of the road," but also to prescribe regulations as to size and weight of vehicles, as to the details of their construction (such as tire width relative to weight), as to their motive power, as to identifying marks and numbers, as to the qualifications of their drivers, as to registration and licensing of vehicles and drivers, as to inspection and oversight. There is no reason, and the court knows of no authority, which will exempt the instruments of interstate commerce from regulations of this sort, adopted for the public safety and convenience, with which other vehicles not engaged in such commerce must comply. It is a legitimate exercise of the police power reserved to the states. Complainants make no contention to the contrary; indeed, they fully concede the proposition above set forth. It is understood, further, that they concede that such fees or charges as may be ratably imposed on all in order to provide the machinery necessary to carry out such regulations cannot fairly be regarded as a tax on interstate commerce, any more than would be the tolls upon a turnpike. On the other hand, it is conceded by counsel for the defendants that whatever authority may be given by law to the local legislature to regulate business generally or to regulate the business of certain specified classes of persons, *qua* business, is inoperative to control a person engaged in interstate commerce, whose business is already regulated by federal law, since the business of such person is within the exclusive jurisdiction of Congress.

With these concessions in mind we may now turn to the specific ordinances in controversy. The Greater New York Charter, § 51, provides:

"Sec. 51. Subject to the Constitution and laws of the state, the board of aldermen shall have power to provide for the licensing and otherwise regulating the business of dirt carts, public cartmen, truckmen, hackmen, cabmen, expressmen, car-drivers and boatmen; of boot-blacks, of pawnbrokers, junk-dealers, keepers of intelligence offices, dealers in second-hand articles, hawkers, peddlers, vendors and scalpers in coal freights; of menageries, circuses and common shows; of bone boiling, fat rendering, and other noxious businesses; and shall have power to regulate or forbid the keeping of dogs. The board of aldermen shall also have power to regulate the rates of fares to be taken by owners or drivers of hackney coaches, carriages, motors, automobiles or other vehicles, and to compel the owners thereof to pay annual license fees. All ordinances in relation to any of the matters mentioned in this section shall be general, shall provide for the enforcement thereof in the manner specified in section 44 of this act as amended, and shall fix the license fees to be paid, if any. All licenses shall be according to an established form, and shall be regularly numbered and duly registered as shall be prescribed by the board of aldermen."

The Code of ordinances contains a group of provisions apparently framed under the authority conferred by this section, dealing with the granting and regulation of licenses and being chapter 7 of such Code.

A bureau of licenses is established and organized (Title 1, §§ 300-304), it being provided that all licenses issued by such bureau shall show, among other things, the "privileges allowed." It is next provided in section 305 that:

"The following businesses must be duly licensed as herein provided, namely, public cartmen, truckmen, hackmen, cabmen, expressmen, drivers, junk dealers, dealers in second-hand articles, hawkers, peddlers, vendors, ticket speculators, coal scalpers, common shows, shooting galleries, bowling allies, billiard tables, dirt carts, exterior hoists and stands within stoop-lines and under the elevated railroad stations."

A penalty of not less than \$2, nor more than \$25, for each offense is imposed upon any person "who shall engage in or carry on any such business without a license therefor." Section 306. The term of the license and its suspension or revocation are provided for in section 307, and the amount of annual license fees is provided in section 308 (printed in footnote infra), a separate fee is charged for each cart, hack, or express wagon, which is a convenient method of making the tax imposed conform to the amount of business done, there being in like manner a separate fee charged for each table in a billiard room and for each chair in a bootblack stand. Renewals of licenses are provided for in section 309.

The next article (3 [sections 310-360]) deals with special regulations and rates. Under the first three subdivisions (sections 310-329) are grouped "public carts and cartmen," and "public hacks and hackmen." A "public cart" is defined by section 310 as "every vehicle of whatever construction, drawn by animal power or propelled by other motive power, which shall be kept for hire or used to carry merchandise, household furniture, or other bulky articles within the city of New York for pay." The owner thereof is declared to be a "public cartman." There is no separate provision in the Code for "truckmen," enumerated in section 51 of the charter and in section 306 of the ordinances. Evidently it was assumed that there was no real distinction to be drawn between a cart and a truck. It is provided that every public cart shall show on each outside thereof identifying marks and an official number (section 311); and that the amount to be charged for loading, transportation, and unloading may be agreed upon in advance, and such contract shall control (section 312). The legal rates "for moving household furniture," unless otherwise mutually agreed, are prescribed in section 313 (printed in the footnote), but there seems to be no prescribed rates for articles not properly "household furniture." To secure payment of his "legal rate of transportation," a public cartman is given a lien, and provision made as to enforcing it (section 314).

Section 315 provides that:

"Every person driving a licensed hack or express, other than the person named in the license therefor, shall be licensed as such driver, and every ap-

plication for such license shall be indorsed, in writing, by two reputable residents of the city of New York certifying to the competence of the applicant."

Subdivisions 3 and 4 (sections 316-329) regulate "public hacks and hackmen"; the word "hacks" including both "cabs" and "coaches" for transporting persons, and the term "hackmen" including owner or driver, or both (section 316). There are provisions as to hackstands and the use thereof. The legal rates of fare for cabs and coaches, both mileage and hourly, are specifically fixed, with right to exact payment in advance. We find provisions for marking and numbering the vehicles, for the disposition of property lost or left therein, and for the settlement of disputes as to the lawful rate of fare, where no agreement has been made.

Section 325 provides that:

"All vehicles for hire shall be licensed, and the owner thereof shall pay the sum of two dollars with his original application as the license fee for each and every vehicle so kept for hire and one dollar for each vehicle for annual renewals."

It is difficult to see to what "vehicles for hire" this can apply, in view of the specific provisions as to "public carts," "public hacks," and "public expresses" found elsewhere in the chapter. Possibly it may apply to vehicles supplied to customers by livery stables.

Subdivision 4a (sections 329a to 329k) deals with public porters, requiring licenses and the wearing of a badge, and regulating the manner in which they shall conduct their business, and the rates they may charge.

Subdivision 5 deals with expresses and expressmen. It reads as follows:

"Sec. 330. Every vehicle of whatever construction kept or used for the conveyance of baggage, packages, parcels and other articles within or through the city of New York for pay, shall be deemed a public express, and the owner thereof shall be deemed a public expressman, and the term expressman shall be deemed to include any common carrier of baggage, packages, parcels or other articles within or through the city of New York.

"Sec. 331. Every public express shall show on each outside thereof the word 'Express,' or the letters 'Exp.' together with the figures of its official number.

"Sec. 332. Every owner of a public express shall give a bond to the city of New York for each and every vehicle licensed in a penal sum of \$100 with sufficient surety, approved by the mayor or chief of the bureau of licenses, conditioned for the safe and prompt delivery of all baggage, packages, parcels and other articles or things entrusted to the owner or driver of any such licensed express.

"Sec. 333. The legal rates for regular deliveries, unless otherwise mutually agreed, shall be as follows in the city:

"Between points within any borough:

Not more than five miles apart, each piece.....	\$ 0 40
Not more than ten miles apart, each piece.....	55
Not more than fifteen miles apart, each piece.....	75

"Between points in different boroughs: One-half the above rates in addition.

"Special deliveries at rates to be mutually agreed upon."

In subdivisions 6 to 16 (sections 334-359) are found provisions regulating in more or less detail the following businesses: Junk dealers,

dealers in second-hand articles, peddlers, ticket speculators, coal scalpers, common shows, shooting galleries, bowling alleys, billiard tables, dirt carts and cartmen and exterior hoists. Article 4 deals with stands within the stoop lines and under elevated railroad stations.

Title 3 (sections 373-378) deals with general regulations and complaints, license fees received from hackmen, dealers in junk and secondhand articles, and for stands within stoop lines are to be paid into the sinking fund, and all other license fees into the city treasury. All licensed vehicles and places of business shall be regularly inspected. Section 374 (printed in the footnote). Licenses must be exhibited on demand; the identifying marks prescribed for licensed vehicles are to be permanently and conspicuously affixed; fines of not more than \$5 may be imposed by the chief of the bureau of licenses. Further penalties for violation of the regulations are provided in section 379 printed in the footnote.

A few preliminary points which have been raised may be first disposed of. It has been suggested that the form, arrangement, and language of the group of ordinances above cited indicate that the board of aldermen which passed them was undertaking to exercise the power conferred by section 51, and was not acting under section 50 of the charter. This may be so, but it is not material to inquire into the mental processes of the members of a past and gone legislative body. If some one or more of its enactments are such as it had authority to pass under some specific grant of power, it will not fail because it was voted for under the supposition that authority was given under some different grant of power, not broad enough to warrant such enactment.

It is shown that for years past and with these ordinances in the Code the express company has not (until just prior to the bringing of this suit) been required to take out licenses for the conduct of its interstate business, or to employ only licensed drivers for its wagons engaged in interstate commerce, or to conform to any tariff charges prescribed, nor has there ever been any inspection of its premises or vehicles. It has, however, taken out licenses for wagons and drivers engaged in conducting its intrastate business. This indicates a practical construction of the ordinances in consonance with complainants' interpretation of them, which might help to turn the scales in a doubtful case, but which certainly cannot control, if some particular ordinance is found to be valid and applicable.

This discussion is much simplified by the manner in which it comes up. The application is for a preliminary injunction. Such relief is not granted unless it is apparent that some irreparable damage to the complainant will result if it is postponed till final hearing. As to nearly all the provisions complained of no such damage is shown. The amounts of license fees prescribed for wagons and drivers may be paid, under protest, without inconvenience, and no irreparable damage will result from filing the bonds required; no harm will result from marking the wagons with their license numbers, or from allowing the city officials to inspect premises or vehicles. No attempt has been made to regulate the rates to be charged and collected for transporta-

tion of interstate packages, nor is any such attempt threatened. The defendants concede that where such rates are not disapproved by the Interstate Commerce Commission the city authorities have nothing to do with them.

It does appear, however, that if the provisions requiring all express wagons to be driven only by drivers licensed as required by section 315 are enforced, the ability of the express company to discharge its duties as a common carrier engaged in interstate commerce may be seriously interfered with. A determination, therefore, of the questions raised as to this section is appropriate at this stage of the case. That section requires that the drivers of certain vehicles therein specified must be licensed, which is calculated to insure their identification, and that their application for license must be accompanied by a certificate in writing by two reputable residents "to the competence of the applicant," which to some extent, however slight, would tend to secure more careful drivers. If this ordinance were enacted under section 50 of the charter, and by its terms applied to all persons driving vehicles in the streets, complainants, on their own statement, would not be here asserting immunity from its provisions. As we have seen it makes no difference under which section of the charter the board of aldermen undertook to act. If the ordinance is such as they were authorized to enact under any section, and they have enacted it, it will stand. The only question is whether the particular ordinance is so special that it must fall, either because it is not a "general ordinance," which alone is authorized by section 50, or because it makes discriminations not to be tolerated under the fourteenth amendment to the Constitution of the United States.

Obviously the ordinance is not of universal application; it does not require the drivers of all vehicles to be licensed after a certification as to competency. No doubt it would be a great boon to pedestrians who have to use the streets if such a measure of protection against reckless driving were secured to them, but this ordinance does not go to any such length. It deals only with a relatively small class of drivers. As we have seen, the only carts which are required to be licensed are those used by their owners to transport the goods of other persons for pay. Section 310. Inasmuch as all licensed vehicles are required to be conspicuously marked, a few hours' walk through the business thoroughfares of the city will give some idea of the relatively small number of vehicles which are within the terms of the ordinances. All carts and trucks used by wholesale dealers, by building contractors, breweries, department stores, and in a host of other employments—some of them of larger size and a greater menace than any operated by public cartmen or expressmen—are wholly without the purview of this ordinance.

It may be that the class covered by this ordinance is still further restricted. The ordinance is limited in terms to "every person driving a licensed hack or express." By definition (sections 310-316) the "public cartmen" whose vehicle must be licensed in operating neither a hack nor an express, so that section 315 does not require the person

driving his vehicle to be licensed. Section 308 provides that the annual license fee for each driver of any licensed vehicle shall be 50 cents, but that may fairly be construed as prescribing only the amount which shall be paid by drivers who are required to be licensed; what drivers shall be licensed being provided for elsewhere. If this construction be correct the only drivers of carts for the conveyance of goods who are required to be licensed are those who drive express wagons; the drivers of the public carts of "public cartmen" are immune. Such a construction, however, is somewhat doubtful, and since no such interpretation is contended for by the complainants, it will be assumed for the purposes of this case that section 315 requires licensed drivers for all public hacks and for all carts or wagons whose owners carry articles owned by others for pay.

This class, which includes the truckmen, cartmen, expressmen and hackmen, is apparently a small one, relatively to the total traffic in the streets; but it is not a class arbitrarily constituted, the line of cleavage between it and the residue of the traffic carried on by owners of the vehicles transporting their own property and persons is a natural one. It is quite conceivable that some good reason may be shown for a separate classification. It is suggested on defendant's brief that the drivers of the one class are readily differentiated from those of the other classes by the circumstance that they name the charges for service to customers, collect the amounts due, and may contract in some instances for special rates. However this may be, the federal courts are not astute to find improper classification where the state has undertaken, in the exercise of its police power, to differentiate between different classes. There must be a very clear showing of inequality (as in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220) to warrant their interposition. In the case at bar this court is not now prepared to hold that the discrimination between the drivers provided for in section 315 and all other drivers is so arbitrary as to require the condemnation of the section under the fourteenth amendment. As to the suggestion that chapter 50 of the charter forbids the passage of special ordinances, it is sufficient to say that an ordinance covering all instances of a certain class may be a "general" one, although it may not be universally applicable to all classes.

It is further suggested that the section should be condemned because it leaves the question, who shall be licensed, to the arbitrary and unqualified discretion of the mayor, who may revoke any driver's license at his own will, without assigning any reasons for such action. Section 307. A similar objection was raised before this court in *Engel v. O'Malley* (opinion filed August 31, 1910) 182 Fed. 365. There a statute was criticised because it apparently confided the issuing of a license to the arbitrary discretion of the State Comptroller. Of this criticism it was said:

"It is sufficient to say that the terms (of the statute) may be construed either way; that is, as giving such officer the power capriciously to refuse a license, or as giving him the power to refuse only in the honest exercise of a reasonable discretion. In the absence of a decision by the state court of last resort construing the language of the statute, it must be assumed that

the latter is the correct interpretation, because otherwise the act would be unconstitutional, and it must be assumed that the Legislature intended to keep its enactments within the limits fixed by the Constitution."

The motions are denied.

NOTE.

The following sections of the ordinances, which are cited in the foregoing opinion, are printed in full in this footnote, for convenience of reference:

Sec. 308. The annual license fees shall be as below enumerated:

For each public cart or truck.....	\$ 2.00
For each public hack coach.....	3.00
For each public hack cab.....	2.00
For each special hack coach.....	5.00
For each special hack cab.....	3.00
For each express wagon.....	5.00
For each junk shop or dealer.....	20.00
For each dealer in second-hand articles.....	25.00
For each junk cart or boat.....	5.00
For each peddler using horse and wagon.....	8.00
For each peddler using push cart.....	4.00
For each peddler carrying merchandise.....	2.00
For each ticket speculator.....	50.00
For each coal scalper.....	250.00
For each common show.....	25.00
For each public shooting gallery.....	5.00
For each public bowling alley.....	5.00
For each public billiard table.....	3.00
For each dirt cart.....	1.00
For each general hoisting.....	25.00
For each special hoisting.....	1.00
For each fruit or soda water stand, or both.....	10.00
For each newspaper or periodical stand, or both, and in addition also fruit or soda water, or both.....	15.00
For each movable newspaper stand.....	1.00
For each newspaper and periodical stand, or both.....	5.00
For each chair of a bootblack stand.....	5.00
For each stand under elevated railroad stations.....	10.00
For each driver of any licensed vehicle.....	.50

Sec. 313. The legal rates for moving household furniture, unless otherwise mutually agreed, shall be as follows:

For a single truck load, within two miles.....	\$ 2.00
For every additional truck load, within two miles.....	.50
For loading, and unloading and housing to ground floor.....	.50
For each flight of stairs, up or down.....	.25
For a double truck load, within two miles.....	3.00
For every additional mile or part thereof.....	1.00
For loading, unloading and housing to ground floor.....	.50
For every flight of stairs, up or down.....	.50

Sec. 374. The mayor shall have power to appoint inspectors in the bureau of licenses to see that the provisions of this ordinance are fully and properly complied with; and all licensed vehicles and places of business shall be regularly inspected, and the result of such inspection shall be indorsed on the official license therefor, together with the date of inspection and the signature of the inspector, and all inspections shall be regularly reported to the bureau of licenses.

Sec. 379. Except as hereinbefore otherwise provided, no person shall violate any of the regulations of this ordinance under a penalty of not less than two dollars or more than ten dollars for each offense. No such violation shall be continued under a penalty of one dollar for each day so continued. Any

person engaging in or carrying on any business herein regulated without a license therefor, or any person violating any of the regulations of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof by any magistrate, either upon confession of the party or competent testimony, may be fined not more than two dollars (\$2) for each offense, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid; but such imprisonment shall not exceed ten days.

TRUST CO. OF AMERICA v. NORFOLK & S. RY. CO.

(Circuit Court, E. D. North Carolina. January 3, 1911.)

No. 312.

1. RAILROADS (§ 171*)—MORTGAGES—FORECLOSURE—JUDGMENT FOR TORT—PRIORITY.

Revisal N. C. 1905, § 1131 (Code 1883, § 1255), provides that corporations shall not have power by mortgage of their property or earnings to exempt same from execution for the satisfaction of any judgment obtained against such corporation for tort committed by the corporation, whereby a person is killed or injured. *Held* that, where, pending a suit to foreclose a railroad mortgage in the federal court, a passenger recovered judgment in a state court against the railroad company for alleged personal injury, resulting from assault and battery committed on him by the railroad company's conductor, the judgment constituted a prior lien on the railroad company's property to that of the mortgage foreclosed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 566; Dec. Dig. § 171.*]

2. COURTS (§ 494*)—CONFLICTING JURISDICTION—RECEIVER—DISCHARGE—PROCEEDINGS IN OTHER COURT.

Where litigation in a federal court to foreclose certain railroad mortgages had terminated and the possession of the railroad property by receivers had terminated and they have been discharged, the state courts were at liberty to deal with the property in the hands of the purchaser according to the rights of the parties before the court, whether such rights required the court to take possession of the property or not.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1356; Dec. Dig. § 494.*]

3. RAILROADS (§ 194*)—SOLVENCY—RECEIVERS—FORECLOSURE OF MORTGAGES—JUDGMENT FOR TORT—EXECUTION.

Suit in a state court by a passenger against a carrier for tort having been brought, proceedings were instituted in a federal court to foreclose certain mortgages on the railroad company's property. Receivers appointed in that suit were not made parties to the action in the state court, but they had notice thereof, and by their counsel conducted the defense. The mortgages were of no validity as against the passenger's claim, and judgment was subsequently rendered therein in favor of the passenger. He took no steps to have the same allowed as a claim in the mortgage foreclosure proceedings, and the railroad company's property was sold under decree entered a few days after the rendering of the judgment in the state court. The decree only required the purchaser to pay a fixed sum supposed to be sufficient to discharge costs, allowances, etc., and authorized the balance of the price to be paid by the cancellation and delivery of bonds according to their relative priority and in addition required the purchaser to assume the payment only of such claims as have been filed with the master and had priority over the mortgage indebtedness. *Held*, that the passenger was under no obligation to file his judg-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment in the foreclosure proceedings and that after their termination, the property sold was liable to execution therefor in the hands of the purchaser.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 194.*]

In Equity. Bill by the Trust Company of America against the Norfolk & Southern Railway Company. Bill by the Norfolk-Southern Railroad Company to enjoin the sale of property purchased by it under foreclosure decree against a railway company for the payment of a judgment recovered by one J. F. Talbott for an alleged assault and battery on him by a train conductor prior to the filing of the bill to foreclose. Denied.

Thos. L. Chadbourne, Jr., and George Rublee, for complainant.

Edward R. Baird, Jr., and Harry Skinner, for defendant.

E. F. Aydlett, for judgment creditors.

CONNOR, District Judge. On July 1, 1908, complainant filed its bill in the Circuit Court of the United States for the Eastern District of Virginia against the Norfolk & Southern Railway Company, a Virginia corporation, for the purpose of foreclosing certain deeds in trust executed by said corporation to complainant for the purpose of securing the payment of certain bonds, all of which will fully appear by reference to the record in this cause. Complainant prayed the court to bring the property to sale, and, pending the suit, to appoint receivers, etc. The defendant's property consisted of a railroad track, rolling stock, and a large quantity of real estate, lying in the states of Virginia and North Carolina; said track running through the county of Currituck in said last-named state. Receivers were appointed by the judge of the Circuit Court for the Eastern District of Virginia. On July 2, 1908, an ancillary bill was filed in the cause in the Circuit Court of the United States for the Eastern District of North Carolina, and the same persons named by the court of original jurisdiction were appointed ancillary receivers. They qualified, in accordance with the provisions of the orders of the court, and took possession of and operated the property until April 30, 1910. On September 3, 1906, J. F. Talbott, a citizen of North Carolina, instituted an action in the superior court of Currituck county, in said state, against the defendant company, alleging in his complaint as his cause of action that, while a passenger on defendant's train, the conductor in charge of said train and in defendant's employment, committed an assault and battery upon him, for which he demanded damages, etc. The defendant appeared by counsel in said cause and filed an answer to the complaint. The receivers were not made parties, but had notice of the pendency of said cause, and, by their counsel, conducted the defense thereto. At the September term, 1909, of said court, Talbott recovered judgment in said action, upon the verdict of a jury, against defendant, Norfolk & Southern Railway Company, for \$1,500, said amount being awarded as damages for the wrongful act of defendant's employé, as alleged in the complaint. The judgment was duly docketed on the judgment docket of said county in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

accordance with the provisions of the statute of North Carolina, and, by virtue thereof, constituted a lien upon the real estate of defendant company in said county. A transcript of the judgment was docketed in Pasquotank county. Said Talbott has not, at any time, filed with the special master appointed by this court in this cause, any notice of his said claim or demand for the payment thereof; nor has he intervened or taken any action, whatever in this cause in regard to his claim or the judgment rendered thereon.

On the 19th day of October, 1909, an order was made by the Circuit Court of the United States for the Eastern District of Virginia, in this cause, and in the said court for the Eastern District of North Carolina, directing that all of the property of defendant company in both states be sold, and appointing commissioners for the purpose of making such sale. By the provisions contained in said order, the purchasers, in addition to the amount bid at the sale for said property, among other things, assumed the payment of "all claims and demands heretofore filed under the order of reference heretofore entered herein, on the 23d day of October, 1908, which have been, or may hereafter be, established thereunder as prior in lien to said first and refunding mortgage hereby foreclosed, and which, at the time of the sale hereunder, may remain unpaid." The usual provision was made, in said order, empowering the court to make further orders to enforce the performance of the terms of sale, etc. Pursuant to said order the commissioners made sale of the property of defendant on December 7, 1909. On April 30, 1910, said sale was confirmed, and the terms thereof complied with, in respect to the payment of the purchase price. It was provided in said order that the purchaser should pay \$100,000 in cash to cover expense, etc., and the balance in the bonds secured in said deed. The commissioners were directed to make title to the purchaser, the Norfolk-Southern Railroad Company, and to deliver and turn over the said property to said purchaser, all of which has been done. Talbott, plaintiff in the aforesaid action, after demanding payment of his judgment, which was refused, sued out an execution on the 24th day of June, 1910, and placed the same in the hands of the sheriff of Pasquotank county. The sheriff levied said execution on certain real estate, owned by defendant company, and advertised same for sale. The purchaser, the Norfolk-Southern Railroad Company, seeks to enjoin the sale of said property under said execution. An order directing the sheriff and said Talbott to show cause why an injunction shall not be granted, was issued, and, upon the return day, the parties were heard upon said motion. The foregoing facts are found by an inspection of the record and affidavits filed herein.

It further appears that, upon the institution of this suit, an injunction was issued restraining all parties to actions then pending in the state courts, from proceeding therein, and that said injunction was, in a few days thereafter, dissolved. It is conceded that the purchase price bid for the property is not sufficient to pay the bonded indebtedness secured by the mortgages.

By virtue of the provisions of section 1131, Revisal N. C. 1905 (Code 1883, § 1255), the property of the defendant corporation is not

exempt from the payment of the claim or cause of action upon which the judgment was obtained by Talbott, by reason of the execution of the several mortgages executed by it to complainants. The validity and construction of the statute were passed upon by the Supreme Court of the United States in *Guardian Trust Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, and by the Supreme Court of North Carolina in *Railroad v. Burnett*, 123 N. C. 210, 31 S. E. 602. The court held that, while not bound by the decision upon the facts set out in the complaint, it concurred with the state court in holding that plaintiff's complaint set out a cause of action in tort. Mr. Justice Brewer, by way of illustration, said:

"If a railroad company contracts to carry a passenger there is an implied obligation that he will be carried with reasonable care for his safety. A failure to exercise such care, resulting in injury to the passenger, gives rise to an action *ex contractu* for breach of the contract, or as well to an action for the damages on account of the negligence—an action sounding in tort."

Talbott alleges that, after he had become a passenger by purchasing a ticket, he was prevented from boarding the train and assaulted by the defendant's conductor. These allegations are found by the jury to be true. It appears that the judge presiding reduced the verdict of the jury to the sum of \$1,500. It is therefore manifest that Talbott had, on September 3, 1906, a cause of action in tort against the Norfolk & Southern Railway Company, with the legal right to sue upon and prosecute it to judgment in the superior court of Currituck county and that, by virtue of the statute law of the state, this cause of action, when reduced to judgment, was entitled to priority over the mortgages executed by the corporation; that is, the property was not exempt from sale by reason of the execution of such mortgages. If the judgment had been rendered prior to July 1, 1908, the date upon which this suit was instituted in the Circuit Court of the United States, an execution issued upon such judgment would have been levied upon the property and sale made thereof, passing title to the purchaser exempt from any lien or incumbrance created by the mortgages.

An order was made October 23, 1908, by the Circuit Court for the Eastern District of North Carolina, appointing a special master with permission to all persons having claims against the defendant company to file them with the master, etc. The Norfolk-Southern Railroad Company insists that, conceding Talbott's judgment to be a valid claim against the Norfolk & Southern Railway Company, having priority over the mortgages held by complainant, he should be required to intervene in this suit and have his rights passed upon by the special master, and, upon exceptions to his findings, by the court; that this is his only remedy. When one court has taken possession of property by its receiver, no other court will be permitted to interfere with such possession. This is conceded to be the general rule. Mr. Justice Miller in *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257, says:

"Whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court

and under its control for the time being; and no other court has a right to interfere with that possession," etc.

See *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981.

"It is a general rule that property in the hands of a receiver cannot be sold under attachment or execution, unless leave of the court, before which the receivership is pending, is first obtained." *Street's Fed. Eq. Prac.* § 2602.

In *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322, Mr. Justice Nelson says:

"A party holding a judgment which is a prior lien upon the property, the same as a mortgage, if desirous of enforcing it against the estate, after it has been taken into the care and custody of the court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing, unsatisfied demand or as to the priority of the lien, etc., and take care that the fund be applied accordingly."

In that case a judgment creditor issued execution and sold property while the suit in equity, in which the receivers had been appointed, was pending. The court held that the sale was void. The learned justice said that the creditor should have intervened, and that, "in administering the fund, the court will take care that the rights of prior liens or incumbrances shall not be destroyed."

In *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729, the principle was applied when the government had instituted a proceeding in rem against certain real estate for violation of provisions of the internal revenue laws by the owner. Pending the proceeding, certain parties, claiming to have a mechanic's lien upon the property, instituted an action in the state court, obtained judgment, issued execution, and, subsequent to the sale under the proceeding by the government, sold the property. The court held the sale void. It is manifest that this court would not permit Talbott to enforce the payment of his judgment by sale while the property was in the possession of the receivers, but it is insisted that the rule does not apply when the property has been sold by the commissioners appointed by the court—the sale confirmed and the property delivered to the purchaser. There is no longer any necessity for restraining the judgment creditor from enforcing his legal rights. Mr. Justice Miller in *Buck v. Colbath*, *supra*, after stating the rule and the reasons upon which it is founded, in his usual clear and forceful style, proceeds to say:

"This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in the possession of the court, either actively or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer of the court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether these rights require them to take possession of the property or not. The effect to be given in such cases to the adjudication of the court first possessed of the property, depends upon the principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions."

In *Moran v. Sturgess*, 154 U. S. 256, 275, 14 Sup. Ct. 1019, 1025, 38 L. Ed. 981, this language is quoted with approval by Mr. Chief Justice Fuller. This view has been held by the Supreme Court of North Carolina in *Railroad Co. v. Burnett*, 123 N. C. 210, 31 S. E. 602, in which the facts are strikingly similar to those presented upon this record. A railroad company executed a deed in trust to the State Trust Company of New York to secure the payment of bonds. A suit in the Circuit Court of the United States for the Eastern District of North Carolina, was instituted for the purpose of foreclosing the equity and bringing the property to sale. A receiver was appointed who took possession. Burnett brought suit in the state court for the recovery of damages sustained while a passenger on the train of the railroad company prior to the institution of the suit in equity, and, pending that suit, prosecuted his action to judgment. The claim was passed upon by the master, but not provided for in the decree. The property was sold and passed into the possession of the purchaser. Burnett sued out execution on his judgment, and the purchaser sought an injunction to restrain the sale, etc. The court held that the judgment was upon a cause of action given priority over the mortgage by the state statute. Section 1255, Code 1883. Referring to other cases construing the statute, Furches, J., says:

"These opinions are expressly put upon the ground that the mortgages were void as to such claims, and that the property stood, so far as such claims are concerned, just as if no mortgage had been made."

To the same contention made here, the learned justice said:

"This is not disputed. But the defendant was not a party to that suit, and no rights that the defendant Burnett had are affected by this decree and order of sale. Therefore the fact that the plaintiff claims under a decree made of foreclosure and order of court does not affect the rights of the defendant Burnett. The order was based on the mortgage and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage, under a power of sale contained in the mortgage."

While the court noted the fact that Burnett's claim had been filed with the master, thereby giving notice to the purchaser, the judge is careful to say:

"But this notice of the defendant's claim is not involved in the principle upon which this case is decided. The principle underlying this decision, and upon which it is decided, is that under section 1255 of the Code the mortgage conveyed nothing as against this claim, and, as it conveyed nothing as against the claim, the purchaser got nothing as against the claim, by the mortgage sale."

The learned counsel for complainant insists that, notwithstanding the rendition of the judgment in the state court, before its payment may be enforced against the property, its validity and right to priority must be passed upon and approved by the special master. This position is based upon two conceptions. One, that immediately upon the filing of the bill in the Circuit Court, followed by the appointment and qualification of the receivers, all judicial proceedings, suits, etc., pending in other courts, whether involving claims against the corporation for torts or for the enforcement of contracts, are drawn into

the jurisdiction of the Circuit Court, unless that court grant leave to the parties to proceed in the state court. The same view was advanced by counsel in *Buck v. Colbath*, supra, and disposed of by Mr. Justice Miller in the following language:

"It is not true that a court having obtained jurisdiction of the subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decisions of the same questions exactly, for in examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought and the identity of the parties in the different suits. * * * The limitation of the rule must be much stronger, and must be applicable under many more varying circumstances when persons not parties to the first proceeding are prosecuting their own separate interests in other courts."

The present case illustrates the principle announced by the learned justice.

Talbott, before the suit in the Circuit Court was instituted, had begun his action at law for damages against the defendant for a tort. The mortgages held by complainant were of no validity as against his claim, and could, under no circumstances, be an obstruction to the enforcement, by final legal process, of such judgment as he should recover. He had a perfect legal right, enforceable in a court of law. His cause of action did not involve the title to the property of defendant or the right to possession. The court, in rendering judgment, made no deliverance nor adjudication in either respect. The defendant litigated the action with Talbott in the state court from its institution on September 3, 1906, and the receivers from their appointment, until final judgment September, 1910, thus waiving any right to remove it into this court. Upon their motion, the first verdict of the jury was set aside, and on the last trial, reduced from \$4,000 to \$1,500. It is strongly urged, and supported by affidavits of counsel and the presiding judge, that this was done after consultation by counsel with the receivers and an agreement to pay the judgment, as rendered. While the action is pending and a recovery being resisted, complainants prosecute their suit in equity to foreclose mortgages declared by the statute of North Carolina to be invalid as to plaintiff's cause of action. The decree of sale in this court is taken a few days after the rendition of the judgment in the state court, and the terms of sale, it would seem, carefully drawn to exclude this judgment from participation in the proceeds, and to relieve the purchaser from any liability for its payment. The purchaser is to pay his bid on account of a fixed sum, supposed to be sufficient to discharge cost, allowance, etc., and the balance of the purchase price is to be paid by the cancellation and delivery of bonds according to their relative priority, and, in addition to assume the payment of such claims as have been filed with the master, having priority over the mortgage indebtedness. The sale has been confirmed, the purchase price paid and satisfied in accordance with the terms of the sale, deed has been executed, and the property, in its entirety, turned over to the purchaser, the Norfolk-Southern Railroad Company. It will be observed that the Circuit Court of the United States for the East-

ern District of North Carolina has had only ancillary jurisdiction in this cause. It has been so conducted, and the property so operated by the receivers that, although five-sixths of its trackage and almost its entire holdings of other property are within the borders of the state of North Carolina, not one dollar of its income during the receivership or the proceeds of the sale has found its way into the registry of this court, or under its control. If Talbott is not permitted to enforce the payment of his judgment, by the process of the state court, he will be compelled to go into the federal court in Virginia to enter upon new litigation to enforce a demand adjudged in his favor by the court of North Carolina. Suppose that the contention of the purchasers be sustained, and he be sent into that jurisdiction, what power has that court to give him relief? It has sold the property out of which his judgment must be collected, the defendant is insolvent, the purchaser has complied with the terms of its purchase, and has possession of the property. To send him into that tribunal would be to keep the promise to the ear and break it to the heart. It is said that he had permission to intervene and protect his rights before the sale was made. The obvious answer is he was not compelled to do so. It would seem that the parties to the suit should have seen to it that his rights were protected. In *United States Trust Co. v. New Mexico*, 183 U. S. 535, 22 Sup. Ct. 172, 46 L. Ed. 315, complainant filed its bill in equity for the purpose of foreclosing a mortgage executed by a railroad company, a receiver was appointed, and the property was sold under a decree which provided that, in addition to the sum bid by the purchaser, he should pay "any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers which are prior in lien to the first mortgage bonds. * * * Any such claim, indebtedness, obligation, or liabilities which shall not have been presented to the receivers or filed with the clerk of this court prior to the time of the delivery of the possession of such property shall be presented for allowance and filed within six months after the publication by the receiver of a notice to the holders of such claims for allowances." The receiver was directed to give notice in certain specified newspapers, etc. The tax collector for the territory, after the sale, but while the property was in the possession of the receiver, filed his petition to intervene and demand payment out of the purchase money of the amount due by defendant for taxes. The District Court dismissed the petition. Upon appeal it was held that the petition was in time. It will be noted that the decree in this case differs, in a material respect, from that in the case cited. Here, the purchaser is required to pay only those claims which have been filed with the master before the day of sale, and no time is allowed, nor is any notice required to be given claimants to file claims before final distribution of the proceeds of the sale.

It is well settled that when a court of equity undertakes to sell a perfect title to property and discharge all liens upon it, or pay off all existing claims entitled to share in the proceeds, it has the power, by appropriate process, to bring all such claimants before the court and

adjudge their validity and order of priority, but it is equally well settled that before claimants are thus barred and foreclosed they must be made parties or brought into the record, and a reasonable time given within which to present their claims and be heard. The claim of Talbott was for damages, triable by a jury in the state court, and, under any aspect of the case, he should have been given notice and a reasonable time after the rendition of his judgment to intervene. The judgment was rendered about one month before the decree for the sale of the property was made.

It will be noted that the statute (Act Aug. 13, 1888, c. 866, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582]) permits parties to institute and prosecute actions against a receiver appointed by the federal courts "in respect to any act or transaction of his in carrying on the business connected with such property without previous leave of the court," subject to such equity jurisdiction of the Court, "so far as the same shall be necessary to the ends of justice." In *Wilcox v. Jones*, 177 Fed. 870, 101 C. C. A. 84, it was held by the Circuit Court of Appeals, Fourth Circuit, that when an action against a receiver, coming within the terms of the act, had been prosecuted to judgment, the federal court had no power to call into question the validity of the judgment or the amount recovered in the state court. Judge Pritchard, in a well-considered opinion, shows, both from the language of the statute and the decisions of the federal courts, that the last clause in the act confers no other power on the court than to protect the possession of the receiver and provide for the payment of the judgment according to its priority over other claims against the property. It would seem that, by analogy, this court would have no other power in regard to the judgment against the defendant corporation upon claims accruing prior to the appointment of the receiver and in litigation at the time of such appointment. Assuming, for the purpose of discharging this duty, and for the purpose of protecting the title of the purchaser, under the decree of the court, that this court has the power conferred by the act in the class of cases coming within its provisions, and that it will inquire into the question of Talbott's alleged priority, why refer the matter to the master? It is manifest that the judgment is valid, that it is upon a cause of action having priority over the mortgages under which the purchaser claims title; that the purchaser holds title subordinate to the claim or judgment; that the court has no power to amend the decree of sale and confirmation. Why, then, should Talbott be delayed in the enforcement of his judgment? It must, in any possible view of the case, be paid by the purchaser of the property, and the only process which can be resorted to for this purpose is the execution from the state court.

I have examined a number of cases more or less in point, and find that the court has uniformly, in its decree of sale, made provision for dealing with and discharging claims having priority over the mortgages being foreclosed, out of the proceeds of the sale, or by expressly imposing the duty of paying them upon the purchaser in addition to the sum bid for the property. *Com. Roofing Co. v. Trust Co.*, 135 Fed. 984, 68 C. C. A. 418; *Atchison, etc., Ry. Co. v. Osborn*,

148 Fed. 606, 78 C. C. A. 378. The motion for an injunction restraining Talbott from proceeding to enforce the collection of his judgment by execution is denied. The cost will be taxed against the movant, the Norfolk-Southern Railroad Company.

DAVID v. McRAE et al.

(Circuit Court, W. D. Washington, N. D. December 28, 1910.)

No. 1,794.

1. EQUITY (§ 117*)—PARTIES—DISMISSAL AS TO PART OF DEFENDANTS—OBJECTION—WAIVER.

Equity rule 51 declares that where plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereon, but plaintiff may proceed against one or more of the persons severally liable. Rule 52 declares that, where a defendant by his answer shall suggest that the bill is defective for want of parties, plaintiff may set down the cause for argument on the objection only, but, if he does not do so, he shall not at the hearing of the cause, if defendant's objections then be allowed, be entitled as of course to an amendment by adding parties, but the court in its discretion may dismiss the bill. *Held*, that where a plaintiff under rule 51 might have brought a suit against less than all of the parties jointly and severally liable, in which case the parties joined might have suggested by answer the lack of indispensable parties, as provided by rule 52, they could also have done so after plaintiff's dismissal as against one of the defendants without prejudice by a plea or supplemental answer, and, having failed to so raise the objection, the court was authorized by rule 53 to render a decree against the remaining defendants, saving the rights of those against whom the suit was dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 287-289; Dec. Dig. § 117.*]

2. EQUITY (§ 423*)—DECREE—NATURE OF RELIEF.

A court of equity in granting relief is not restricted to the label which complainant has adopted for his pleading, nor by the phraseology of his prayer, but may render such a decree as the facts warrant, and hence, in a suit to enforce an alleged lien on stock deposited in escrow under an executory contract of sale for an unpaid portion of the price, the court properly entered a decree for specific performance of the contract, though complainant had no lien.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001, 1005, 1006; Dec. Dig. § 423.*]

3. SPECIFIC PERFORMANCE (§ 5*)—INADEQUACY OF REMEDY AT LAW—EXECUTORY CONTRACTS—SALE OF CORPORATE STOCK.

A contract for the sale of certain corporate stock by complainant to defendants provided that in consideration of \$1 complainant had sold the stock to defendants at the price of \$75 a share, payment to be made in certain installments, and complainant to deposit the stock in some bank on or before a specified date, the bank to hold the stock and on payment of the price as provided surrender one share on the payment of each \$75. *Held*, that such contract did not operate as a sale in present, but was instead an executory contract of sale, and that since complainant, having deposited the stock in escrow, was no longer in a position to tender a delivery of the stock on demanding payment of the balance of the price, he had no legal adequate remedy for defendants' failure to per-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

form, and was therefore entitled to maintain a bill for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 5; Dec. Dig. § 5.*

Right to specific performance as affected by adequacy of remedy at law, see note to *Marthinson v. King*, 82 C. C. A. 368.]

In Equity. Suit by Lester W. David against A. D. McRae and others for specific performance of an executory contract for the purchase of certain corporate stock pursuant to which the stock was delivered in escrow by complainant in fulfillment of the contract. Decree for complainant.

Kerr & McCord, for complainant.

Chas. F. Munday, for defendants.

HANFORD, District Judge. This suit is founded upon a written contract of the following tenor:

"This memorandum of sale made this first day of February, 1908, by and between Lester W. David of the town of Blaine, state of Washington, hereinafter known as the first party, Edward F. Swift of the city of Chicago, state of Illinois, Andrew D. Davidson of the city of Toronto, province of Ontario, Dominion of Canada, Alexander D. McRae of the city of Winnipeg, province of Manitoba, Dominion of Canada, and Peter Jansen of the town of Jansen, state of Nebraska, hereinafter known as the second party, witness that:

"In consideration of one dollar paid in hand, that party of the first part has this day sold to second party three thousand one hundred and eighty-five (3,185) shares of the present capital stock of the Fraser Sawmills, Ltd., Corporation, at the price of \$75.00, seventy-five dollars, per share, payments of same to be made in the following manner:

March 15th, 1908.....	\$ 25,000 00
April 1st, 1908.....	25,000 00
April 15th, 1908.....	13,875 00
May 15th, 1908.....	25,000 00
June 15th, 1908.....	12,500 00
Nov. 1st, 1908.....	25,000 00
Dec. 1st, 1908.....	25,000 00
Jany. 1st, 1909.....	25,000 00
Feby. 1st, 1909.....	25,000 00
March 1st, 1909.....	25,000 00
April 1st, 1909.....	12,500 00

\$238,875 00

"These payments to draw interest at rate of 6½ per cent. from date.

"First party is to deposit with the Bank of Montreal at New Westminster, B. C., or any chartered bank of Canada or any National Bank of Seattle or San Francisco, this total number of three thousand one hundred and eighty-five shares (3,185 shares) of stock, properly indorsed, on or before March 10th, 1908, with said bank, and said bank to hold stock and upon payment to said bank by second party of payments above referred to, said bank is to surrender and deliver to second party, one share of said stock of the par value of \$100, upon payment of each \$75.00 to it by second party.

"In witness whereof parties hereto have hereunto set their hands and seal the day and year above written.

Lester W. David.

"A. D. McRae.

"Peter Jansen.

"Edward F. Swift.

"A. D. Davidson."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In a memorandum decision after the original submission of this cause, it was held that the case was not within the jurisdiction of the court for the reason that, as the record was then made, the requisite diversity of citizenship was not apparent, the defendant Davidson being a citizen of the United States residing in Canada, and the court expressed the opinion, tentatively, that Davidson is an indispensable party. Afterwards, on motion of the complainant's solicitor, the case was dismissed as to Davidson without prejudice, and without other pleadings the case has been again submitted for final determination. The remaining defendants by argument, however, contest the jurisdiction of the court on the ground that there is now a defect of parties. In accordance with the fifty-first equity rule, the complainant might have brought his suit against the other parties to the contract without joining Davidson as a defendant, and, if that had been done, those joined as parties defendant might by their answer have suggested a lack of an indispensable party as provided in the fifty-second equity rule, and it is the opinion of the court that the same thing might have been done by a special plea or supplemental answer, after the court had granted the complainant's motion to dismiss the case as to Davidson. The remaining defendants having failed to raise the question in the manner provided by the fifty-second rule, the court is authorized by the fifty-third rule to render a decree against them saving the rights of Davidson.

The bill of complaint avers that, in fulfillment of the contract, the plaintiff deposited the stock which is the subject of the contract in escrow with the National Bank of Commerce of Seattle, to be delivered absolutely to the defendants upon the payment of the purchase price stipulated for, that 1834 shares of the stock remains in said bank, and there is due on account of the purchase price a balance of \$137,500, with interest. The prayer of the complaint is for a judgment against the defendants for the unpaid residue of the purchase price with interest and costs, and for the foreclosure of an alleged vendor's lien upon the stock.

There is no controversy as to the facts—the complainant has fully complied with all the requirements of the contract on his part, and the money which the defendants agreed to pay for the stock is due to him. In defense it is insisted that the stock is not subject to any lien because no lien has been created by any method recognized by law. No satisfactory answer has been made to this contention; but it does not follow as a necessary consequence that the suit must fail. The court is not restricted in granting equitable relief by the label which the complainant adopts for his pleading, nor by the phraseology of his prayer, but may render a decree for the kind of relief appropriate to the facts alleged and proved. In this case appropriate relief is within the power of the court to grant. The complainant is entitled to have a decree in his favor, for the specific performance of the contract, which will be accomplished by exactly the same procedure as in the foreclosure of a vendor's lien. It will be decreed that the defendants pay the complainant the amount due, and that a special execution is-

sue to be levied upon the stock in escrow, which will be sold and the proceeds of the sale applied in payment.

In the argument there has been no discussion respecting the power of a court of equity to decree specific performance of an executory contract for the sale of personal property. My own researches, however, have led me to the conclusion that the jurisdiction of the court is ample. I am obliged to differ from counsel on both sides as to the legal effect of the contract. Both rest their arguments upon a theory that the written contract is not an executory contract for the future sale of the stock, but is evidence of a sale in præsentia. It is the opinion of the court that the writing does prove an actual sale, to be consummated, however, by the absolute delivery of the stock certificates at the time of payment of the purchase price. Therefore the title did not pass by the execution of the written contract, but remained to be transferred in the way that stock is usually transferred from one proprietor to another. Until payment of the purchase price, the defendants could not sell the stock, nor could their creditors take it in execution for their debts so as to defeat the intention expressed in the contract that it should remain in escrow until paid for. With the stock held by the bank in escrow, the complainant could not, in an action for the purchase price, truthfully allege a sale and delivery of the stock, nor could he withdraw the stock for the purpose of making a tender. Being in this situation, the complainant has a right to insist upon payment of the amount of money which has become due according to the terms of the contract, and yet he is without an adequate legal remedy for the deprivation of his right by the withholding of the purchase money. The inadequacy of legal remedies justifies the exertion of the powers of a court of equity and is the basis of equity jurisdiction in all cases. *Pomeroy on Specific Performance of Contracts*, §§ 17, 19; 26 Am. & Eng. Enc. of Law (2d Ed.) 103; *Express Co. v. Railroad Co.*, 99 U. S. 200, 25 L. Ed. 319.

By the uncontradicted averments of the bill of complaint, it appears that 1,834 shares of the stock remains on deposit in escrow represented by a number of certificates, each for a specified number of shares, and, in order to save the rights of Davidson, an equitable division will be made exempting from the decree to be entered the following certificates: Certificate No. 102 for 310 shares, certificate No. 118 for 32 shares, certificate No. 180 for 20 shares, certificate No. 206 for 85 shares, making an aggregate of 447 shares.

In making this division the court presumes from the wording of the contract that the four purchasers acquired equal rights.

In accordance with this opinion, a decree will be entered against the defendants and each of them for the balance of \$137,500, with interest as specified in the contract, and for costs, and that a special execution be issued to be levied upon the stock on deposit, excepting the shares represented by the certificates above specified, and from the proceeds of sale a sum equal to the value of $1\frac{1}{2}$ shares at the highest sum bid for any shares be deposited in escrow with the above-specified certificates, to be disposed of finally when the rights of Davidson shall have been adjusted.

In re BENDALL

(District Court, N. D. Alabama, N. W. D. December 30, 1910.)

No. 14.

BANKRUPTCY (§ 140*)—FRAUDULENT SALES—RECLAMATION OF PROPERTY.

Where a bankrupt secured goods on credit by false representations, in one case of the ownership of a fixed amount of assets, and in another by falsely concealing specific outstanding indebtedness to firms other than the seller, and the false assertion of possession of a specific bank balance, the sales were void, and the sellers were entitled to recover the property sold, as against the bankrupt's trustee, without proving that the bankrupt was in fact insolvent when he made such representations.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In the matter of bankruptcy proceedings of R. L. Bendall. On petition of the Courtney Shoe Company and the Baltimore Bargain House to reclaim property sold the bankrupt under alleged fraudulent misrepresentations. Petition to review referee's order denying the application. Granted, and applications allowed.

Kirk, Carmichael & Rather, for claimant Courtney Shoe Co.

D. A. Grayson and Walker & Spragins, for claimant Baltimore Bargain House.

Almon & Andrews, for trustee in bankruptcy.

GRUBB, District Judge. These two petitions arising out of the same bankruptcy may be considered together, though the facts differ. Each petitioner seeks to reclaim goods sold to the bankrupt and found in his possession at the time the petition was filed, because of fraud on the bankrupt's part.

The bankrupt commenced business early in the year 1909 upon a capital of \$2,000, which was invested by the bankrupt in the purchase from the Baltimore Bargain House, one of the petitioners, of a general stock, amounting to about \$5,000, on which \$1,700 was paid in cash. In June, 1909, the bankrupt purchased from the Courtney Shoe Company, the other petitioner, a bill of \$1,700 on credit. As a basis of credit he made to this petitioner, at the time of the purchase, a statement in writing of his assets and liabilities. In it he represented his stock of goods to be of the value of \$5,500, his personal property other than his stock at \$1,000, his cash in bank \$250, real estate in Oklahoma \$800, and an undivided interest in a farm at \$500. The evidence is convincing that his stock was not worth more than \$4,000; that he had but \$50 in bank, and no personal property other than his merchandise, and no real estate; and that his assets are exaggerated at least \$3,000, and possibly \$5,000. The evidence shows that the Courtney Shoe Company acted in partial reliance upon the representations of the bankrupt made in this statement in making the sale to him of the goods sought to be reclaimed. On July 20th the bankrupt went to Baltimore to buy goods. Before leaving, he seems to have had a tentative understanding with the cashier of the local bank with which he did business to honor his check for \$1,000; the overdraft to be made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

good on his return by a loan or discount to him by the bank. He also wrote the Baltimore Bargain House from Tuscumbia, his home, that he would bring with him \$1,000 to apply on the balance of his old account with them. Upon his arrival in Baltimore he sought to buy goods from the Baltimore Bargain House. While negotiations were pending, he represented to petitioner's salesman and creditman that he had made no substantial purchases of goods, other than groceries, except from petitioner. In truth, he had made purchases, prior to the making of such representations, from other firms of goods, other than groceries, in an amount exceeding \$5,000. He also stated to petitioner's salesman that he had \$1,000 in bank, the proceeds of his business, which he intended to apply on the account of petitioner, and gave petitioner a check on his local bank in that amount to accomplish this purpose. In truth he had no money in the bank, and the check was protested. Petitioner thereupon stopped deliveries of the goods purchased by the bankrupt by wire, and thereupon the bankrupt wrote petitioner stating that the check was refused by the bank because of the bank's error in referring it to his individual instead of business account, and the bank confirmed bankrupt's letter. In truth the bankrupt had but one account, his business account, and no balance to his credit on it. The bankrupt afterwards negotiated a loan from the bank and with its proceeds sent petitioner exchange to cover the dishonored check. Petitioner thereupon delivered the goods sought to be reclaimed. The misleading statements as to condition of bankrupt's bank account were, however, left uncorrected. The statement of the bankrupt that prior to the time of the purchase from petitioner he had made no substantial purchases from other firms was untrue and was material, in that its effect was to conceal from petitioner an outstanding indebtedness of more than \$5,000. So the statement that he had a thousand dollars in bank, which he was applying to the payment of the old balance, and the source of which was from sales in his business, was material, since, if true, it indicated not only the possession of additional assets in that amount, but the existence of a profitable business from which they were derived. This representation was also untrue. The bankrupt had no such sum and obtained it thereafter only by incurring the obligation of a loan. It seems reasonably clear that petitioner would not have made the sale to the bankrupt if it had been apprised that the bankrupt had incurred additional indebtedness for goods purchased from other firms in excess of \$5,000, and had no cash in bank, but was compelled to borrow money from his bank to make a payment on the old balance due it.

In the matter of the Courtney Shoe Company's petition, the evidence is convincing that the goods were obtained from it after a false representation was knowingly made to it by the bankrupt, for the purpose of obtaining credit, as to the amount of his assets; that his existing assets were by such statement not only exaggerated in value, but fictitious assets amounting to about \$2,000 were included therein, making the false representation a material one and likely to influence petitioner in making the sale from which the loss resulted.

In the matter of the Baltimore Bargain House petition, the evidence is convincing that the goods were obtained from it after false statements of fact were made to it by the bankrupt, having a material bearing upon the decision of the petitioner in extending the credit and probably causing the loss to it resulting from the sale of the goods sought to be reclaimed.

The trustee's position is that such false statement would not justify rescission in any case unless the evidence was sufficient to establish the bankrupt's insolvency at the time of the purchases by him of the goods in controversy, and that the record fails to show any such evidence. In the view taken by the court, it is unnecessary to enter upon this question of the bankrupt's insolvency. If the fraud complained of by petitioners consisted in the fact that the bankrupt had falsely represented that he was solvent, or had fraudulently concealed his state of insolvency, when he purchased the goods of petitioners, the position of the trustee would be well taken. If the bankrupt were then solvent, there could have been no false representations or concealment of his insolvency. Proof of actual insolvency would be, therefore, essential to rescission. Here the representations complained of are of a different kind. In the Courtney Shoe Company petition there was a representation of ownership of a fixed amount of assets which was untrue. In the Baltimore Bargain House petition a false concealment of specific outstanding indebtedness to firms other than petitioner and a false assertion of the possession of a specific bank balance existed. Proof of insolvency is not essential to the establishment of such false representations, for they could be made as well by solvent as insolvent purchasers. On the contrary, the falsity of a representation of solvency depends upon the establishment of insolvency, and fraud in the concealment of insolvency cannot exist where insolvency itself does not exist. There can be no false representation with reference to and no fraudulent concealment of insolvency where there is no insolvency. The class of cases relied on by the trustee, holding proof of insolvency essential, are of this latter character. Where the representation is of a specific fact, the inquiries are whether the representation is untrue, and whether it is of a character, if relied upon by the seller, likely to induce a sale, which he otherwise would be unwilling to make. It is clear that a merchant might willingly sell to a retailer whose assets exceeded his debts by \$50,000, and still be unwilling to sell to this same retailer if his assets merely equaled his debts. In each instance, the purchaser would be solvent. In the former, he would be a desirable, and in the latter might be a very undesirable, customer. If a solvent purchaser falsely represents the extent of his assets, with the purpose of obtaining credit, and the seller, relying on this false representation of amount of assets, extends the credit, when, in the absence of such representation, he would have declined the sale, and insolvency thereafter ensues, causing loss to the seller, the elements necessary to rescission are present, and the right of rescission complete.

The trustee introduced no evidence, and the brief filed by the trustee asserts that it was led to pursue this course because the allegations of the respective petitions were construed to put in issue only the class

of fraud depending upon the existence of insolvency. That the petitions are open to this criticism seems very doubtful. That injustice may not be done, the trustee will be permitted, by filing in the cause, within five days from the entry of the order, an affidavit that he is prepared to introduce evidence; in the event the Courtney Shoe Company matter is reopened, tending to show that the bankrupt had real estate and personal property other than his stock of merchandise and a bank account of substantially the value set out in the written statement made, and, in the same event, in the Baltimore Bargain House case, that no representations were made by the bankrupt as to not having purchased goods from other firms than petitioner and as to having \$1,000 in bank at Tuscumbia, the proceeds of his business, when he made the purchases, or that such representations, if made, were true, to ask leave to set aside the orders, or either of them, made herein, and to have the respective cases, or either of them, for such purpose only, reopened, under terms to be then prescribed, by order of court.

The petitions for review in each case are granted, and an order will be entered directing the trustee to pay to the claimant, but not before the expiration of five days, and not before the hearing and disposition of the application to reopen in either case, if one is made upon affidavit filed within that time, out of the proceeds of the sales of the property, the respective amounts agreed upon as representing the value of the property of the respective claimants sought to be reclaimed; and the trustee is taxed with the costs of the petition for review in each case.

In re SPANN.

(District Court, N. D. Georgia, N. W. D. November 30, 1910.)

No. 339.

1. BANKRUPTCY (§ 140*)—PROPERTY OF BANKRUPT—PURCHASE—DELIVERY.

A sale of goods to a person contemplating bankruptcy is not complete until delivery.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—PROPERTY OF BANKRUPT—FRAUDULENT PURCHASE—CONCEALMENT OF FINANCIAL CONDITION.

Where claimant sold certain shoes to a bankrupt which had been delivered only three days before the petition in bankruptcy was filed, and were all on hand with the exception of two or three pairs when the trustee took possession, and it appeared that the bankrupt, when purchasing the shoes, though knowing his precarious financial condition, failed to disclose the same, the sale was fraudulent and void, entitling the seller to recover the shoes or their proceeds against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219; Dec. Dig. § 140.*]

In the matter of bankruptcy proceedings of Joseph E. Spann. On petition to review a referee's order denying a petition of Smart Brothers & Company for the proceeds of certain shoes delivered to the bankrupt at an alleged fraudulent sale. Petition granted, and determination of referee set aside.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

F. K. McKutchen, for trustee.

Maddox, McCamy & Shumate, for petitioners.

NEWMAN, District Judge. This is a petition to review the action of the referee in the matter which will fully appear from the following statement made by the referee on the petition to review his action:

"Smart Bros. & Co., creditors of the bankrupt, intervened in said cause in due time, setting up title to certain shoes to the value of \$460.50, said shoes having been sold by Smart Bros. & Co. to J. E. Spann on June 13, 1910, and shipped by them on August 9, 1910, and received by the bankrupt and placed in his stock August 10, 1910; the date of receipt by the bankrupt being five days prior to the date of his adjudication in bankruptcy. By agreement the trustee sold the shoes, realizing \$330.39.

"Smart Bros. & Co. set up in their intervention that title had never passed to said shoes, because of fraud upon them in the following particulars: First. That Spann knew he was insolvent when he purchased the goods and that he would be unable to pay for them. Second. That at the time of the receipt of the goods by the bankrupt he was contemplating filing his petition in bankruptcy, and in fact he had fully determined to do so. Third. That the interveners were ignorant of the true financial condition of the bankrupt at the time the goods were sold to the bankrupt, and were still ignorant of his financial condition when the goods were shipped to him and received by him.

"The trustee answered denying all the material allegations of the intervention and setting up specially that there was no fraud practiced upon the interveners, and that no fraudulent intention existed on the part of the bankrupt in purchasing the goods or receiving them and placing them in his stock; that bankrupt was solvent at the time of the purchase and at the time of the receipt of the goods and was not positive that he would go into bankruptcy. He was inclined to the hope that he could pacify his creditors, and did not, in fact, know until the 13th of August, 1910, that he would be obliged to go into bankruptcy.

"The facts shown to the referee were as follows:

"The bankrupt ran his business very loosely, and it appears from the facts adduced before the referee that he is not a capable business man. He appears to have kept his affairs in such shape that he does not have a clear knowledge of the general status of his business. He ran a store first on the outskirts of Dalton, Ga., in a cotton factory settlement, and while at this point, in January, 1910, he made a statement to R. G. Dun & Co., which clearly appears to have been inaccurate. He does not profess to state positively just how accurate that statement was, but testifies that he guessed at the amounts, and it is fairly apparent the statement was inaccurate as to the amounts owing by the bankrupt, and misstated to some extent his net worth. There is no proof that Smart Bros. & Co. sold the bankrupt on the strength of this statement, or that it ever reached Smart Bros. & Co. or was communicated to them. The bankrupt's testimony being positive that he did not give a statement of his financial condition to Smart Bros. & Co. and no false representations whatever were made to them. The order for the goods was given on August 9th, and Smart Bros. & Co. shortly afterwards sent duplicate of the order with the following acceptance indorsed thereon: 'Duplicate many thanks. Edward Smart.'

"The bankrupt moved his business to the business center of Dalton, Ga., in hopes of improving his financial condition. After this move he became less prosperous in his business, and on August 15, 1910, was adjudicated bankrupt. For a short time prior to his adjudication in bankruptcy creditors were pushing him, pressing for payment of their claims. The bankrupt admits this, but claims he kept hoping to pacify his creditors and pull through the dull season. He consulted his attorney several days prior to the date of his adjudication, because of his shaky financial condition. The bankrupt's testimony is, however, that at the time he received the goods in question, and at the time he was consulting with his attorney, he did not know he would

have to go into bankruptcy; he hoped to pull through, and, in fact, did not decide to go into bankruptcy until August 13, 1910. In fact, he thought then he might be solvent and thinks if his debts could be collected he could even now pay out.

"The goods in question were received by the bankrupt on August 10th, and it appears that he must have thought at that time that his solvency was doubtful and that his financial condition was very shaky.

"An order was entered by the referee refusing the intervention, and this order is certified for review by the court. The referee was moved by the following reasons in passing the order in question: The proof does not show any fraud whatever practiced at the time the goods were purchased. The bankrupt's financial condition up to that time is uncertain, though it is very probable that he might have been solvent; even though insolvent it would not have been fraud upon Smart Bros. & Co. unless some misrepresentation took place. The interveners received the order, had ample opportunity to investigate the financial condition of the bankrupt, yet shipped the goods without question as above set out. The bankrupt's testimony, being the only direct evidence offered, is not strong enough to show any fraudulent intention on his part, even at the time of the receipt of the goods. Even though the bankrupt had sinister motives in receiving the goods when he was in a shaky financial condition, it is doubtful if that would be sufficient to vitiate the transaction and restore the title to the goods to the vendors, the goods having been purchased in evident good faith and the purchase consummated by the delivery of the goods as above set out. However, as above stated, though it appears that the bankrupt was in a very shaky financial condition and probably insolvent, still he must have realized this fact at the time he received the goods, if his act in receiving them could at all affect the legality of the transaction."

I am unable to agree with the referee in the conclusion he has reached in this matter. It is perfectly clear from the evidence, indeed from the evidence of the bankrupt himself, and it appears, I think, also clearly from the statement of the referee, that on August 10th, when these goods were received by the bankrupt and placed in his stock, that he knew he was insolvent. He must have known that it was entirely probable, and indeed almost certain, that within a very few days he would be compelled to acknowledge his bankruptcy and file a petition to have himself so adjudged.

The purchase was not complete, in my opinion, until the goods were delivered, and if, at the time of the delivery of the goods, the bankrupt concealed his financial condition, he is guilty of a fraud which authorized the vendors to ask for a rescission and delivery back to them of the goods sold and still in the possession of the bankrupt. The goods—shoes—had been in the store only three days when the petition in bankruptcy was filed and were all on hand, and probably in the original packages, except some two or three pairs, which, according to the testimony of the bankrupt, had been sold between the time that they were received and the institution of the bankruptcy proceedings.

If the purchaser concealed his insolvency and knowledge of the fact that he could not pay for the goods, it would void the sale both under the law of Georgia and the ruling of the Supreme Court of the United States.

In *Donaldson, Assignee, v. Farwell et al.*, 93 U. S. 631-633, 23 L. Ed. 993, the opinion of the court by Mr. Justice Davis, which is brief, not only determines this question, but also that the trustee in bank-

ruptcy would obtain no greater rights than the bankrupt had. The opinion referred to is as follows:

"The instructions present the question of law arising upon the facts which this controversy involves. The doctrine is now established by a preponderance of authority that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract, and recover the goods. *Byrd v. Hall*, *41 N. Y. 647; *Johnson v. Monell*, *41 N. Y. 655; *Noble v. Adams*, 7 Taunt. 59; *Kilby v. Wilson, Ryan & Moody*, 178; *Bristol v. Willsmore*, 1 Barn. & Cress. 513; *Stewart v. Emerson*, 52 N. H. 301; *Benjamin on Sales*, § 440, note of the American editor, and cases there cited.

"Here the vendor exercised the right of rescission shortly after the sale in question, and as soon as they obtained knowledge of the fraud. If, therefore, this controversy were between Mann and them, it is clear that he would not be entitled to recover.

"The assignment relates back to the commencement of the proceedings in bankruptcy, and vests, by operation of law, in the assignee the property of the bankrupt, with certain specified exceptions, although the same be then attached. It also dissolves any attachment made within four months next preceding the commencement of the proceedings. If there be no such liens, and the property has not been conveyed in fraud of creditors, he has no greater interest in or better title to it than the bankrupt. Only the defeasible title of the latter to the goods in controversy passed to the assignee, and it was determined by a prompt disaffirmance of the contract."

Certain sections of the Civil Code of Georgia of 1895 pertinent here are as follows:

"Sec. 3532. Fraud or duress, by which the consent of a party had been obtained to a contract of sale, voids the sale."

"Sec. 3534. Concealment of material facts may in itself amount to fraud. (1) When direct inquiry is made, and the truth evaded. (2) When, from any reason, one party has a right to expect full communication of the facts from the other. (3) When one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silent."

"Sec. 4027. Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or from the particular circumstances of the case."

The Supreme Court of Georgia, in *Johnson & Co. v. O'Donnell & Burke*, 75 Ga. 453, in the opinion by Justice Blanford, says this:

"Where a party purchases goods, who is insolvent, and, not intending to pay, conceals his insolvency and his intention not to pay for them, he is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. [*Donaldson v. Farwell*] 93 U. S. 633 [23 L. Ed. 993]; [*Ash v. Putnam*] 1 Hill [N. Y.] 302-311; [*Devoe v. Brandt*] 53 N. Y. 462; [*Stevens v. Brennan*] 79 N. Y. 255; 15 M. & W. 216; [*Carter v. Lipsey*] 70 Ga. 417; [*Crine & Daniels v. Davis*] 68 Ga. 138; [*Cohen v. Meyers, Cohen & Co.*] 42 Ga. 46; Code, §§ 2635, 3175, 3173. Under the allegations in the bill, a court of equity has jurisdiction, and the remedy in equity is more adequate and complete than at law. Code, § 2635."

I think the facts in the present case bring it clearly within the rule laid down both by the Supreme Court of the United States and by the highest court in the state. It must have been perfectly manifest to Spann that he would be unable to pay for the shoes purchased from

these intervening petitioners, and, as a consequence of that, of course he did not intend to pay for them. It would be wholly inequitable and wrong, under all the circumstances of the case, for the court to take the proceeds from the sale of the shoes and distribute them among the other creditors of the bankrupt.

The action of the referee is disapproved, and he is directed to enter an order turning over the amount realized from the sale of the shoes to the petitioner, Smart Bros. & Co.

In re J. E. MAYNARD & CO.

(District Court, N. D. Georgia. December 13, 1910.)

1. BANKRUPTCY (§ 400*)—EXEMPTION—SCHEDULE—PETITION.

In a bankrupt's schedules under Schedule B (5), entitled "property claimed to be exempt," was a recital that the bankrupt claimed as exempt \$1,600 of goods from the stock of goods, located, etc., and locked up under an attachment in a storehouse at V., Ga.; that the exemption was claimed under Civ. Code Ga. 1895, § 5912, or, in lieu thereof, such sum of money as was obtained by a sale of the property marked "exempt. [Signed]," etc. The schedule was attached to a petition reciting that the bankrupt was a married man having a wife and children, and was entitled under the Constitution and laws of Georgia to a homestead of \$1,600 out of the stock of goods located, etc., and that he requested the court to allow him to point out such property from which he could secure such homestead. *Held* a sufficient application and schedule to justify allowance of the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 398*)—REQUISITES—FRAUD—PURCHASE MONEY—NECESSITY OF PAYMENT.

Const. Ga. art. 9, § 1, par. 1 (Civ. Code 1895, § 5912), provides for an exemption of the property of every head of a family out of realty or personalty or both to the value in the aggregate of \$1,600, and the next section declares that no court or ministerial officer shall have jurisdiction or authority to enforce any judgment, execution, or decree against the property set apart for such purpose including improvements except for taxes, purchase money, etc. *Held* that, so far as a bankrupt's exemptions under such act are concerned, the bankruptcy court takes the property only for the purpose of setting it aside; it never becoming, except for that purpose, a part of the bankrupt's assets, and hence it was no objection that certain of the property claimed as exempt was subject to a lien for purchase money, as such lien would follow the property and be enforceable against the same in the hands of the bankrupt, notwithstanding the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 398.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. E. Maynard & Company. On petition to review a referee's order declining to approve the acts of trustees setting apart \$1,600 out of the bankrupt's assets as a homestead exemption under the state law. Order reversed, and exemption approved.

Robert T. Daniel, for applicant Hasten.

J. W. Wise and Hewlett & Dennis, for objectors.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEWMAN, District Judge. The trustee in this case set apart to E. I. Hasten, \$1,600 out of the sale of the stock of goods as exemption under the Constitution and laws of Georgia.

The referee declined to approve the action of the trustee in setting it apart for the reasons, as he says: First, that there was no sufficient application or schedule filed; second, that there was no sufficient application for the property said to be exempt; and, third, that the purchase money, according to the testimony of the claimant and the other members of the firm, for at least half of the goods in the store at the time the proceedings commenced, had never been paid, and according to the other witnesses the proportion of the goods which had not been paid for is no larger, and no effort has been made by the claimant to separate the articles paid for from those not paid for, but, on the contrary, claimant testified that it was impossible to separate and identify them. The referee cites *White v. Wheelan*, 71 Ga. 533, 534, and *Phelps v. Porter*, 40 Ga. 485.

In the schedule filed by the bankrupt, this appears, under Schedule B (5), property claimed to be exempted:

"Bankrupt claims an exemption of \$1,600 in goods from the stock of goods located at Vaughn, Ga., and which is now locked up under an attachment from the Spaulding superior court in the storehouse at Vaughn, Ga. This exemption is claimed under section 5912 of the Civil Code of Georgia of 1895, or in lieu thereof such sum of money as is obtained by the sale of the said property. Said property is marked exempt. [Signed] I. E. Hasten."

To this schedule is attached a petition in which this occurs:

"Bankrupt says that he is a married man and has the support of his wife, Eliza Hasten, and five minor children, Guy, Ruth, Max, Claud and Henry, that he is entitled under the Constitution and laws of Georgia to a homestead of \$1,600 out of the stock of goods located in the storehouse at Vaughn, Ga., and he respectfully requests the court to allow him to point out such property from which he can secure the said homestead."

It seems to me that this is about all the bankrupt could have done under the circumstances and considering the situation of the goods, in claiming his exemption out of the same, or out of the proceeds arising from the sale of the goods.

Subsequently, during the receivership, an order was made for the sale of the goods. The sale was made and approved, and after the trustee was elected he set apart to the bankrupt \$1,600 in cash out of the proceeds of the sale of the stock of goods.

In view of all this, there does not seem to be any serious objection to the manner in which the application for exemption was made or to the action of the trustee in setting it apart, provided Hasten was otherwise entitled to the exemption.

The principal question made and argued at the bar is whether, in Georgia, the bankruptcy court, following, as it will, the state law with reference to the allowance of exemptions, will set apart an exemption out of property where the purchase money of the same has not been paid, and applying the inquiry more particularly to the facts of this case, as to whether such exemption will be granted where it appears that the purchase money of a large part of a stock of goods is unpaid, and it is impossible to segregate goods on which the purchase money

had not been paid from those on which it may have been paid. Counsel for the objecting creditors relies upon the rule which has been adopted by the courts in other states, to the effect that it is the duty of a person claiming an exemption under such circumstances—that is, where goods paid for have been mingled with goods not paid for—to take the burden of pointing out and showing clearly what goods have been paid for, before he can have the exemption allowed, and then only to the goods which had been paid for.

Whether there be such a rule in Georgia it is unnecessary to say here, because the case is controlled in an entirely different way and must be decided for entirely different reasons.

The Constitution of Georgia provides (article 9, § 1, par. 1 [Civ. Code 1895, § 5912]) as follows:

“There shall be exempt from levy and sale, by virtue of any process whatever under the laws of this state, except as hereinafter excepted, of the property of every head of a family, or guardian or trustee of a family of minor children, or every aged or infirm person, or person having the care and support of dependent females of any age, who is not the head of a family, realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars.”

The next section of the Constitution (of the Code, § 5913) is as follows:

“No court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, execution or decree, against the property set apart for such purpose, including such improvements as may be made thereon from time to time, except for taxes, for the purchase money of the same, for labor done thereon, for material furnished therefor, or for the removal of incumbrances thereon.”

It would seem, therefore, that the scheme of the Constitutional provision is that the homestead should be set apart, and that, after being so set apart, it is subject to the taxes, purchase money, etc. There are a number of decisions by the Supreme Court of the state on the question as to whether or not the ordinary, in passing upon the exemption under the state law, has any jurisdiction to entertain an objection on the ground that the purchase money has not been paid. These opinions are all cited and discussed, and a conclusion reached, in the opinion of Judge Lumpkin, for the Supreme Court, in *Dix v. Dix*, 132 Ga. 630, 64 S. E. 790.

The objections which are permissible under the law of Georgia, when application is made to the ordinary for homestead exemption, are stated in Civ. Code 1895, § 2836, as follows:

“Should any creditor of the applicant desire to object to said schedule, for want of sufficiency and fullness, or for fraud of any kind, or to dispute the valuation of said personalty, or the propriety of the survey, or the value of the premises so platted as the homestead, he shall, at said time and place of meeting, specify the same in writing.”

And the ruling of the court in *Dix v. Dix* clearly is that these are the only objections that can be heard to allowing or setting apart the homestead before the ordinary, leaving parties having claims which are good against the exempted property to enforce them in courts of

competent jurisdiction, or in a proper way, notwithstanding the fact that the property is set apart as ordinarily exempted.

A similar question was before this court and determined in *Re Castleberry* (D. C.) 143 Fed. 1018. In that case taxes coming into the hands of the county treasurer had been paid for real estate for which he had taken title in his own name. The county was one of the objectors to the allowance of the exemption, and, while it was recognized that the claim of the county would be good even against an exemption, still it was held that the only thing that a court of bankruptcy could do would be to set aside the property and allow the county, as well as other creditors, to propound their claims in a court having jurisdiction of the matter. The court in that case cited *In re Camp* (D. C.) 91 Fed. 745; *In re Wright* (D. C.) 96 Fed. 187, etc. In this the court followed *In re Bass*, 3 Woods, 382, Fed. Cas. No. 1,091, decided by Mr. Justice Bradley. Also, *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

The result of the examination of the authorities and the application of the same to the facts in that case was expressed as follows:

"It seems to me clear, therefore, that the bankruptcy court only took the property in this case, as in the case of all property claimed as exempt, for the purpose of setting it aside, and it never became, except in that limited way, a part of the assets in bankruptcy. No other reason for refusing the exemption is shown except that Dade county has a lien of the highest character on the fund so set apart. This it can readily enforce by instituting proper proceedings for that purpose."

The recent decisions of the Supreme Court of Georgia are in line with this view of the matter. *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 48 S. E. 150, and *Brooks v. Britt-Carson Shoe Co.*, 133 Ga. 191, 65 S. E. 411.

The result of the foregoing is that I must differ with the referee in reference to approving the action of the trustee in setting apart the exemption claimed by Hasten in this case. The exemption being in cash, however, and it appearing that there will be creditors with claims which they will desire an opportunity to enforce against the fund notwithstanding its being set apart as an exemption under the Constitution and laws of Georgia, the fund will be held by the trustee for a reasonable time to give opportunity to creditors having such claims to take steps to enforce the same. This the court did in the *Castleberry* Case, and I think it is in line with the views of the Supreme Court in the *Lockwood* Case.

The action of the trustee in setting apart the exemption will be approved, and the exemption held by the trustee for a reasonable time to await the action of the creditors having claims which they desire to enforce against the exemption in such way as they may be advised.

In re BUZZINI & CO., Inc.

Ex parte L. BARTH & SON.

(District Court, S. D. New York. December 29, 1910.)

1. BILLS AND NOTES (§ 422*)—INDORSEMENT—WAIVER OF PRESENTMENT AND NOTICE OF PROTEST.

The maker of a note has no such conflicting interest with the indorser when he fastens liability on the indorser as will prevent him from waiving presentment and notice of protest as agent of the indorser; the maker not being exonerated by the fixing of the indorser's liability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1197; Dec. Dig. § 422.*]

2. BILLS AND NOTES (§ 398*)—INDORSEMENT—CONSIDERATION.

Where a bankrupt corporation received property from the maker of certain notes to secure the corporation's indorsement thereof, the corporation could not keep the property and throw the loss on the maker merely because the holder failed to fasten liability on the corporation as indorser by due presentment and notice of protest.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1045-1050; Dec. Dig. § 398.*]

3. BILLS AND NOTES (§ 422*)—INDORSEMENT—WAIVER OF PRESENTMENT—NOTICE OF PROTEST—EFFECT.

The effect of a waiver of presentment and notice of protest of a note as against the indorser relieves the obligation of the condition usual in such cases, and makes the note the indorser's absolute obligation to pay the sum fixed, leaving his recourse to enforcement of his right of subrogation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1208; Dec. Dig. § 422.*]

4. BANKRUPTCY (§ 316*)—PROVABLE CLAIM—INDORSER.

The obligation of an indorser is a provable claim in bankruptcy, even though subject to the condition of presentment and notice of protest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 475, 476; Dec. Dig. § 316.*]

5. BANKRUPTCY (§ 316*)—CLAIM—LIABILITY OF INDORSER.

The A. Company being insolvent, and B., being willing to become liable for the claim of petitioners against the company, gave certain notes as security, petitioners agreeing not to present the notes until the last dividend from the A. Company's assets was paid, and then to enforce the notes against B. only to the extent of its own loss and procured the B. Company to indorse the notes. *Held*, that B. thereby assumed the obligation of the A. Company, leaving in petitioner's hands the dividends in bankruptcy as security pro tanto, and that the liability of the B. Company on the notes was not so contingent as to prevent proof as a valid claim in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474-476; Dec. Dig. § 316.*]

6. BANKRUPTCY (§ 316*)—CLAIMS—"CLAIMS ABSOLUTELY OWING."

Where a claim against a bankrupt as indorser of certain notes was an indebtedness absolutely owing, it was not material to the holder's right to prove such claim against the bankrupt's estate that the notes would not be due for more than a year after the adjudication of the indorser as bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474-476; Dec. Dig. § 316.*]

In the matter of bankruptcy proceedings of Buzzini & Co., Incorporated. On petition of L. Barth & Son for the allowance of a claim. Referee's order refusing to allow the claim reversed, and claim allowed.

Chas. Coleman Miller, for trustee.
Emanuel Eschwege, for petitioner.

HAND, District Judge: Two points only are made against the claim: First, that there was no notice of protest; second, that the notes fell due more than a year after adjudication. As to the first point, the plaintiff proves sufficiently waiver of presentation and notice of protest. To this the trustee replies that it was Buzzini who made the waiver, and that he was maker; that as maker he had a conflicting interest with his corporation, and so could not act as its agent. But a maker has no conflicting interest when he fastens liability on the indorser, because the indorser's liability does not exonerate him. If the indorser pays, he takes up the note, and sues the maker. How then can the maker have a conflicting interest in fastening liability on the indorser? He is liable to somebody anyway, and it can make no difference to him whether the plaintiff, who sues him, be the holder or the indorser. But the trustee answers that, though formally the bankrupt was only indorser and so surety, in fact it was the party ultimately liable upon the notes, and so could not have thrown the loss on Buzzini. To this the reply, in turn, is that if that be the proper interpretation of the facts, which are very vague at best, then the bankrupt was in any case liable in one way or another. All that Buzzini says is that he had agreed to give the patents to the bankrupt in consideration of the indorsement of the notes. If this is true, Buzzini could have sued the bankrupt in any event, had he paid the notes, even if the holder had failed properly to charge the indorser, because his right was not dependent upon the liability of the bankrupt to the claimant upon the indorsement.

It arose from the implied agreement that, if the bankrupt got the property, it would exonerate Buzzini if he had to pay; the money which he paid on the notes would have been paid to its use. Equity would not have allowed the bankrupt, having indorsed the notes, to keep the property and throw the loss on Buzzini merely because the holder failed to fasten it as indorser. It would have been an almost imaginable contract, which should have read thus: "I will sell you the patents which I am to get for these notes, if you will indorse them, but, should the holder sue me and not you and recover, the burden shall rest on me, though you keep the property." Even had the claimant released the bankrupt, Buzzini could have sued in the common courts, for his recourse does not depend on subrogation to rights of the holder. *Pearce v. Wilkins*, 2 N. Y. 469. Therefore from any point of view the validity of the indorsement was a matter of indifference to Buzzini, and there was no conflict of interest between him and the corporation when he waived presentation and protest. His authority is not questioned, for he had general management of all the bankrupt's affairs.

The trustee also raises the question of the provability of this liability. It consists of an indorsement upon a note as to which the indorser has waived presentation and notice of protest. The effect of such a waiver is to relieve the obligation of the usual conditions and to make it an absolute obligation to pay the sum upon the day fixed, or in this case upon the adjourned day, leaving to the indorser his recourse over by subrogation. However, it is settled in this circuit that the obligation of an indorser is a provable claim even when it is subject to the condition of presentation and notice of protest. *Re Philip Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551, and, although that case follows *Re Gersen*, 107 Fed. 897, 47 C. C. A. 49, the reasoning in which is, in turn, disapproved of in *Re Roth & Appel* (C. C. A.) 181 Fed. 667, 674, still I should not feel at liberty to disregard it on that account while it stands not expressly overruled.

However, it is rather because Buzzini's own liability as principal was contingent that the trustee attacks these claims. The facts were these: When the notes were given, a petition in bankruptcy had been filed against the Arena Company, and its affairs were being conducted by a committee of creditors. It was recognized as insolvent, though to what extent could not then be exactly known. Buzzini either already was, or was then willing to become, liable for the claim of L. Barth & Son against the Arena Company, and gave the notes as security. The claimant agreed not to present them till the last dividend from the Arena Company came to hand, and then to enforce them only to the extent of its own loss. The question is whether this made them contingent. The dividends from the Arena Company were an undetermined fund which was security for the notes. I do not forget that the contract calls the notes collateral security for the claim, but the claim against the Arena Company except for these dividends was a mere formal obligation, and there was in fact nothing but the notes to meet the deficiency. It is true that the time of payment of the notes was delayed but that the statute expressly distinguishes from contingency. Section 63a (1), Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447). It is also true that they were not to be enforced to the extent to which the dividends paid upon them. In that respect they were like any obligations for which the creditor holds some security, which he is obliged under the act (section 57h) first to realize in accordance with the terms of the contract, and then is allowed to prove for the balance. That I think is the true analysis of the relations of the parties here: That Buzzini in fact assumed the obligation of the Arena Company, leaving in the hands of the claimant its dividends in bankruptcy as security pro tanto. It is true undoubtedly that the notes were contingent upon the final liquidation of the bankrupt company, but so is any claim for which the creditor holds security as soon as bankruptcy occurs. The trustee would indeed be forced to this distinction: That a secured creditor could not prove for the balance of debt, when the contract required him to liquidate and apply the security first before suit, since then it would be contingent, though he could prove it if the contract had allowed him to sue for the full claim, although the statute, even in the case of such a contract, requires him to liquidate first

and prove for the balance. That would be a very narrow way to interpret the legislative intent.

The question is next raised of the time of payment. The trustee says that, since the final dividend was paid on the Arena Company claims more than a year after the adjudication of this bankrupt, the notes which were not due till then could not be proved. I can find no authority for the proposition that, granted an obligation is "absolutely owing," it makes the least difference when it is payable, and the statute (section 63a [1]) is expressly to the contrary. There is, of course, a difficulty in the case of indorsements of notes. On that account Judge Brown in Rhode Island (*Re Smith*, 146 Fed. 923), suggested obiter that only indorsements of notes falling due within less than one year were not contingent. However, the time when the contingency of the claim is to be determined the statute fixes at the time of petition filed (section 63a [1]; *Re Pettingill*, 137 Fed. 145), and, if the claim be "absolutely owing," then there appears to be no law for disallowing it because the date of payment is delayed. In this case the claim must, of course, have been proved within the year, but its liquidation would be delayed till the security was all realized. This is a thing which may occur very frequently in bankruptcy.

Therefore I can see no objection to the claim and the order expunging it must be reversed, and the claim allowed.

FINANCE CO. OF PENNSYLVANIA v. NEW JERSEY SHORT LINE R. CO.
et al.

SAME v. TRENTON & N. B. R. CO. et al.

(Circuit Court, D. New Jersey. January 12, 1911.)

CORPORATIONS (§ 561*)—ASSETS—MISAPPROPRIATION—RIGHT TO SUE.

Where the proceeds of bonds issued by an insolvent corporation, for which a receiver had been appointed, were misappropriated by the officers and directors thereof to pay interest coupons of other corporations, the stock of which was owned by the insolvent, a proceeding for the recovery of the amount so misappropriated could only be maintained by the insolvent corporation's receiver, and not by its stockholders or other bondholders, in the absence of a showing that the receiver had been requested to proceed to enforce such claim and had refused.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2261-2264; Dec. Dig. § 561.*]

In Equity. Bills by the Finance Company of Pennsylvania against the New Jersey Short Line Railroad Company and others, and against the Trenton & New Brunswick Railroad Company and others, to foreclose certain mortgages. Application for an order of distribution. On objections by the Guaranty Trust Company of New York and others, constituting the bondholders' protective committee of the New York-Philadelphia Company, a corporation, organized to hold the stock of the railroad companies, to a distribution of any of the proceeds of the sale to the payment of certain bonds held by Stern and Silverman, individually, or by the corporation of Stern & Silverman, on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ground that they, as officers and directors of the holding company, diverted the bonds thereof to the payment of interest coupons of the railroad companies contrary to the terms of the mortgage. Objections dismissed without prejudice to the interposing of similar objections on behalf of the receiver of the holding corporation.

David Wallerstein, for the order.

Alan H. Strong, opposed.

RELLSTAB, District Judge. The order of distribution is opposed by the Guaranty Trust Company of New York, mortgagee, and John Alvin Young, Henry V. Massey, and Frederick Kopf, bondholders' protective committee of the New York-Philadelphia Company (hereinafter called the opposing defendants), so far as concerns bonds held by Stern and Silverman individually, or by the corporation of Stern & Silverman, on the ground that, as officers and directors of the New York-Philadelphia Company (hereinafter called the holding company), they were instrumental in diverting the proceeds of the bonds of said holding company, secured by a mortgage given by it to the said Guaranty Trust Company, to the payment of interest coupons of the New Jersey Short Line Railroad Company and the Trenton & New Brunswick Railroad Company, respectively (hereinafter called the operating companies), contrary to the terms of such mortgage.

The moneys to be distributed are the proceeds of sale of the properties of the operating companies, under foreclosure of mortgages given by them to the Finance Company of Pennsylvania, trustee. Stern and Silverman and Stern & Silverman Company (hereinafter called Stern & Silverman) are the holders of some of the bonds of both of said operating companies, secured by the mortgages so foreclosed. The holding company was the holder of all the capital stock of the operating companies, which, with other stock held by it, it pledged by a mortgage to the said Guaranty Trust Company of New York, as security for the payment of its issue of bonds to the amount of \$890,000. These holding and operating companies are corporations of the state of New Jersey, and were in the hands of receivers at the time these foreclosure suits were instituted.

On the petition of the opposing defendants, they, together with J. Kearney Rice, the receiver of said holding company, were made parties defendant in said foreclosure proceedings, with leave to file an answer to complainants' bills, setting up as a defense the various matters stated in their petition. In such petition it is alleged, inter alia, that said holding company had claims against the properties being foreclosed, to which it was entitled to priority of payment over complainants' mortgages. On the hearing of said petition, the receiver of the holding company advised the court that he had no knowledge that the holding company had any claim against the operating companies that entitled it to priority of payment over the complainants' mortgages; that no evidence of such a claim had been brought to his attention; that he had no means to prosecute such a claim; and that if he were required so to do he should be permitted to employ independent counsel and have the means furnished to cover the costs and expenses thereof.

In both of the orders admitting such defendants, it was provided:

"That before J. Kearney Rice, receiver, is required to assume any responsibility for, or to perform any services in connection with, said * * * answer, or the proof or litigation with respect to the same, there shall be deposited with the clerk of this court a reasonable and proper sum to cover the costs and expenses, including counsel fee, of said receiver, in connection with the proper presentation of the matters contained in said * * * answer."

Subsequently, but without making such deposit of indemnity, the petitioners filed an answer in their names and that of J. Kearney Rice, receiver. These answers made no charge that the holding company had claims against the properties of the operating companies entitled to priority in payment over the mortgages under foreclosure. The gravamen of the charges of such answers, so far as concerns the present inquiry, is that certain unnamed persons, as officers and directors, controlled and dominated the management of all said companies, and that as such they illegally, and in fraud of the holding company's bondholders, applied some of the proceeds of its bonds to the purchase or payment of interest coupons due on the bonds of the operating companies, some of which latter bonds were held by such persons, or by others for their use, and that, by reason of the payments to such mismanaging officers and directors, the opposing defendants are entitled to a first lien on the bonds held by or for such persons, and secured by the mortgages now being foreclosed, for the amount of such proceeds thus applied in the purchase or payment of their coupons, or be subrogated to their rights in such bonds to the extent of the moneys so received by them.

Upon the coming in of said answers, J. Kearney Rice, the receiver of the holding company, filed a disclaimer of the right and authority to file such answers for him, and of his responsibility therefor. No answers were filed by said receiver, and he has interposed no objection to the order of distribution sought in these proceedings.

After testimony taken on a reference made on such answers, and hearing had on the settlement of the terms of the final decree, all the issues raised by such answers were determined against the contentions of the opposing defendants, except the question whether or not they were entitled to subrogation in respect to the bonds or coupons owned by A. S. and A. N. Chandler, W. A. Stern, and I. H. Silverman, at the time of the appointment of the receivers for the defendant operating companies, or at any time subsequent thereto, and which question was reserved by the court until distribution. The question thus reserved furnishes the issue now before the court.

On the argument hereof no relief was claimed against the Messrs. Chandler, but only against Stern and Silverman; these being two of the referred to unnamed dominating officers and directors of the holding company, responsible for the alleged illegal diversion of its bondholders' moneys.

It will be noted that the equity asserted is not against all the bondholders secured by the mortgages foreclosed, and that, though in the petition such claim was made the main ground for intervention, it was abandoned in the answer. The equity now claimed is against

Stern & Silverman, and is to the effect that, as officers and directors of the holding company, they occupied the position of trustee for the benefit of the bondholders of such company; that they used such trust relation for their own benefit, in that, out of the moneys obtained from the bonds issued by the holding company, they paid to themselves as holders of the operating companies' bonds, the accruing interest thereon; that as to such interest coupons they must, as against the opposing defendants, be held not to have been paid, but purchased on behalf of such defendants; and inasmuch as, by the terms of the operating companies' mortgages securing such bonds, unpaid interest coupons are preferred in lien and entitled to be first paid, the opposing defendants are entitled to have the moneys so wrongfully applied to the payment of such interest coupons paid back to them out of the dividends to be declared on Stern & Silverman's bonds before any payment is made on the principal thereof.

Assuming, but not deciding, that an equity exists against Stern & Silverman's bondholdings, it is evident that the opposing defendants are not in a position to sue for it. The right to question Stern & Silverman's conduct in such financial transactions is in the holding company, not its bondholders. The bondholders are creditors of the holding company, not of its directors; the bonds of the mortgage security declared that recourse for the payment of such bonds shall not be had against any director of such company, and article 1, section 6, of the mortgage provides that the proceeds of such bonds "shall be used for betterments, improvements, and extensions of the properties, the stocks of which are covered by this deed of trust, and for other purposes of company."

If, as the opposing defendants insist, the word "company," used in the quoted paragraph, means the holding company, and not the operating companies, and the moneys used in payment of such interest were a misappropriation, those moneys are recoverable for the uses of the holding company. This company having been declared insolvent, and a receiver appointed for it, the cause of action is in the receiver. General Corporation Act N. J. (P. L. 1896, p. 298) § 68; *Squire v. Princeton Lighting Co.* (E. & A.) 72 N. J. Eq. 883, 68 Atl. 176, 15 L. R. A. (N. S.) 657. Only upon the receiver's refusal to prosecute such equity, on a proper demand of the stockholders or bondholders, would they be permitted to litigate such claim. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Ackerman v. Halsey*, 37 N. J. Eq. 356, affirmed 38 N. J. Eq. 501.

This demand on the receiver has not been made. In fact, the opposing defendants disregarded the terms imposed by the court to the use of the receiver's name in this litigation, and they are not here relying upon the failure of the receiver to press such equity, but on the distinct claim of right in themselves to the benefit thereof, and to prosecute it, without regard to such receiver.

Perhaps the moneys recovered by the receiver would eventually pass to such bondholders; but they are nevertheless assets of such company, to be administered by the receiver. This is dispositive of the present opposition to the proposed order of distribution. But in

view of the equity here asserted against persons who occupied dual relations in respect to these holding and operating companies, and the charges of fraud upon which such equity is based, the fund being in court, an opportunity will be given for a proper application to prosecute such equity.

To this end distribution of so much of the fund as is payable on the bonds held by Stern & Silverman at the time of the filing of the foreclosure bills herein will be deferred for 10 days, to enable the opposing defendants to make the proper overtures to the receiver of the holding company to prosecute such equity. As to the remainder of the fund, distribution may be made at once in accordance with the final decree.

In re SUNFLOWER STATE REFINING CO.

(District Court, D. Kansas, Third Division. January 7, 1911.)

CORPORATIONS (§ 480*)—LIENS—ATTACHMENT—BONDHOLDERS—PRIORITY.

Where a bankrupt corporation has executed and recorded a mortgage on its property to secure bonds to be issued, and thereafter, but before the bonds were issued, petitioner secured a lien on the company's property by a writ of foreign attachment, after which bonds were issued under the mortgage as collateral security for bona fide loans made after levy of the attachment, such bondholders were not bound to search the public records for liens on the company's property subsequent to the mortgage, and hence their liens were prior in right to that of the attaching creditor.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480;* Mortgages, Cent. Dig. § 291.]

In Bankruptcy. In the matter of bankruptcy proceedings of the Sunflower State Refining Company. On application of William H. Holtgreve for allowance of his demand as a secured claim prior in right to those holding bonds of the bankrupt corporation in good faith issued and pledged to them as collateral security for money borrowed after the levy of petitioner's attachment, and secured by trust deeds on property of the bankrupt executed and recorded prior to the attachment. Application denied.

Kellough & Dillard, for trustee.

David Ritchie, for Holtgreve.

POLLOCK, District Judge. The question presented for decision arises in this manner: The bankrupt, the Sunflower State Refining Company, on May 22, 1905, duly made and executed its deed of trust or mortgage covering all its real and personal property therein mentioned and described by it then owned or afterwards to be acquired, to secure the payment of an issue of bonds in the sum of \$125,000 and interest thereon, as specified in the mortgage. This deed of trust or mortgage so executed was filed for record about the date of its execution and recorded in the appropriate office by law provided to impart constructive notice to all parties. The property covered by the mortgage is situated in Chautauqua county, this state. There-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after, and on the 30th day of January, 1909, an action was commenced in the district court of Saline county, this state, by claimant, Holtgreve, against the bankrupt, to recover the sum of about \$4,000, and a foreign writ of attachment was duly issued, directed to the sheriff of Chautauqua county, which said writ came into his hands and was duly levied in pursuance of the law of the state on certain property of the bankrupt mentioned and described in the trust deed or mortgage theretofore executed. The attachment was levied by the sheriff February 2, 1909. Thereafter the claimant, as plaintiff in said action, by the consideration of the district court of Saline county, on the 26th day of April, 1909, recovered a judgment against the bankrupt in the sum of \$3,111.58, together with interest thereon at the rate of 5 per cent. per annum and costs of action, and an order to sell the attached property in satisfaction of said judgment. The bonds of the bankrupt company provided to be issued under the terms of the trust deed or mortgage were not presently caused to be issued, and so far as claimant holding said bonds as collateral security, the National Bank of Commerce of Kansas City, Mo., and the Pittsburg Crude Oil & Gas Company, are concerned, here contesting with the attaching creditor as to the prior rights in the property of the bankrupt, the bonds by them held were not actually issued and outstanding at the date said foreign writ of attachment was levied on the property of the bankrupt. Since said date there has been about \$60,000, face value, of said bonds issued by the bankrupt in pursuance of the terms of the mortgage, pledged as collateral security to the National Bank of Commerce to secure the payment of promissory notes executed by the bankrupt, evidencing about \$50,000 borrowed money; also certain of said bonds have in like manner, after the levy of the attachment, been pledged as collateral security with the Pittsburg Crude Oil & Gas Company, and perhaps other claimants.

The question thus presented is, Which claim has the prior lien on the property of the bankrupt, Holtgreve under the levy of his writ of attachment, or those claimants who in good faith hold bonds issued in pursuance of and in conformity to said deed of trust or mortgage made and recorded before the levy of the attachment, but who received from the bankrupt portions of the issue of said bonds as collateral security for bona fide loans made after the date the attachment was levied?

The insistence of attaching claimant, Holtgreve, is this: A mortgage under the laws of this state is a mere incident to the debt secured. Therefore, where the debt ceases by payment, or otherwise, the mortgage likewise ceases to exist as a lien, and by a parity of reasoning it is claimed, before the debt comes into existence, the mortgage, although properly executed, acknowledged, delivered, and recorded, does not come into existence as a lien on the property described therein. Therefore it is confidently asserted by attaching claimant in this case, as the foreign attachment under which he claims was duly issued, levied, and entered on the execution docket in the office of the clerk of the district court of the county in which the property is situate, so as to impart constructive notice, as required by section 4921, Gen. St.

Kan. 1901, before the actual issuance and delivery of the bonds as collateral security to claimants, as the debt secured by said bonds had no existence at the date of the levy of the attachment, the mortgage had no existence as a lien, and in consequence the attachment is prior in point of right.

On the contrary, it is the contention of those claimants who advanced money on the strength of the security afforded by the bonds issued in pursuance of the mortgage that the lien of the mortgage, on the issuance of the bonds, and their pledge to claimants, related back to the date of the mortgage. Therefore they were required to take constructive notice only of the state of the title and the liens attached thereto as shown by the public records at the date of the execution and recording of the mortgage, and were not bound to take notice of the attachment lien secured by Holtgreve, intermediate the execution and recording of the mortgage and the pledge of the bonds regularly issued in pursuance of its terms to them as collateral security. Therefore their claims are prior in point of equity to the rights of attaching creditor.

The solution of the problem thus presented is not entirely free from doubt. From an examination of the decided cases they are found to be in hopeless conflict. In some cases this conflict will be found to arise from a construction of local statutes which renders the conflict in such cases more apparent than real; but in others the conflict arises from the process of reasoning employed by the court, and is real. Hence the question presented must be ruled on principle, aided, in so far as may be done, by the decisions of the Supreme Court of this state construing our statutes relating to real estate mortgages and attachments.

In this state the lien secured by attachment fastens upon only the interest of the debtor in attachment in the property upon which the writ is levied at the date of the levy, and in consequence it is held a prior unrecorded mortgage, valid between the parties thereto, takes precedence over the lien of an attachment levied after the making but before the recording of the mortgage. *N. W. Forwarding Co. v. Mahaffey, Slutz & Co.*, 36 Kan. 152, 12 Pac. 705; *Holden v. Garrett*, 23 Kan. 98. This also is the rule in Missouri under similar statutes. *Reed v. Ownby*, 44 Mo. 204; *Potter v. McDowell*, 43 Mo. 93; *Stillwell v. McDonald*, 39 Mo. 282. As ground for this holding, Valentine, J., in *Forwarding Co. v. Mahaffey, Slutz & Co.*, delivering the opinion of the court, said:

"It is admitted that, at the time of the levying of the attachment, the mortgage, although it had not yet been filed for record or recorded, was valid as between the parties, and that a valid lien upon the property had already been transferred by the mortgage from the mortgagor to the mortgagee; and the defendants claim that the attachment lien did not attach to or affect the interest which had already passed to the mortgagee, but attached to and affected only what was still remaining in the mortgagor, that although the mortgage may be considered void, except as to the parties thereto and those having notice thereof, still the attaching creditor merely takes under one of the parties and gets no greater rights or interest than the party had under whom he takes, and for whom he is substituted and whom he represents, and he takes nothing and cannot take anything from some other person who holds adversely to the party under whom he takes. In attaching the prop-

erty he parts with nothing, and cannot in equity claim more than the person under whom he takes had a right to claim."

True, in the cases above cited, and kindred cases, the debt had been created, and the mortgage, although executed, outstanding, and valid as between the parties, though unrecorded, as to those dealing with the mortgagor in relation to the mortgaged property, without actual notice, was void, and created no lien.

The precise question, in principle, which here arises between an attaching creditor and those holding bonds of the bankrupt secured by the mortgage as collateral security, was presented in *Claffin v. South Carolina R. Co.* (C. C.) 8 Fed. 118, between those holding bonds as collateral security, precisely as in this case, and a subsequent mortgagee, whose mortgage was taken and recorded before the bonds issued under the first mortgage were pledged as collateral. Chief Justice Waite, delivering the opinion of the court at the circuit in that case, says:

"The question is thus distinctly presented whether bonds then in the hands of the company, or which afterwards got there, could be issued or reissued, so as to carry with them a lien under the first mortgage as against the second. This, as it seems to me, is a question of intention, to be gathered from the language of the instrument, considered with reference to the surrounding circumstances and the subject-matter of the contract. I am aware that, ordinarily, a debt once paid is extinguished, and that, as a mortgage is but an incident of the debt it secures, if there is no debt, there can be no mortgage. But here the point of the inquiry is whether the parties intended to apply this rule in all its strictness to the prior mortgage, about which they were contracting. Certain it is that, before the mortgage can be canceled, the debt it purports to secure must be shown never to have been created, or, if created, extinguished within the meaning of the contract for security expressed in the mortgage. As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds became due. The contract with the individual bondholder is no more than that he shall have his due proportion of the security the mortgage on its face implies. * * * Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market, and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company their lien under the mortgage was suspended; but, the moment they were out in the usual course of business, it again took effect as of the time the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments, and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time when they were actually put out, unless the contrary is clearly expressed."

In the briefs of solicitors for the respective parties in this case the question presented is treated as though the bonds, when issued and pledged as collateral, were received by those claimants who advanced the money in the same manner as though the mortgage had provided for future advances and the collateral had been received in this manner. It may be the question cannot in principle be distinguished from one in which money is received under a mortgage providing for future advances. If so, I am inclined to the opinion, while there are many cases found holding a contrary doctrine, that the better rule, and that supported by the greater weight of authority, is that the rights of

those claimants who in good faith received the bonds as collateral security for money advanced on the strength of the mortgage under which they were issued are prior in point of equity to the right of attaching claimant, Holtgreve. This precise question is elaborately discussed by Mr. Jones in his work on Mortgages (volume 1, 5th Ed., §§ 365, 379, inclusive). At section 368 the writer says:

"Mortgages to secure future advances or liabilities are valid and fixed securities against subsequent purchasers, or attaching creditors of the mortgagor, although the advances are made for the liabilities assumed after the record of such later deeds or attachments, and although it is optional with the mortgagee whether he will make such advancements or assume such liabilities or not, if they are made or assumed in good faith and without notice of any subsequent intervening incumbrance."

At section 372 the writer says:

"A prior mortgage is affected only by actual notice of a subsequent mortgage, and not by constructive notice from the recording of the second mortgage. Such, it is conceived, is the rule supported by reason and the weight of the authority."

And many cases will be found cited in support of the text.

Again, in sections 372 and 373, the writer says, after reviewing the authorities on the question presented:

"But the better authorities are against that view. A mortgage to secure future advances is a conveyance within the recording acts, and the record is notice to subsequent purchasers and incumbrancers, who are thereby put upon inquiry as to the extent of the advances made and to be made. The mortgage is a potential lien for the full amount of the advances contemplated, and through the record subsequent purchasers and incumbrancers have notice of the extent and purpose of the mortgage."

Section 373:

"The rule that a recorded mortgage expressed to cover future advances has priority in all cases over subsequent conveyances and incumbrances has full support in recent discussions, and must now be regarded as a settled rule of law. Notwithstanding all the distinctions and refinements which have been introduced into the law of this subject by the many conflicting adjudications upon it, there is strong reason and authority for the rule that a mortgage to secure future advances, which on its face gives information enough as to the extent and purpose of the contract, so that any one interested may by ordinary diligence ascertain the extent of the incumbrance, whether the extent of the contemplated advances be limited or not, and whether the mortgagee be bound to make the advances or not, will prevail over the supervening claims of purchasers or creditors, as to all advances made within the terms of such mortgage, whether made before or after the claims of such purchasers or creditors arose, or before or after the mortgagee had notice of them," etc.

In *Courier Job Printing Co. v. Schaefer-Meyer Brewing Co.*, 101 Fed. 699, 41 C. C. A. 614, the Circuit Court of Appeals for the Sixth Circuit, now Mr. Justice Lurton, delivering the opinion of the court, said:

"Mortgages to secure future advances, or future liability as surety, are not unusual, and have been sustained in many cases. They constitute a continuing security for the time and to the amount fixed, when a particular advance or liability is incurred and paid off, wholly or in part, the mortgages, if so intended, will continue as a security for new advances or new liabilities made within the limit fixed. *U. S. v. Hooe*, 3 Cranch, 73, 2 L. Ed. 370; *Shirras v.*

Caig, 7 Cranch, 34, 3 L. Ed. 260; Lawrence v. Tucker, 23 How. 14, 16 L. Ed. 474; Hannum v. Wallace, 4 Humph. [Tenn.] 143; In re York, Fed. Cas. No. 18,138; Kramer v. Trustees, 15 Ohio, 253; Robinson v. Williams, 22 N. Y. 380."

In the light of authority and in the very reason of the matter, I am inclined to the opinion, in states having statutory provisions such as those of this state, when one in good faith either by absolute purchase or as collateral security for the repayment of a loan receives bonds duly executed under a valid mortgage regularly recorded, he need not make search of the public records for the purpose of ascertaining whether a writ of attachment has been levied on the property after the making and recording of the mortgage, but before he receives the bonds issued in pursuance thereof; that he is not, in the taking or purchasing of such bonds, charged with constructive notice of what the public records show as to such lien, although at the time he takes or purchases such bonds a writ of attachment in fact has been duly issued and levied upon the property in the manner provided by the statutes of the state, as was done in this case; that his search of the public records in such a case may properly end with the date of the execution and recording of the mortgage and the state of the title and liens of such date. If the bonds offered are legally issued under the provisions of the mortgage, and have not been paid off and discharged, the mortgage will constitute a continuing security for the amount of the bonds regularly issued thereunder, prior in point of right to the lien of the attachment.

It follows, as between those claimants holding bonds duly issued in pursuance of the terms of the mortgage May 22, 1905, although received as collateral security after February 2, 1909, the date the attachment was levied, are prior in point of equity to the claim of attaching creditor Holtgreve in this case. The claim of the attaching creditor, Holtgreve, will be allowed as a secured claim for the amount of the judgment rendered in the state court, \$3,111.58, with interest thereon at the rate of 5 per cent. per annum until the date of adjudication, as a secured claim on the property of the bankrupt, seized under the writ of attachment, as shown by the return of the officer, junior and inferior only to the rights of claimants for the amounts of their respective claims as allowed, who in good faith hold bonds of the company pledged as collateral security issued under the mortgage of May 22, 1905, or those who by purchase hold any such bonds absolutely, if any such there be found.

It is so ordered.

DENT v. RAILWAY MAIL ASS'N.

(Circuit Court, D. Minnesota, Third Division. December 9, 1910.)

1. INSURANCE (§ 787*)—CAUSE OF DEATH—POISON — "TAKEN" OR ADMINISTERED.

Where a benefit certificate provided that no benefit should be paid where death or disability resulted from poison or other injurious matter "taken or administered accidentally or otherwise," the word "taken" should be construed, in connection with the word "administered," to mean an internal taking; and hence such clause did not preclude a recovery for death resulting from insured coming in contact with poison ivy while cutting a branch in the woods adjoining a city.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 787.*

For other definitions, see Words and Phrases, vol. 8, pp. 6846, 6850, 7812.

Risks and causes of loss under accident insurance policies, see notes to National Accident Society of New York v. Dolph, 38 C. C. A. 3; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 126.]

2. INSURANCE (§ 787*)—"ACCIDENTAL"—WHAT CONSTITUTES.

Since the word "accidental" is descriptive of means which produce effects which are not their natural and probable consequences, where insured died as the result of his hand coming in contact with poison ivy while he was cutting a branch in the woods near a city, his death was "accidental" within the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 787.*

For other definitions, see Words and Phrases, vol. 1, pp. 62-72; vol. 8, p. 7560.]

3. INSURANCE (§ 787*)—ACCIDENT INSURANCE—VISIBLE, EXTERNAL MARKS OF INJURY OR VIOLENCE.

Where an accident policy provided that no benefit or sum whatever should be payable thereunder unless the accident alone resulted in producing visible, external marks of injury or violence suffered by the body of the member, but did not provide when the visible marks must be produced, it was a sufficient compliance with the policy, in a case where insured died as the result of his hand coming in contact with poison ivy where claim was made on the policy for the death that the visible marks appeared before insured died.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 787.*]

4. INSURANCE (§ 719*)—ACCIDENT POLICY—CHANGE OF AMOUNT.

Where a change was made in the constitution of defendant benefit society, raising the amount of death benefits from \$3,000 to \$4,000 subsequent to the time insured came in contact with poison ivy, but before he died as a result thereof, his beneficiary, in an action on the policy for death benefit, was entitled to recover the increased amount.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 719.*]

At Law. Action by Ella S. Dent against the Railway Mail Association. Judgment for plaintiff on directed verdict.

This was an action brought by the widow of James Dent, who came to his death from the effects of poison ivy. From the undisputed facts it appeared that on May 2, 1909, the deceased with the plaintiff went to the outskirts of the city of St. Paul, where he, leaving his wife, walked into some adjacent woods, and there cut a branch of oak and a little stick, which he brought back to her. Within a day or two he called his wife's attention to a discoloration between the fingers of his hand, which subsequently turned into an eruption that spread to his arms, neck, and chest. This eruption

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

progressed, and in the latter part of the month he called on a physician who prescribed for him. A few days thereafter he saw the physician again who told him that he would have to quit work. About two days later the same physician was summoned and found deceased in a very bad condition, and a nurse was called in. This condition went from bad to worse, and grew desperate, so that on June 21st he was removed to a hospital, where he died two days later. The undisputed evidence showed that his death was caused by poison ivy. He held a policy in the defendant company, but it refused to pay on the ground that the death was not accidental.

Owen O'Neil, for plaintiff.

John P. Kennedy, for defendant.

WILLARD, District Judge (orally, after stating the facts as above). This case presents some very interesting questions. During the recess I have examined with some care the cases cited by defendant. The questions presented in the case may be reduced to three. The first one relates to the clause in the policy or in the constitution with regard to poison. The second one is whether this was an accident or not. The third relates to that part of the constitution or the policy which provides for external visible marks.

Taking up the clause relating to poison first, it is seen that it reads as follows:

"Nor shall any benefit be paid where death or disability results from voluntarily inflicted injuries, by the member sane or insane; nor from poison or other injurious matter taken or administered accidentally or otherwise."

If that portion of the certificate or constitution had stopped with the words "from poison," another question altogether would have been presented. But it does not say "no benefit shall be paid if the loss occurs from poison." That general clause is qualified by the words "taken or administered accidentally or otherwise." The word "administered," of course, has no application to this case, and the question is: In what sense must the word "taken" be considered? I am very clearly of the opinion, when we consider that the word "taken" is used in connection with the word "administered," and that they are both used in connection with the words "accidental or otherwise," that it excludes a case similar to the one that we have here. It must have been, in my judgment, an internal taking, and that taking must be the effect of an act voluntary or involuntary of the person injured.

I think it would shock the ideas of justice of us all to hold that this policy did not include a death by the bite of a poisonous snake. If anything could be considered an accident, I think that would be so considered, and there is no reason why this company should not and should not be willing to pay for such a loss. As said by Mr. O'Neil, this clause was undoubtedly inserted to exclude a case of suicide. It was intended to cover such a case, and exempt the company where death resulted from the taking of the insured's own life by administration of poison by himself; or perhaps to cover such a case as the one in Wisconsin, where a dentist administered some poisonous substance to his patient.

An examination of the authorities cited by the defendant makes it plain that the policies differ in important particulars from the policy here.

The first case cited is *McGlothter v. Provident Mutual Accident Company of Philadelphia*, 89 Fed. 685, 32 C. C. A. 318. The policy there contained the words "or from poison, contact with poisonous substances." If that clause had stopped with the word "poison," the case would have been stronger than this; but it does not stop there, but says also "contact with poisonous substances," which makes it much stronger than this case. If those words had been contained in this policy, it would have been very difficult, in my judgment, for the plaintiff to recover.

It was entirely within the power of the company to have made this provision plain. If it had intended to exclude any liability on account of death caused by any poison, in any way, it could have used the language that was before the court in the *McGlothter Case*. But it did not do that.

The same thing may be said of the case cited by defendant from the Supreme Court of Florida, the case of *Preferred Accident Insurance Company v. Robinson*, 45 Fla. 525, reported in 33 South. 1005, 61 L. R. A. 145.

The words "absorbed" was not in that case used in connection with the word "poison." That policy provided as follows:

"Nor injury, fatal or nonfatal, resulting from any poison or infection, nor from anything whatever, accidentally or otherwise taken, administered, absorbed or inhaled."

This was a positive provision that the policy did not cover a case which resulted from poison. It went further than this certificate goes in that respect, and also went further than this certificate goes in another respect; for it provided that it should not apply to a case of injury resulting from anything whatever, accidentally or otherwise taken, administered, or absorbed. The word "absorbed" is not found in this policy.

The case of *Bacon v. U. S. Mutual Accident Association*, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748, had to do with a policy which contained the simple phrase "from poison," without any qualifying words. It being within the power of the company by the use of those words to exempt it from liability from this particular loss, if there is any doubt as to what the policy means, it must be construed against the company. And although Judge Sanborn says in the opinion first cited that this proposition has been very much abused, yet it must be applied, I think, in a case of this kind where there is a real doubt. In that case there was no doubt, because, the person having been killed from poison, whether he took it accidentally or not, he must have died from poison.

But the question here is whether the insured died from poison taken or administered, and I think the construction of these words "taken or administered" excludes the manner in which Dent came to his death.

The next question is whether the circumstances proven in this case show an accident. Upon that point the controlling authority for this court is the case of the *Western Commercial Travelers' Association v. Smith*, 29 C. C. A. 223, 85 Fed. 401, 40 L. R. A. 653.

This is the case referred to by Mr. O'Neil, where it is said:

"In the latter part of August, 1895, while this certificate was in force, Freeman O. Smith, who was a strong and healthy man, commenced wearing a pair of new shoes. About September 6, 1895, the friction of one of his shoes against one of his feet, unexpectedly and without design on his part, produced an abrasion of the skin of one of his toes. He gave the abrasion reasonable attention, but it nevertheless caused blood poisoning about September 26, 1895, which resulted in his death on October 3, 1895."

Concerning the word "accidental," the court said, on page 227 of 29 C. C. A., page 405 of 85 Fed. (40 L. R. A. 653):

"The significance of this word 'accidental' is best perceived by a consideration of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use—the result which may be reasonably anticipated from their use, and which ought to be expected."

Within that definition I think it can be fairly said that when a person goes into the woods in this vicinity and cuts a bush, or a stick, or a shrub, he does not reasonably or ordinarily expect that he is going to be poisoned by ivy. If he knew that poison ivy existed there, very likely there would be another question. But, without any knowledge on his part, the ordinary, reasonable, and natural result of going into the woods and cutting a bush or shrub is not that the person shall be poisoned by ivy.

I shall therefore hold, under that definition, that the taking or catching of this poison by cutting the shrub or bush was an accident, and that it comes within the terms of the policy.

The remaining question is whether the company can be relieved by reason of this provision in the policy which says:

"No benefit or sum whatever shall be payable in any case whatever, unless the accident alone results in producing visible external marks of injury or violence suffered by the body of the member."

It says "visible external marks of injury." It does not say when the visible marks must be produced; it does not say that the accident must at the very moment of its happening have produced a visible or external sign. Passing the point made by Mr. O'Neil to the effect that this clause has no application to a case of death, it seems to me that it must be held that it is complied with if such visible marks do appear afterwards. Of course it must be established to the satisfaction of the court or jury that those visible marks were the result of the accident. If they were not, but were the result of something else, there could be no recovery. But, if it is established to the satisfaction of the court or jury that these visible external marks are the result of the injury, the fact that they did not appear instantly is not a defense to the suit. Take a case of drowning. I suppose there are no external marks at the time, and yet I do not believe that Mr. Kennedy would claim that a recovery could not be had under this policy in such a case. Or take the case of a person inhaling gas, where he goes to sleep in a closed room, and it is found that the gas was turned on. I suppose that there is in such a case no visible sign or mark, and yet I think such a case would be covered by this policy.

When the case of *Bacon v. U. S. Mutual Accident Association*, in 123 N. Y., 25 N. E., 9 L. R. A., 20 Am. St. Rep., was read, I thought that it possibly might have a more important bearing than these other cases; but, upon examination, it seems that the whole question turned upon whether the man died from disease or not. The facts of the case, as stated in the dissenting opinion, are these:

"The insured went to Council Bluffs on the 1st of February, 1884, and, as has been stated, died there in less than two months after. He was first employed as a bookkeeper in a meat market, and later as a check clerk in the transfer department of the Union Pacific Railroad. It was shown that car loads of hides frequently pass that station, and that a large number of cattle are brought there and slaughtered in the vicinity; but there was no direct or positive proof that the deceased ever came in contact with the hides, or even the flesh of these animals."

It is said further:

"There is no dispute as to the fact that death resulted from the effects of a malignant sore upon the lip of the insured, which soon after its appearance involved the neighboring parts, producing such septicemia and utter exhaustion."

There was a good deal of discussion and dispute as to whether this was a death from disease or accident. The court held that it was a death from disease; that it was caused from anthrax, which is a disease that may be taken through the mouth, or it may be absorbed through the pores. While giving that case all the weight to which it is entitled, I do not think that it comes up to this case; and, as I understand the decision read by Mr. O'Neil from the House of Lords, it is inconsistent with this New York case.

The cases under employers' liability acts of this kind decided in England evidently hold to a broad doctrine, and would resolve this case in favor of the plaintiff.

The result of my consideration of the questions involved is that the motion will have to be denied.

Counsel for defendant now moves the court to direct the jury to find that the amount of recovery cannot exceed the sum of \$3,000, for the reason that the amendment to the constitution changing the amount from \$3,000 to \$4,000 was made subsequent to the time when the injury was received.

The Court: If this were an action for compensation for this injury which had not resulted in the death of the insured, I think it is very probable that any increase in the amount of compensation after the accident took place would not relate to this accident. But that is not this case; this is a case of death. The death occurred after this amendment was made, and there is no saving clause in it to the effect that it shall not apply to a case where death resulted from an accident which had occurred previous to the amendment. I think I shall have to hold that the full amount of \$4,000 can be recovered in this case, and I will deny the motion.

Is there anything on which you desire to go to the jury, Mr. Kennedy?

Mr. Kennedy: No sir; I think not.

The Court: I do not think there is anything for the jury.

Counsel for plaintiff then moved for a directed verdict for the amount claimed in the complaint, with interest from the date of the commencement of the action.

The Court: Gentlemen of the jury, as you have gathered from what has been said, I hold as a matter of law that the plaintiff is entitled to recover in this action, and that she is entitled to recover the sum of \$4,000, with interest from the date of the commencement of the suit. I therefore direct you to return a verdict for the plaintiff in the sum of \$4,000, with interest at 6 per cent. from the 1st day of December, 1909.

HIGHAM v. IOWA STATE TRAVELERS' ASS'N.

(Circuit Court, W. D. Missouri, W. D. January 14, 1911.)

No. 3,554.

1. PROCESS (§ 141*)—SERVICE—RETURN—CONCLUSIVENESS.

While a sheriff's return of service may be conclusive on the parties so far as it concerns the sheriff's physical acts, and as to his recitals respecting the person on whom the service was made and the date thereof, it is not conclusive as to his conclusion of law that the person on whom service was made represented the defendant in such capacity as to authorize service on him.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 189-192; Dec. Dig. § 141.*]

2. PROCESS (§ 158*)—SUFFICIENCY OF SERVICE—DETERMINATION—REMEDY.

The proper practice in the federal court to try the question of the sufficiency of service of summons is by motion to quash the return supported by affidavit.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 218-220; Dec. Dig. § 158.*]

3. COURTS (§ 344*)—FEDERAL COURTS—STATE PRACTICE.

In the absence of statute, the federal court is not required by the conformity act to follow the state practice of determining the sufficiency of the service of process.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*]

4. INSURANCE (§ 627*)—FOREIGN CORPORATIONS—SERVICE—PERSONS ON WHOM SERVICE MAY BE MADE.

Rev. St. Mo. 1899, § 7992 (Ann. St. 1906, p. 3801), provides that service may be made on a foreign accident insurance company by delivering a copy of the summons and complaint to any person within the state who shall solicit insurance on behalf of any such corporation, or may make any contract of insurance, or who receives any premium for insurance, or who adjusts or settles a loss, or pays the same for such insurance corporation, or in any manner aids or assists in doing either. *Held*, that since, to authorize service, the agent must be one who represents the defendant in an actual, present, official, or representative status, service could not be made on a foreign accident insurance company by leaving a copy of the summons and complaint with a physician whose only connection with the company was that he was from time to time employed in isolated cases to report on the physical condition of injured policy holders within a specified district for which he was paid a physician's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fee, being without any authority or duty to make any contract or pay losses or indemnities allowed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 627.*

Service of process on foreign corporations, see notes to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.]

At Law. Action by Olive Higham against the Iowa State Travelers' Association. On motion to quash service of summons. Sustained.

Reed, Yates, Atwood, Mastin & Harvey, for plaintiff.

Frank Hageman, for defendant.

VAN VALKENBURGH, District Judge. Robert Higham, plaintiff's husband, was insured in the defendant company against injury and death resulting through external, violent, and accidental means. The petition alleges that in March, 1907, the said Robert Higham received such accidental bodily injuries which, independently of all other causes, resulted in his death. Suit is brought for the recovery of \$5,000 therefor. The defendant is a mutual insurance corporation organized and existing under the laws of the state of Iowa, with its headquarters and only office at Des Moines, Iowa. It is not authorized to do business in the state of Missouri by the superintendent of insurance and maintains no agents or representatives in the latter state who solicit insurance or make any contract of insurance, or collect or receive any insurance premiums, or who adjust or settle losses, or pay the same for such insurance corporation.

Section 7992, Rev. St. Mo. 1899 (Ann. St. 1906, p. 3801), provides that in the case of such corporations service of summons shall be valid and legal "if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collects or receives any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either." Service in this case was made upon one Dr. B. F. Watson, as a proper person to be served under this statute. The defendant, appearing specially for the purposes of this motion, contends that he was not such a representative of the company as would make service upon him satisfy the requirements of due process of law.

The summons, with return of service, has been lost; but it is conceded that one was served upon Watson, and the plaintiff, in opposition to the motion, has filed Watson's deposition upon which she relies to establish his relationship to the defendant corporation. So that, we are not concerned here with the form of the return; the only question being whether the service was valid and legal.

Plaintiff contends, first, that the return is conclusive, and that its truth cannot be controverted, citing *Newcomb v. Railroad*, 182 Mo. 678-704, 81 S. W. 1069. While this may be conceded, for the purposes of this case so far as it concerns the physical acts of the sheriff and recitals respecting the person upon whom service was made and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the date of such service, it does not follow that the conclusions of law stated by the sheriff in his return may not be controverted. In the federal court it is proper practice to try the question of the sufficiency of the service of a summons by motion to quash the return, supported by affidavit, and in the absence of statute a federal court is not required by the act of conformity to follow the state practice of trying this question. *Wall v. Chesapeake & Ohio Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129. And such is the uniform practice. *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

Owing to the fact that much of the business of the country is done by corporations having foreign charters and principal offices remote from the state wherein they transact business, it has been found necessary to make provision for the service of summons upon local agents, in order to give jurisdiction to try controversies which have originated in such states, and in pursuance of this policy the state of Missouri has enacted the sections of its statutes providing for service upon insurance companies. *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245-253, 29 Sup. Ct. 445, 53 L. Ed. 782. Such provisions, however, must not encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. They must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. To involve the representation of the company, the supposed representative would have to hold or enjoy in this state an actual present official or representative status. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. He must so far represent the corporation that he may properly be held in law an agent to receive such process in behalf of the corporation. It is not sufficient that he be employed, not generally, but merely for some particular case, and he must be clothed with power of the company to represent it. The question always turns upon the character of the agent or representative; whether he is such that the law will imply the power and impute the authority to him. It is always open to show that the agent stands in no representative character to the company, that his duties are limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose. If it appear that the character of the agency is such as to render it fair, reasonable, and just to imply the authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority. *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. It is always a matter for the federal court to determine whether the corporation has such an agent or representative within the district that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent. And in such laws reference is plainly had to business operations of the corporation carried on within the state through the medium of agents

appointed for that purpose, that are continuous, or at least of some duration, and not to business transactions that are merely casual. *St. Louis Wire-Mill Co. v. Barb-Wire Co. et al.*, 32 Fed. 802. The power to make contracts for the company is recognized as indicative of such authority. *Wall v. Chesapeake & Ohio Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129. It is not sufficient that the agency be of the most casual and temporary character. *Frawley et al. v. Penn. Casualty Co.*, 124 Fed. 259.

Plaintiff relies mainly upon the decision of the Supreme Court in *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, in which this very statute was involved. There the service was made upon one Dr. Mason, who, as the record disclosed, had authority to adjust and settle the loss which was the subject of the plaintiff's claim, and was sent into the state for that very purpose. Among other things, the court said:

"This language (of the statute) clearly has reference to the authority of the person whom the statute declares to be competent to receive service of summons, and the statute, in effect, provides that the person clothed with such power shall be capable of receiving service upon the corporation. * * *

"The company could only be served with process through some agent. It was competent for the state, keeping within lawful bounds, to designate the agent upon whom process might be served. It chose to enact a statute providing that an agent competent by authority of the company to settle and adjust losses should be competent to represent the company for the service of process. When the company sent such an agent into Missouri, by force of the statute he is presumed to represent the company for the purpose of service. * * *

"It is not necessary that express authority to receive service of process be shown. The law of the state may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law."

This case goes no farther than to hold that the state may designate a proper person upon whom service may be made, exercising its power within lawful bounds, and that in that case the person served was such a proper person. It will be observed that the statute uses the word "person" instead of "agent"; but the Supreme Court holds that the relationship of principal and agent must exist. In other words, the person must be a legal representative of the corporation.

In the light of the principles thus announced, let us examine into the relationship existing between the company and Dr. Watson as disclosed by his deposition. He was a resident physician of Kansas City, Mo., to whom the company from time to time wrote letters asking him to call on traveling men who had been injured, and who claimed indemnity against the company. It may, perhaps, be conceded that such reference was made to him in most matters occurring within this jurisdiction. On such occasions he visited the disabled person, examined him, and reported to the company whether he thought the man permanently or only temporarily disabled, and in some instances how long he thought the disability would continue. For this service he was paid a physician's fee in each case. He was not under salary, had no blanks to fill out, made no recommendations as to indemnity, adjusted no losses, had no power to contract or pay either losses or

indemnities if allowed. His contractual relations with the company, such as they were, ceased with each individual case. The company was under no obligation to call upon him again. He never had any instructions from the company defining the duties of an agent. He did not act in the present case at all; never saw Robert Higham before or after death; and never heard from the company respecting this case until after he had been served with process, and that through its attorneys. It is quite evident, therefore, that he was not clothed with authority to adjust or pay this loss, or any loss, nor that he was ever appealed to for such purpose.

The only question then is whether the fact that he was from time to time employed by the company in isolated cases to report upon the physical condition of the injured policy holder makes him a person who aids or assists in doing any of the acts named in the statute so as to constitute him such an agent of the company that the state, exercising legislative power within the lawful bounds of due process of law, may designate him as one upon whom legal service may be made. My conclusion is that he does not stand in such a representative relationship to the company as to satisfy the requirements prescribed by the courts. I do not think such is the meaning of the statute in question, and, if that be the interpretation, then the Legislature has not kept within the lawful bounds of due process of law. To hold otherwise would be to uphold service upon those having the most casual connections by correspondence with foreign corporations. Such a ruling carried to its necessary logical conclusions discloses its own weakness. Mere knowledge or notice that might thus be brought home to the party sued would be insufficient without legal service. *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

The sympathy of the court goes out to those situated as the plaintiff here, provision for whose support was sought to be made through insurance companies inaccessible except in distant jurisdictions; but this must not blind us to the necessity of legal service of process, which is the essential foundation of all court procedure.

The motion to quash is sustained.

VICTOR TALKING MACH. CO. et al. v. SONORA PHONOGRAPH CO.

(Circuit Court, S. D. New York. December 12, 1910.)

PATENTS (§ 328*)—INFRINGEMENT—GRAMOPHONE.

The Berliner patent, No. 534,543, for improvements in talking machines, claims 5 and 35, *held* infringed.

In Equity. Suit by the Victor Talking Machine Company and United States Gramophone Company against the Sonora Phonograph Company. On final hearing. Decree for complainants.

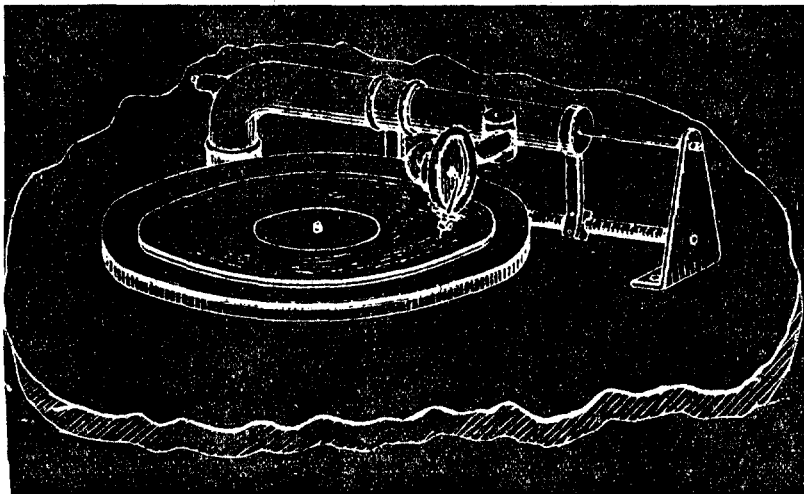
See, also, 180 Fed. 777.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
183 F.—54

Horace Pettit, for complainants.

Waldo G. Morse, for defendant.

HOUGH, District Judge. The defendant is alleged to infringe claims 5 and 35 of the Berliner patent by making and vending the talking machine shown below:



It is unnecessary to recite the language of the claims in suit, or to recount the numerous decisions on this patent, for defendant admits that by them, from 140 Fed. 860, to 177 Fed. 248 (where all the intermediate cases are enumerated), the patent in suit has been sustained, wherefore the only defense here advanced is noninfringement. Defendant's position is that when Berliner filed his application the talking machine art was not new; that in that art flat discs containing sound records were known; that the reproduction of sound therefrom by the engagement of a stylus with a spiral sound-recording groove upon such discs was also known, and that in such reproduction of sound a loose mounting of the reproducing style, so that it would be readily guided by the record itself, had been shown to the world. This knowledge is said, and I think truly, to have been given the public especially by the Bell and Tainter patent (341,214), the other well-known inventions of Mr. Tainter, and the still earlier patents of Edison. The further argument is that although the validity of Berliner's invention must stand admitted, that the scope of that invention has not been so plainly shown as to cover defendant's device, while the final position taken is that said device does nothing that was not known before Berliner.

The machine asserted to infringe scarcely needs explanation, but the court's understanding of it may be thus stated: The illustration shows the usual revolving tablet capable of receiving a disc record of any commercial form; back of that tablet is a telescopic tube con-

nected with and forming a part of the amplifying horn. That tube is actuated by a half nut seen in engagement with a revolving shaft bearing a screw thread corresponding in gauge to the cutting of the nut. When the shaft is revolved the telescopic tube is advanced into the amplifying horn, with which it is in frictional engagement only. Attached to the tube is seen the tone arm, anteriorly connected with the tube by a universal joint, and terminating in the stylus resting in the groove of the disc record. The gauge of revolving shaft and half nut is 96 cuts to the inch, which is probably near the average gauge of commercial disc records, although the evidence shows them running from 72 cuts to 112. The tone arm of the machine has enough play through the universal joint to enable it to swing over about one-half of the ordinary commercial record; wherefore to cover the whole of such record the telescopic tube must advance toward the center of the disc, and thus compensate for the shortness of the arm. If the arm were longer the telescopic feature would be useless; if it were shorter the movement might require acceleration; but as shown it is of a length permitting the stylus to nearly reach the disc center, when the tube has passed into the horn as far as it can go.

The inquiry as to just what is the scope of the Berliner patent might be greatly prolonged by quotations from numerous decisions, but it is certainly fair to defendant, and seems sufficient for the purposes of this case, to adopt the definition of defendant's own expert, who gave it as his opinion that:

"The main feature of the patent in suit (Berliner's patent) as to the reproduction of sound appears to consist in the provision of apparatus by which the reproducer is fed across the record by the record groove and independent of other mechanical means. That is to say, prior to the patent in suit it was customary to feed the reproducer across the record or feed the record past the reproducer by mechanical means, a common form being the so-called screw feed. As an improvement upon both of these methods Berliner dispensed with the mechanical feed and depended wholly and entirely upon the record groove as a means of feeding the reproducer across the record."

While not so elaborate, it seems to me that this view is entirely in accord with the exposition of Hazel, J., in the original case (140 Fed. 863), and with subsequent efforts in the same direction in 158 Fed. 310, and 177 Fed. 254. For the purposes of this litigation the important part of the above description of the scope of Berliner's invention is that he "dispensed with the mechanical feed and depended wholly and entirely upon the record groove as a means of feeding the reproducer across the record." Starting from this text the defendant by its expert asserts that in defendant's machine—

"for the purpose of feeding the reproducer across the record a mechanical means is provided separate and independent of the record groove in the form of a screw shaft and half nut, the common type of the so-called screw feed. Under the action of this mechanical feed the reproducer, once started in the usual manner to play a record, *is positively driven by the feed across the face of the record*, to the limit of the thread on the screw shaft, and thereupon the feed ceases to act and a positive stop comes into action holding the reproducer at this point regardless of the length of the record groove or its position on the record disc. To express it in another way, the screw feed in this machine will appear to be controlling and to afford a *positive and certain means of propelling the reproducer across the face of the record separate*

and independent of the record groove. To provide for inequalities, differences in pitch of the feed screw and record spiral, and other uncertainties, the defendant * * * mounts the reproducer in a manner to have *slight play or yielding action* in order that it may adapt itself as may be required to the record groove while driven by the mechanical feed."

It is thus asserted as a description of defendant's method, and the reason for noninfringement, that the stylus of the machine pictured "is positively driven by the feed across the face of the record"; that the machine in question "affords a positive means" of so driving the reproducing stylus "separate and independent of the record groove"; and that the movement of the tone arm is no more than a "slight play or yielding action" necessary to provide for inequalities, etc., while the reproducer itself is being "driven by the *mechanical feed*." These last two words really sum up the present litigation. Is the defendant's reproducer when in useful and intended operation actuated "by and in accordance with" the record, or is it actuated *by* the screw shaft and half nut and *in* (not in accordance with) the record groove?

The words just used, "useful and intended operation," are most important, for a positive actuation of the stylus when the machine is not producing sound in the manner intended by its makers and sellers, cannot be regarded as a "mechanical feed." The Hoschke machine (158 Fed. 309; 177 Fed. 248), with its spring constantly pulling at the tone arm, would propel (or rather draw) the stylus across the record face when the disc tablet was not in revolution, but that did not make the spring a mechanical feed, when the tablet was revolving and the machine doing what it was intended to do. So here, the screw shaft and nut illustrated above will propel (that is, push) the stylus across the disc when the movement arc of the tone arm is exhausted, and the tablet is not in revolution; the stylus is then "mechanically fed" but such feeding has nothing to do with the "useful and intended operation" of the device.

Defendant's machine is made to give forth recorded sound with the disc record turning around, and the tone arm free to swing (even without movement of the telescopic tube) as above stated; wherefore it is also beside the mark to point out (as has been done) that this machine will reproduce sound with a rigid tone arm, screwed or soldered to the tube, provided the stylus be loosely mounted to compensate for "drunkenness" in the record, and the gauge of the record be the same as that of the screw shaft (96 to the inch). Such a device would be a true mechanical feed, for it would be by the actuation of the screw shaft alone, that means or power is provided for enabling the stylus to travel from periphery to center of the disc record. But the argument seems idle, inasmuch as the question is not what a machine with a rigid arm would do, but what is done by this machine with a short swinging arm.

Similarly, it is not useful to demonstrate that defendant's machine cannot reproduce from a record which begins at the center rather than the circumference of the disc. This is because the arc of the tone arm's movement is all (or nearly all) to the left (looking at the illustration) of the universal joint. Admittedly the complainant's well-known apparatus will reproduce from a disc with spiral record read-

ing either way, because of the greater area of the swing of its longer arm; but if defendant's machine does the same thing in the same way, reading one way as does complainant's, then infringement is not avoided as to that way—or method of operation—because the infringing machine is not as good or complete as the patentee's. Half an infringement is just as thoroughly an infringement (as far as it goes) as a slavish and complete copy.

It is necessary, then, to consider the normal and intended operation of the apparatus presented. What is it that in machines covered (under repeated decisions) by Berliner's patent is actuated "by and in accordance with" the record? And what is it that in undoubted mechanical feed machines (such as the Edison phonograph) is positively driven by a force wholly outside of and unconnected with the record? It is always the stylus; if that be mechanically driven past the irregularities of the sound groove, it is mechanically fed; but if that stylus is not driven at all, but permitted by its wide radius of swing to follow a groove in a disc which is itself mechanically fed under the stylus, then the stylus is said to be "propelled * * * by and in accordance with" the record—a result and distinction reached in a line of cases now much too long to cavil at.

Applying this to any model of defendant's apparatus, it is apparent that the mechanical device, or feed contained in screw shaft and nut does not operate upon the stylus at all, but on the tone arm, and serves merely to reposition that part of the machine, and extend the area of its operation, but at any given movement of operation, the swinging arm and stylus is doing just what is described in claims 5 and 35 of the patent in suit, and doing it in exactly the same way. The truth of this seems easily tested. If the nut be disengaged, the machine will play until the tone arm's limit of movement is reached; if the revolution of the record be stopped, but the so-called mechanical feed continue in operation, the stylus does not stir until again its arc of movement is exhausted, and then it only scratches.

My conclusion is that the assertions made by defendant's expert are not borne out by the evidence. The reproducer is not positively driven by the feed across the face of the record, nor does the machine afford means of so propelling that reproducer separate and independent of the record groove. On the contrary, the stylus, when doing what the machine is sold to do, is always following the groove in its spiral path from circumference to center. What makes it do so is the groove itself. The mechanical device (misnamed a "feed") attached to the apparatus is merely a moving pivot for the tone arm. The 96 gauge of nut and shaft is wholly unnecessary and unessential; it might be 20, or it might be dispensed with altogether, and the telescopic tube pushed in with the finger—one push given when about half way through an ordinary record would be enough. The act would not disturb the stylus, would reposition the anterior end of the tone arm, and during the whole operation the reproducing point would continue to follow the groove just as does Berliner's.

Complainants may take a decree as prayed for.

**TRI-STATE TELEPHONE & TELEGRAPH CO. v. CITY OF THIEF
RIVER FALLS et al.**

(Circuit Court, D. Minnesota, Sixth Division. December 30, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 10*)—STATE LAW—CONSTRUCTION.

Gen. St. Minn. 1866, c. 34, § 13, as amended by Laws 1899, c. 51, gave to corporations organized under Minnesota laws the right "to acquire" by the exercise of the power of eminent domain the necessary property for the transaction of their business, and provided that nothing therein contained should be construed to grant to any person, persons, associations, or corporations any right for the maintenance of a telephone system within the corporate limits of any city or village until the right to maintain a telephone system in such village or city shall have been obtained or for a period beyond that for which the right to operate such telephone system is granted by such village or city. *Held*, that the law of 1899, of itself, gave no right even to a corporation, but merely imposed a limitation on rights already supposed to exist; and hence, after the passage of such act, neither telephone companies nor private persons could obtain any right to use the streets of a city without action by the city.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

2. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—CLASSES—COMPLIANCE WITH CITY CHARTER PROVISION—ADVERTISING—COMPETITION.

Laws Minn. 1895, c. 8, provides for the incorporation of cities, and section 133, par. 6, gives to a city power to regulate, control, and prohibit the placing of poles and the suspension of wires along and across streets and alleys. Section 142 declares that the council shall not grant a public franchise except on advertisement for proposals therefor as provided by law, and section 143 provides that every advertisement for proposals shall be made by publishing a notice containing a general description of the franchise to be granted. *Held*, that advertisements for proposals so as to create competition in the granting of a franchise to maintain and operate a telephone system in a city would not be regarded as a mere directory requirement, omission of which would constitute a mere irregularity, but that the city had no power to grant a franchise to an individual or a telephone company to maintain and operate a telephone system in the streets of a city without advertisement or competition.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

3. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—ILLEGAL GRANT BY CITY—ESTOPPEL.

Where a city without authority granted a telephone franchise for the maintenance and operation of a telephone system along its streets, without advertising for proposals, or competition, as required by its charter, and the grantee of the franchise immediately carried the same into operation by expending money in equipping a plant, the city was not by that fact estopped from later questioning the validity of the franchise.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

In Equity. Bill by the Tri-State Telephone & Telegraph Company against the City of Thief River Falls and others. On motion for a temporary injunction. Denied.

Harlan P. Roberts, for complainant.

G. Halvorson and E. T. Young, for defendants.

WILLARD, District Judge (orally). From the various legislative acts of the state of Minnesota cited by the parties in the arguments, it appears by Rev. St. 1866, c. 34, § 28, that any telegraph corporation organized under the laws of Minnesota had the right to use the public roads for the purpose of erecting its poles and stringing its wires. By Laws 1881, c. 73, that section was amended so as to include telephone corporations organized under the laws of Minnesota.

The complainant is not a corporation organized under the laws of Minnesota. The telephone system of Thief River Falls was constructed by a private person in 1900. Chapter 231 of the Laws of 1901 gave to individuals the same rights with regard to the operation of telephone lines that were by the laws of the state given to corporations. By reason of the laws hereinafter cited it is not necessary to inquire whether Fant, the person who erected the system, could acquire any right to use the streets under the provisions of the Revised Statutes hereinbefore referred to.

Chapter 74 of the Laws of 1893 amended section 1 of chapter 34 of the Revised Statutes of 1866. That section provided for the organization of corporations with the right of eminent domain, and, as amended by the act of 1893, contained this provision:

"But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alleys or other highway of any city or village, a railway of any kind or any subway, pipe line or other conduit for supplying the public with water, gas light, electric light, heat, power or transportation or any improvement of whatsoever nature or kind without first obtaining a franchise therefor from such city or village according to the terms of its charter and without first making just compensation therefor, as herein provided."

It was held by the Supreme Court of Minnesota, in the case of Northwestern Telephone Exchange Company v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, that the Revised Statutes of 1866 and the act of 1881 gave telephone corporations organized under the laws of Minnesota the right to use not only country highways, but also city streets. This was held also by the Circuit Court of the United States of this district, in *Abbott v. City of Duluth*, 104 Fed. 833.

In the case of *City of Duluth v. Duluth Telephone Company*, 81 Minn. 486, 491, 87 N. W. 1127, 1130, the court, speaking of chapter 74 of the Laws of 1893, said:

"In our opinion, this amendment repealed the provisions of section 2641 (Rev. St. 1866, c. 34, § 28), so far as it applied to the state at large, or to new enterprises undertaken by defendant in other cities or villages."

By chapter 51 of the Laws of 1899 another section (13) of chapter 34 of the Revised Statutes of 1866 was amended. That section gave the right to corporations organized under the laws of Minnesota to acquire by the exercise of the power of eminent domain the necessary property for the transaction of their business. The section, as amended by chapter 51 of the Laws of 1899, contained this provision:

"Provided, that nothing herein contained shall be construed to grant to any person, persons, association or corporation any rights for the maintenance of a telephone system within the corporate limits of any city or village in this state until such person, persons, association or corporation shall have

obtained the right to maintain a telephone system in such village or city, nor for a period beyond that for which the right to operate such telephone system is granted by such city or village."

This law of 1899 of itself gives no right even to a corporation. It is simply a limitation on rights already supposed to exist.

From all these laws it is apparent that, so far as cities are concerned, a telephone corporation, and therefore a private person, could not in 1900 obtain any rights in the streets of a city without action on the part of the city.

Chapter 8 of the Laws of 1895 provides for the incorporation of cities, and Thief River Falls was incorporated under that law in 1896. In my view of the law, the rights of the parties to this controversy must be determined exclusively by the provisions of this act. It contains various provisions relating to the subject-matter of this suit.

Section 115 provides that the style of all ordinances shall be: "The city council of the city of * * * do ordain as follows." That section also provides that no ordinance, except for general appropriations, shall contain more than one subject, which shall be expressed in its title.

Section 135, par. 6, gives the city power to regulate, control, and prohibit the placing of poles and the suspension of wires along or across the streets and alleys. Paragraph 78 of that section provides that no franchise shall be granted save by a three-fourths vote of all members elect of the council.

Section 138 provides that no exclusive or perpetual franchise or privilege shall be granted by the city council.

Section 142 provides that the council shall not grant any public franchise, except upon advertisements for proposals therefor as provided by law.

Section 144 provides that the council shall require of every party accepting a franchise from the city the giving of a bond.

Section 145 provides that every advertisement for proposals shall be made by publishing a notice containing a general description of the franchise to be granted.

The ordinance in question contains no title. It contains no limit as to the time during which Fant and his assignees should have the right to maintain their system in the streets of the city. There is no proof that the ordinance was passed by a three-fourths vote of the members of the council. There is no proof that any proposals were ever asked, as provided in section 142; no proof that any bond was ever given, as provided in section 144; and no proof that any advertisement was ever published, as provided in section 145.

In view of these provisions of the charter, the first question is the question which I asked Mr. Roberts, whether the action taken by the city council of Thief River Falls in May, 1900, was the granting of a franchise. I understand from his answer that there is no contention on the part of complainant that the council did not grant a franchise at that time. It, however, makes no difference whether the word "consent" or the word "franchise" is used. The case comes within the act of 1895 under which this city was incorporated, and from which it derives all its powers.

I pass by many of the questions presented. I do not propose to decide the question whether this contract or this ordinance was void because there was a grant in perpetuity; or as to whether the ordinance was void because it contained no title; nor do I undertake to decide whether the original grantee was the one who constructed the telephone plant. In my judgment, the provisions of the charter which require previous advertising for proposals were binding upon the city, and no ordinance, contract, or franchise could be made or given unless these provisions of the charter were complied with.

It is said that there is an allegation in the bill that this ordinance was duly passed and published by the city council, but in an application for a temporary injunction I could not allow it to issue unless it was undisputed that these provisions had been complied with; and, in my judgment, it is evident that they were not. It is not claimed that any proposals were invited. It is not claimed that any advertisement was made. But it is claimed that there was a law under which the city council had power to grant a franchise of this kind; and that, although the city council did not comply with that law, yet its failure to comply with it constituted merely an irregularity; that the provision with regard to advertising for bids and instituting competition for the purpose of selling the franchise was merely a formality; that, although the law required it, yet if this formality was dispensed with, and these irregularities were committed, yet the conduct of the city thereafter has been such that it and its inhabitants are now estopped from alleging the invalidity of the ordinance.

The purpose of the Legislature is very plain, and the reasons why it inserted these provisions are well known. It was common talk, and a matter of common knowledge throughout the United States, that franchises had been sold and given away, and that the action of the city councils had not always been governed by considerations of what was for the best interest of the public whom they were supposed to be serving; but that, on the contrary, there had been a great deal of corruption with regard to the granting of such permits and franchises. It was the purpose of the law, undoubtedly, to correct these evils, and absolutely to prohibit cities organized under that act from granting a franchise unless there was some sort of competition, and unless the people had some opportunity of knowing what was going on, so that other persons might have a chance to obtain the rights which the person applying for the franchise wanted to obtain for himself.

That being the purpose of the law, it seems to me that it cannot be said that a failure to advertise for bids was a mere irregularity, or that the requirement as to competition was a mere formality which could be dispensed with, and the ordinance still be declared valid. It may be difficult to tell what constitutes a formality; it may be difficult to tell what constitutes an irregularity; but, as I look at it, these provisions were so vital that no court would be justified in saying that a failure to comply with that part of the charter which insisted upon competition was neglecting a formality, or that a failure to comply with that part which called for advertising for bids was a mere irregularity.

As I suggested to Mr. Roberts, there could be no easier way to completely nullify the statute than the one employed in this case. If this ordinance is good, it is good although the people who passed it ignored the law, in granting a contract without, as far as the case shows, giving any notice to anybody. In such a case as is thus presented, can the doctrine of estoppel apply? It appears that Mr. Fant commenced the construction of his telephone system at once, worked at it continuously, and completed it within the time when probably every man who had granted the right to him was in office. They of course would be the very last persons to object to it.

In the construction of a telephone plant the principal expense of the same lies in the installation of the plant itself. I suppose the great bulk of the money was expended in this case when the plant was constructed.

The doctrine of estoppel rests upon the proposition that a person has expended money relying upon the action or representations of the person sought to be estopped. In the present case, the great part of the money having been expended at once, the estoppel would arise at once. If the theory of the complainant is correct, the city was estopped in 1901 just the same as it is estopped now in 1910. It is very easily seen, therefore, that it would be within the power of a city council and a corporation desiring a franchise to entirely nullify the law, by the city granting a franchise without notice, without soliciting proposals, and without advertising, and the corporation commencing at once the installation of its plant, thereby making the estoppel complete, while the council granting the franchise was in office, and before the general public had an opportunity to know what had been done, or to become aroused to the necessity of action.

The cases to which my attention has been called come very far from holding that in a case like this there can be an equitable estoppel against the city. One case from Vermont held that the city was estopped where the only defect was that the council acted by resolution instead of by ordinance; but whether action should be taken in one of these ways or the other does not involve any question of public policy. So there might be an irregularity in a city council failing to insist upon a bond; but the provision of the charter which required such a bond was not a provision which involved any principle of public policy. But, when we come to the granting of a franchise, there is involved a question of public policy, and an important one; a question which had agitated the country for years, and which found expression in that very act of the Minnesota Legislature.

Believing as I do, I hold that a city council organized under this act has no right to grant a public franchise to a street car company, a telephone company, a gas, water, or electric light company, or any company of a like nature, without advertising or without any competition whatever, and that such a contract cannot be valid or binding upon the city, though the person receiving the franchise has constructed the plant.

The motion for a temporary injunction is hereby denied.

In re ENNIS et al.

Ex parte ROCHE.

(District Court, S. D. New York. December 19, 1910.)

1. BANKRUPTCY (§ 386*)—COMPOSITION—VACATION—TIME.

Where the six months provided for a vacation of a composition by Bankr. Act July 1, 1898, c. 541, § 13, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), have expired, the composition may not be set aside at the instance of a nonconsenting creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. § 386.*]

2. BANKRUPTCY (§ 386*)—ORDER—MOTION TO VACATE.

A motion to vacate must be made before the judge who granted it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. § 386.*]

3. BANKRUPTCY (§ 385*)—COMPOSITION—CONFIRMATION—RIGHTS OF NON-SCHEDULED CREDITOR.

Bankrupts prior to January, 1910, had made an offer of compromise, obtained the necessary consents, deposited the sum required, and filed their petition to confirm with the referee. The referee then sent out notices and made a rule nisi to all creditors who were scheduled, or who, though unscheduled, had filed claims up to the date the papers were mailed, and an order of confirmation was subsequently entered. *Held*, that the owner of an unscheduled claim who did not file the same until after the making of the rule nisi, but did file it before entry of the order of composition was not entitled to share in the deposit made by the bankrupts, being only entitled to any surplus remaining after paying expenses and dividends on the scheduled claims and those filed prior to the rule.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 595, 596; Dec. Dig. § 385.*]

In the matter of bankruptcy proceedings of Thomas A. Ennis and Charles F. Stoppani, individually and as members of the firm of Ennis & Stoppani. On petition of Walter Roche to set aside an order affirming a composition and for permission to proceed against the bankrupts, also to compel payment of a dividend out of the composition fund. Denied.

See, also, 171 Fed. 755.

Ralph Wolf, for trustee in bankruptcy.

Alfred T. Davison, for petitioner Roche.

HAND, District Judge. Six months have expired since the order of confirmation was passed and entered, so that the composition may not be set aside. Section 13 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]). The petitioner's request that he may proceed against the bankrupts must be heard by Judge Hough, since it is an application to vacate his order. I will therefore dismiss that branch of the application without prejudice to an application to Judge Hough.

There remains, therefore, only the application to direct the referee, who is the disbursing officer of the court, to pay out of the deposit in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

composition the dividend to the petitioner. The petitioner's claim was filed on January 14, 1910, within one year after the adjudication. The bankrupts prior to January, 1910, had made their offer of compromise, obtained the necessary consents, deposited the requisite sum, and filed their petition to confirm the composition with the referee. Upon these the referee sent out copies of the usual notice and rule nisi to all creditors who were scheduled, or who, though unscheduled, had filed claims, up to the date when these papers were mailed. The return day was January 4, 1910, but the proceedings were adjourned and continued till March 8, 1910, when the composition was confirmed; the order of composition actually being entered on May 4, 1910. The claim was therefore filed with the referee before the proceedings were decided. At one of the hearings after January 14, and before March 8, 1910, the petitioner appeared by attorney, who said in open court that the claim had been filed, and that he wished to give notice that enough money must be deposited to cover his claim before the composition should be confirmed. The petitioner's attorney also went to the office of the referee, and says that he was told by some person that there was money enough to pay the claim. The statement in court was not followed by any change in the deposit made by the bankrupts, and the referee now refuses to countersign a dividend cheque of the petitioner until it can be ascertained whether there is cash enough to pay scheduled claims and claims not scheduled, but filed prior to the issue of the notice and rule nisi. The petitioner has made a party to the proceeding the assignee of the bankrupts.

So far as there may be a surplus after paying expenses and the dividends of the scheduled claims, and those unscheduled but filed before the issue of the rule nisi, I agree with the referee that out of it he may pay the petitioner. The bankrupts were at least in error not to schedule the claim, and as between them, or their assignee and the petitioner, any balance left from the deposit must go to the petitioner to the extent of his dividend. However, the petitioner should not share ratably with the other creditors if there is not enough to pay dividends to all the creditors who received notice of the proceedings and were cited under the rule nisi. The procedure in compositions requires the bankrupts to make an offer of specific terms upon which the bankrupt shall have back his estate. He must get the consent of one-half of his creditors who have filed claims and deposit enough money to pay all of them who have been scheduled or filed claims up to that time. *Re Fox*, 6 Am. Bankr. Rep. 525. Then he may file a petition and compel the remainder to accept the terms if he can induce the court so to order. Perhaps it is his further duty to keep advised of any further claims filed before confirmation, and add to his deposit for those. As to that I say nothing. This being done, the referee sends out the notice and rule nisi to bring in all the creditors, and give the court jurisdiction to confirm. The petition and the accompanying papers, all on file, are the statement of the case for the bankrupt and of his claims against the persons cited. Now, it is quite fundamental in this as in any other judicial procedure that a person cited may rely upon the claim made against him as the limit of what the relief will be, if he

defaults. Here the relief asked is that the bankrupt may have back his estate in exchange for the deposit in court. Upon what facts then may a creditor cited rely when he receives the notice and rule nisi? Obviously, that he need not appear to oppose, if he is content to exchange his claim to the estate for the dividend mentioned in the composition agreement, which, if he has not himself signed it, he may see upon file. Further, he may rely upon the fact that this dividend has been already deposited in court in trust for him, to which he will be entitled, if the composition is confirmed, because its amount has been calculated upon the assumption that only he and the other creditors known at the time of deposit will share in it. If not that, at least that it will cover their dividends. These rights are necessarily vested and inalterable, if the creditor is to be safe in getting his dividend without appearing on the return day, and following all proceedings till the order is entered. Of course, the court can, if it will, impose upon him this duty of attendance throughout the proceedings upon pain of a change in the terms of the composition, but to do so is to violate the analogies of other legal proceedings, and actively to mislead creditors, who should be entitled to rely upon the assumption that the relief asked will not be enlarged against them. While the matter appears to be *res integra*, I cannot doubt that the court may not allow new claims to come in and share the deposit, until the dividend has been paid to all those who were cited into the proceedings. If a creditor has not been provided for, he may be able to stop the whole proceedings, and prevent confirmation till his deposit is made. That is not up here, but if he is unsuccessful in doing that for any reason whatever, even because he is misled, he cannot take from the other creditors the fund which has been deposited for them and change the contract once made which entitles them to it.

This disposes of any relief to the petitioner upon this petition. Whether he may sue the bankrupt elsewhere upon the offer of composition it is not necessary to decide. What he asks here is to share with the other creditors and that he may not do. The case is a hard one, and, if in justice to others the petitioner could have relief, he ought to get it, but to relieve him involves taking from others what was set aside especially in trust for them.

Let an order pass in accordance with this opinion.

In re A. O. BROWN & CO.

Ex parte SCOTTEN.

(District Court, S. D. New York. December 24, 1910.)

1. BROKERS (§ 35*)—SECURITIES OF CUSTOMERS—SALE—CONVERSION.

It is not a conversion for a stockbroker to sell the stock certificate of a customer, if the broker has that amount in similar stock on hand free and clear.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 27; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **BANKRUPTCY (§ 155*)—COLLATERALS—SALE—RIGHTS OF OWNER.**

Where stock was deposited with a broker, on condition that it was not to be used unless the customer's account needed further security, and the broker pledged the stock and became a bankrupt, the owner, in order to obtain a preference, was not only bound to prove a conversion, but was also required to trace his property to the specific proceeds from which he claimed a preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

3. **BANKRUPTCY (§ 155*)—BROKERS—CONVERSION—PLEDGING SECURITIES.**

Petitioner pledged certain stock, represented by a certificate, to a stockbroker, on condition that it should not be used unless his account needed further security, which event did not happen; but the broker, before bankruptcy, pledged the petitioner's certificate as security for loans at a bank, and it was shown that nine months thereafter the bank held a similar certificate, and only one, as security for the broker's account, though it could not be shown that the certificate deposited was the one found in the possession of the bank. *Held*, that such evidence was sufficient to establish a prima facie case, entitling plaintiff petitioner to a preference thereon at the sale of such stock, in the absence of any proof that there had been in fact a change in the securities of the bank, so far as the certificates in question were concerned.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

In the matter of bankruptcy proceedings of A. O. Brown & Co. Application by one Scotten for the proceeds of a stock certificate sold as a part of the assets of the bankrupt and alleged to belong to petitioner. On referee's report granting the application. Confirmed.

See, also, 171 Fed. 254, 281.

Thorndike Saunders, for petitioner.

Ralph Wolf, for trustee.

HAND, District Judge. It is settled that to sell the exact certificate of a customer is not even a conversion, if the broker has that amount of similar stock on hand free and clear. *Richardson v. Shaw*, 209 U. S. 365, 378, 28 Sup. Ct. 512, 52 L. Ed. 835; *Re McIntyre*, Ex parte Nivin, 174 Fed. 627, 98 C. C. A. 381. In this case the claimant must prove not only a conversion, but he must trace his property to some specific proceeds, if he is to get a preference. In order to prove that his stock, once bought by the broker, is represented by other stock of similar kind, it is not enough in this circuit merely to show that at the time of the bankruptcy the bankrupts had possession of similar stock, whether it be free and clear or pledged with a bank. *Re McIntyre*, Ex parte Grace Talbot et al. (C. C. A.) 181 Fed. 960. Such a showing is consistent with a conversion of the stock in the meantime, and the repurchase of similar stock, which repurchase is not prima facie presumed to be in restitution of the conversion. *Re Brown & Co.*, Ex parte Gibbons-Hovermann (D. C.) 171 Fed. 254, is overruled.

In the case at bar it would therefore not be enough to show simply that Scotten had given the bankrupt 100 shares of Great Northern Ore certificates and that 100 shares were found pledged to the bank. What he has shown is, however, that his certificate actually went into the securities deposited on the loan on November 5, 1907,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and that on August 25, 1908, the same bank which received it had a certificate, and only one certificate, of that stock, which was likewise for 100 shares. As the number of Scotten's certificate is not known, nobody can say absolutely that the certificate deposited on November 5, 1907, is the same as that found on August 25, 1908, and the expert accountants properly refuse to say so. It is consistent with the facts proved that the bankrupt may have withdrawn the claimant's certificate, sold it, and later substituted another of similar kind and amount. If so, then there is no presumption that the certificate replaced was meant to be in restitution. *Re McIntyre* (C. C. A.) 181 Fed. 960.

Here the certificate is traced into a particular place, that is, to the collateral deposited by the bankrupt in the bank's custody, and there is no proof that the certificate was ever withdrawn, or ever used by the bankrupt. Suppose the certificate was traced with other security to an actual box in the bankrupt's custody, and at bankruptcy a certificate of like kind and amount was found in that box. All possible negatives are not excluded, for the original certificate might have been withdrawn and sold; but is not the claimant entitled to the usual presumption that a state of facts, once proved, continues till the contrary is shown? This has nothing to do with any presumption about the intent of the bankrupt in buying new shares, when once you have shown that the claimant's shares have been sold; nor has it even anything to do with the presumption that the bankrupt means to substitute similar shares of stock already in his possession as his customer's, when he sells the actual certificate out of a general mass of certificates in his hands. Indeed, it is not a presumption regarding his intent at all, but regarding the question of the physical identity of one sheet of paper, deposited on November 5, 1907, with another sheet of paper found on August 25, 1908. It seems to me that that identity may be presumed quite as much when the sheet has been traced to the custody of a bank as though it were traced to a box. Having shown that it reached the bank, it will be assumed to have remained there till the contrary is shown.

Possession of land, once established, is presumed to continue. *Lazarus v. Phelps*, 156 U. S. 202, 205, 15 Sup. Ct. 271, 39 L. Ed. 397. The same rule applies to personal property (*Chapman v. Town of Taylor*, 136 N. Y. 663, 32 N. E. 1063; *Bethel v. Linn*, 63 Mich. 464, 474, 30 N. W. 84), though it depends naturally upon the absence of evidence which would lead to a contrary conclusion. The certificate, once shown in the bank's possession, would remain there till the loan was closed out, or till another certificate was substituted for it. Of course, there would be no presumption as to the period when it would be in fact closed out, so that the presumption of continuity would not extend to a given period; but when the period is once shown, and the presence in the loan at the end of it of a similar certificate, there only remains the possibility that it was withdrawn and another substituted. It is a fair presumption, or inference, that it remained, and it is reasonable to put upon the estate the duty of bringing forward some proof that it was withdrawn and another substituted. Records of such loan substitutions are common, and the receiver at least should have called the loan clerks, or accounted for the lack of proof. I

think that the claimant established a prima facie case of identity, call it presumption of continuity or the duty of going forward with the proof, as one may. Wigmore, §§ 2494, 2530. In all the cases where the customer has lost his stock, there was proof that his certificate was in fact sold; and the question has always been as to whether it was represented by another certificate not his. In the case at bar, it has not been shown that his certificate was ever sold at all. That proof was necessary to overcome the presumption in his favor.

Therefore the certificate sold by the bank was Scotten's, and when pledged and sold it was free and clear, because there was ample security at all times for his liabilities. The deposit was made upon condition that it was not to be used unless his account needed further security. The case is under *Re McIntyre, Ex parte Pippey* (C. C. A.) 181 Fed. 955, even though the certificate there remained in specie after the bank closed out the loan.

Report confirmed.

In re BOSCHELLI.

(District Court, M. D. Pennsylvania. December 22, 1910.)

No. 1,266, in Bankruptcy.

1. BANKRUPTCY (§ 188*)—CLAIMS—ESTOPPEL OF CLAIMANT.

Where rent distrained for was all due, when the landlord also became bankrupt, and the claimants of the property distrained could not have escaped from the landlord's right by having moved earlier, any better than they could thereafter, the landlord was not estopped from prosecuting his distraint as against the claimants, because, by representation made by him at a meeting of creditors held to untangle his affairs, the claimants were induced to delay action.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

2. BANKRUPTCY (§ 188*)—PROCEEDINGS BY LANDLORD—STAY—APPRAISEMENT.

Where a landlord, having instituted distress proceedings against a bankrupt tenant, was stayed by the bankruptcy court, his rights in the bankruptcy proceedings pursuant to such distraint were not affected by his failure to have proceeded to an appraisal.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

3. BANKRUPTCY (§ 188*)—RIGHT OF DISTRESS—GOODS HELD BY TENANT UNDER CONDITIONAL SALE—GUARANTY OF PRICE BY LANDLORD—ESTOPPEL.

Where a landlord guaranteed payment by his tenant for certain fixtures sold to the tenant under a conditional sale in the form of a lease, the landlord, though subsequently becoming a bankrupt, on the bankruptcy of his tenant could not distrain on the fixtures so held as against the conditional vendor; the vendor's right to reclaim the property being a part of the security.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

In the matter of bankruptcy proceedings of Angelo A. Boschelli. On certificate to review order of referee denying the petition of the Brunswick-Balke-Collander Company to reclaim certain fixtures. Order reversed, and petition granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John E. Fox, for petitioners.
Robert Snodgrass, opposed.

ARCHBALD, District Judge. This is a proceeding to reclaim certain property. The facts on which it depends are not in controversy. On October 9, 1907, the bankrupt, Angelo A. Boschelli, who was engaged in conducting the Metropolitan Hotel in the city of Harrisburg, under lease from M. P. Johnson, the owner, ordered and agreed to buy from the Brunswick-Balke-Collander Company, the present claimants, certain bar fixtures, which were to be made for him. The price was to be \$7,500, of which \$1,000 was to be paid in cash, and the rest by two notes of \$3,250 each, at 6 and 12 months, which were to be indorsed by the landlord, M. P. Johnson. At the foot of this order Mr. Johnson agreed in writing "to sign the above-mentioned notes in the capacity of a guarantor." Subsequently, on March 2, 1908, the fixtures were delivered and set up in the hotel; the down payment of \$1,000 being made, and the two notes being given, indorsed by Mr. Johnson. At the same time also an agreement was entered into, by which the Brunswick-Balke-Collander Company leased the property to the bankrupt for the term of 12 months, for the sum of \$7,500, payable in the way specified, title to remain in that company as lessor until the so-called rent had been fully paid, after which the bankrupt might acquire the property on payment of a dollar. Nothing, however, except \$1,000 was paid on this lease, and within a very few months both Mr. Boschelli and Mr. Johnson became involved in financial difficulties, and in July, 1908, first one and then the other made an assignment for the benefit of creditors under the state law; and this was followed in September by involuntary proceedings in this court, on which each was subsequently adjudged a bankrupt. Before this, however, although after proceedings against Mr. Johnson were instituted, a large amount of rent being due for the hotel, Mr. Johnson's assignee issued a landlord's warrant for \$13,070.26, and all the personal property in the hotel was levied on, including the bar fixtures now in question. This precipitated the bankruptcy proceedings against Mr. Boschelli, and, on application to this court, an order was made staying the distress. And this was the situation when the present petition was filed by the Brunswick-Balke-Collander Company to reclaim the property.

The right of Mr. Johnson, or his assignee, as owner of the hotel, to distrain on the personal property there for the rent in arrears, under ordinary circumstances, would not be open to question. It is contested here, however, on the ground that Mr. Johnson was estopped by the representations which he made at the meetings of creditors, held for the purpose of trying to untangle his affairs and get him on his feet, by which, as it is said, the present claimants were lulled into inaction. The distress is also said to be invalid, no appraisalment having been made, as required by the statute. And it is further contended that Mr. Johnson had no right to distrain on the goods in the face of his having guaranteed their payment.

There is no occasion to stop long over the first two suggestions. It is not shown what the claimants would have done, had it not been for

the oversanguine views about getting financial help which were advanced by Mr. Johnson. The rent, which is distrained for, was all due, and the claimants could not escape from under it, had they moved earlier, any better than they can now. There are other things to be said upon the subject, but this disposes of it. And as to there having been no appraisal, it is difficult to see how the landlord could proceed with the distress, after the court had told him to stop. The guaranty, however, is a more serious matter.

In undertaking, by his indorsement, that the notes given by the bankrupt for the property would be paid, Mr. Johnson put it out of his power to proceed against it by a distress; this, in effect, destroying the obligations for which he was surety. With the property seized by him as landlord for the rent of the hotel, the claimants could not demand anything for the use of it of which the bankrupt was thus deprived; and the landlord, having indorsed the notes given for its use, could not be permitted to wipe out in this way the consideration of that for which he had made himself responsible. Nor could he as surety do anything to impair the right, which the claimants had, to retake the goods in case of a default, as provided in the agreement. He knew, when he agreed to indorse for the bankrupt, that the claimants reserved this right, and it would be utterly subversive of it, if, after the goods had been put into the hotel, he could nevertheless distrain on them. The right to reclaim was a part of the security on which they were parted with, and operated to the benefit of the landlord as indorser, as well as the claimants; and if they could not forego it to his detriment, neither should he be allowed to interfere with it, because the goods happened to be on his premises.

It is said, however, that the right of distress is given by the law, and is not lightly to be dispensed with; and that a waiver is not to be implied in this instance, Mr. Johnson not having signed the printed release on the back of the agreement with the bankrupt, which the claimants evidently take pains to exact in like cases, when that is the understanding. But the mere fact that this printed form was unsigned does not do away with the effect of the arrangement, which, if the conclusion reached with regard to it is correct, was good without that. The law goes to the extreme in subjecting the goods of another than the tenant to distress for rent, because of being found on the premises. And it is no more than just to hold the right waived, where they have been put there, as here, upon the undertaking of the landlord that he would see that they were paid for.

It is true that the landlord is now in bankruptcy, and his creditors are to be reckoned with, and that they are entitled to all that his estate can be made to realize. But bankruptcy, where there is no fraud, does not disturb contract relations, nor equities growing out of them. And if the landlord impliedly released the goods, or estopped himself from proceeding against them by becoming surety for what was to be paid on account of them, this is not to be undone in the interest of creditors, because he subsequently became bankrupt.

The referee is reversed, the petition is sustained, and the trustee is directed to turn over to the petitioners the property in question.

THE ADRIATIC.

(District Court, E. D. Pennsylvania. December 20, 1910.)

No. 36.

TOWAGE (§ 12*)—INJURY TO TOW—LIABILITY.

Injury to a steamship, while being taken out into the Delaware river from alongside a pier with the help of a tug, caused by her bow swinging against the cribbing outside the pier and the catching of her anchor on the piles of such cribbing, *held* due to the combined fault of the tug, in allowing the ship's stern to swing downstream, and of the steamship, whose engines were stopped by her master, which made her handling by the tug more difficult.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 24-26, 29; Dec. Dig. § 12.*]

In Admiralty. Suit by Sivert O. Sovensen, master of the Norwegian steamship *Olaf Kyrre*, against the steam tug *Adriatic*. Decree for half damages.

Henry R. Edmunds, for libellant.

Howard H. Yocum, for respondent.

HOLLAND, District Judge. This libel is filed by the master of the steamship *Olaf Kyrre* against the steam tug *Adriatic* to recover damages for injuries sustained by the steamship in consequence of alleged negligence of those in charge of the steam tug, while taking the steamer out in the stream from Greenwich Pier No. 6, at Philadelphia, July 10, 1908, about 3:30 o'clock p. m.

The *Olaf Kyrre* is a Norwegian vessel, 320 feet long, 40 feet beam, and at the time of the accident she was loaded with coal bound outward for Cuba, and drawing 22 feet 11 inches of water. Her bridges were about 130 feet from her stem. The sheer of the bow commenced 30 or 40 feet from her stem, and the hawse pipes were approximately 2 feet aft the stem.

Greenwich Pier No. 6 is about 600 feet long, built on piles, through which the tide flows. There is no other pier below it. Coal chutes have been erected upon it, and in order to prevent vessels fastened alongside coming in contact with wings of these chutes at high tide, cribbing was built along the entire length of the wharf on the south side about 7 feet below the pier. This cribbing is constructed by sinking a row of piles 2 or 3 feet apart, upon which four or five pieces of 5-inch sheathing were bolted, extending from low to high water mark. The ends of the pilings extended above high water about 3 or 4 feet. The cribbing is protected at its outermost end by a cluster of piles, 14 or 15 in number, fastened by iron bands, and extend somewhat beyond the end of the pier.

The steamship on this afternoon was lying at the south side of the pier, bow in, and her stern inside about 50 feet from the end. The *Adriatic* had been employed to take the *Olaf Kyrre* out into the stream, and the master of the tug went on the upper bridge of the steamship and took charge. He first ordered the tug to be placed in position,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the latter was accordingly made fast to the steamship on her port side aft as close to the stern of the steamship as it was possible to get with proper bearing for the tug's bow. The tug lay head on, pointing upstream, and was made fast by a line from her bow bitts to the port side bitt forward of the after poop on the Olaf Kyrre.

The steamship, as is customary under like circumstances, used her own engines in coming out of the dock. The tug made fast on her port quarter, being there for the purpose of holding her stern up against the ebb tide as the vessel came out into the stream, in order that she might go out parallel with the wharf and not catch in the piling along the side. Capt. Martin, of the tug, started the steamship slowly ahead for the purpose of straightening her, then stopped, and then started full speed astern. The captain of the tug was on the upper bridge, from which point he directed the movement of the steamship. There were upon the tug an unlicensed mate, engineer, fireman, and deckhand. The pilot master and third mate, the latter at the wheel, were on the lower bridge of the steamship, and the chief engineer was on deck amidships. Her chief officer and carpenter were stationed forward about 10 feet from the stem, the latter at the windlass to attend to the anchor and see that it remained in position.

These facts are practically undisputed, but from this point there is a conflict in the evidence as to what subsequently happened. The libellant contends that through the negligence of the tug in not pressing against the steamship in time as she moved out into the stream, her stern, as it came under the influence of the ebb tide, was carried down the river, throwing the starboard bow of the steamship in towards the piling, and causing her anchor to catch and jump along on top of the piles, pulling the chain of the anchor out, notwithstanding the efforts of the carpenter to prevent it; that the chief officer called out to those on the bridge that the anchor was caught, and that she was breaking down the fenders; and that the master of the steamship at once gave orders to stop the engines, which was done, but the steamship, from the momentum it had already acquired, continued to move somewhat slower out into the stream, the fluke of the anchor finally catching in the cluster of about 14 piles which were placed at the end of the pier, breaking them, and injuring the stanchions of the awning on the forecastle head, and bending the hawse pipe.

The contention of the defendant is that under the direction of the master of the tug, who was upon the upper bridge, the steamship was moving out of the dock safely, and that the master of the steamship stopped her engines; that this order was given prior to the collision of the anchor with the piling and before any damage was threatened to the ship; that in consequence of this order to stop the speed of the steamship was diminished, her stern was seized by the tide, and, notwithstanding the efforts of the tug on her port quarter to keep her stern up, her bow was forced against the side of the wharf, causing damage to the steamship and to the cluster of pilings at the end of the pier.

After an examination of the evidence offered by both the libellant and respondent, we concluded the tug, which was second largest at

this port, 86 feet over all and 24 feet beam, equipped with an engine of 350 horse power, and accustomed to this work, was able to have taken the steamer out with safety, if it had been properly and carefully managed; but the evidence clearly shows that before the engines were stopped the tug had permitted the stern of the steamship to swing down the stream, which resulted in throwing the starboard bow of the steamer in towards the piling and causing her anchor to catch and jump along on the top of the pilings. Upon this fact being reported to the master of the steamship, he ordered the engines to stop, which resulted in slowing down her movement out into the stream, and aggravated the situation which had been brought about by the negligence of the tug, and as the steamship passed out with her engines stopped the effect of the tide was to throw the stern further down the stream, which caused the fluke of the anchor to catch the cluster of 14 piles at the end of the pier, and this caused the greater part of the damage both to the vessel and the piling.

We conclude, therefore, that it was the negligence on the part of the tug in not properly holding the stern of the steamship against the tide, which threw the starboard bow of the steamship in towards the pilings; but if the engines had continued full speed astern the steamship could have been taken out more nearly parallel, and the stern of the vessel would not have been swept so far downstream, which undoubtedly aggravated the situation originally caused by the negligence of the tug. In other words, while the tug is in fault for permitting the stern of the steamer to swing down the stream, this was made more difficult to prevent by the unwarranted interference of the master of the steamship, by stopping his engines shortly before the bow of his vessel passed the outer cluster of pilings, and he was, to this extent, responsible for the damages which resulted from the fluke of the anchor catching in the cluster of the 14 piles at the end of the pier.

The damage caused by the accident was the result of the combined fault of the tug and the master of the steamship, so that each should be responsible for one-half the damages and costs.

Let a decree be drawn accordingly.

PHILLIPS v. TAXI SERVICE CO.

(Circuit Court, D. Massachusetts. January 11, 1911.)

No. 698.

1. MUNICIPAL CORPORATIONS (§ 705*)—STREETS—INJURIES TO PEDESTRIANS—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE.

Plaintiff, desiring to take an outward bound street car in a thickly built part of Boston, stopped on the curb at a street crossing and made observations concerning the location of traffic, and, believing it safe to cross, proceeded to the rear of an inward bound car then standing at the crossing, and while attempting to reach the further side of the outward bound track, without again stopping to look for obstructions that might be in the opposite side of the street, hurried to take his car, when he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was struck and seriously injured by one of defendant's automobiles, the speed of which was not reduced to a moderate rate before reaching the place of the accident. *Held*, that under the decisions of the Supreme Judicial Court of Massachusetts plaintiff was not negligent in not looking again before passing the rear of the inward bound car.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

2. DAMAGES (§ 131*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff was seriously injured in a collision with an automobile in a city street. He had lost two years' time, the value of which was \$3,000, and his expenses to effect a cure were something over \$1,500. It also appeared that there would certainly be future loss of employment for a limited time, and there was evidence that he had suffered or would suffer great pain, discomfort, and inconvenience, though his injury was not permanent. *Held*, that a verdict allowing plaintiff \$6,926.06 was not excessive.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 131.*]

At Law. Action by James E. Phillips against the Taxi Service Company. On motion for a new trial. Denied.

Barton & Barton, for plaintiff.

Warner, Warner & Stackpole and George L. Mayberry, for defendant.

PUTNAM, Circuit Judge. The motion for new trial was in the usual form, to the effect that the verdict was against the evidence and the weight of the evidence, and that the damages awarded were excessive. The verdict was rendered on November 18, 1910, in favor of the plaintiff, for \$6,926.06. The suit was for damages arising from a collision with a taxicab on Beacon street, in Boston, near where Commonwealth avenue crosses it. An inward bound car was standing with its rear to the crosswalk, and the plaintiff left the curb of the sidewalk, and crossed behind the inward bound car to take an outward bound car which was approaching. After passing behind the inwardbound car, and while attempting to reach the further side of the outwardbound track to take his car, the accident happened. The facts involved here arrange themselves into two groups.

The first group of facts relates to whether the plaintiff took proper observations of the street before leaving the curb, and the further fact that he did not look up and down the street after passing the rear of the inward bound car. If he had not made observations from the curb, the court would have instructed the jury to return a verdict for the defendant, on the ground that the plaintiff did not make any observations after passing the rear of the inward bound car. The court expressed its personal view that the plaintiff was bound to make observations immediately on passing the rear of the inward bound car, but felt itself constrained to relieve the plaintiff on this score provided he made observations from the curb as claimed by him, and this in view of the decision of the Supreme Judicial Court referred to in the charge to the jury. Therefore, as to this group of facts, the only question of fact was whether he did make proper observations of the street from the curb.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The views expressed by the Supreme Court of the United States with reference to analogous positions, and the views expressed by the Supreme Judicial Court of Massachusetts directly as to the use of these powerful machines on the streets, as well as the rule of common sense, declare such machines to be dangerous, and therefore to be handled with extreme care to prevent injury to travelers. The speed of this machine had been reduced somewhat before reaching the precise point where this injury occurred; but it is to be regretted that the drivers of automatic machines are too apt to regard a mere reduction as coming down to a proper speed, and that they do not stop when passing a condition with reference to surface cars such as existed here until all passengers are safe and all obstructions to sight are removed. Nevertheless, they do not do it, which is clearly matter of negligence. Moreover in this particular case the taxicab did not come down to a moderate rate of speed, so that it might have reached the place of the accident in a very brief time after the street was observed from the curb by the plaintiff, if it was so observed, without his being made aware of its approach. This fact and other facts demonstrate clearly the fault of the taxicab, and also leave ground of probability which prevents discrediting the claim of the plaintiff that he did look up and down the street from the curbstone. It is to be regretted that on that point the testimony of the plaintiff was not brought out in a clear manner on either the direct examination or the cross-examination, but was left in a confused condition. Nevertheless, in view of the fact that there is no inherent improbability in the claim that the plaintiff did observe as we have stated, and of the further fact that the burden was on the defendant, the court was unable to find at the trial that the plaintiff was proved to have been guilty of negligence with reference to this single particular.

The other group of facts concerns the claims of the defendant that the plaintiff not only passed the inward bound car without looking at the time of leaving it, but that he also proceeded towards the outward bound track on a "run" or "dog trot." As to this there was apparently direct conflict of evidence, but the expressions used are, of course, comparative; and what may have seemed to some witnesses as a "run" or "dog trot" may have seemed to others as only the natural and proper hastening of one's steps across a street to reach a car, which hastening one is justified in making after he has taken a proper observation of the street from some suitable point.

As bearing particularly on this question, and all the questions of fact involved in this case, the court finds that it opened its charge to the jury as follows:

"This case is mainly for you, gentlemen. I could not dispose of it."

This was the view the court took at that time, when all the proofs were clearly in its mind. If at that time the court had taken the view which the defendant now urges on it, it certainly would have directed a verdict for the defendant, and not left the parties to the burden of a full and somewhat expensive trial, merely to be announced a nullity afterwards. On a careful review of the proceedings since this motion for a new trial was argued, the court has not been able to change its

opinion, expressed in its charge, as already stated. If the defendant has been prejudiced, it must find its relief in the errors of law which the court may have made with reference thereto.

As to the damages, the plaintiff was admittedly entitled to compensation for loss of time for about two years, amounting to \$3,000. He is also entitled to his expenses, which admittedly amounted to something over \$1,500. These make a total of \$4,500. In addition, there was the certainty of future loss of employment for a limited time, and there were pain in the past and discomfort and inconvenience in the future, although his prospect of recovery within a few months was very favorable. The injury was of so severe a character that the progress at the present time appears to the court to have been the result of very skillful and faithful medical and surgical treatment and nursing. His sufferings during a large portion of the time of his recovery were intense, and the inconveniences arising therefrom were very great indeed. It is not for the court to say that a jury exceeded a just limit in awarding anywhere from \$2,000 to \$3,000, or even more, for all the considerations aside from the \$4,500 to which the plaintiff was admittedly entitled. In the view of the court, the award of damages was moderate.

The motion for new trial is denied.

In re HUGHES.

(District Court, S. D. New York. December 2, 1910.)

1. BANKRUPTCY (§ 77*)—INVOLUNTARY PETITION—PETITIONING CREDITORS—AMOUNT OF CLAIM.

In involuntary bankruptcy proceedings it is not essential that the amount due the petitioning creditor be exactly determined, as long as it appears that the petitioners are creditors to an amount sufficient to satisfy the provisions of the act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 77.*]

2. BANKRUPTCY (§ 57*)—ACTS OF BANKRUPTCY—FRAUDULENT CONVEYANCE—EVIDENCE.

Where, within four months prior to the filing of a bankruptcy petition, the alleged bankrupt had conveyed without consideration what seemed to be all of his property to his wife, and testified that he did so because of his fear that one of his creditors would institute suit against him for an amount larger than he thought was owing, proof of such facts, without other evidence that the alleged bankrupt was then insolvent, was sufficient to establish a prima facie case, entitling the petitioning creditors to an adjudication in bankruptcy, in the absence of proof by the alleged bankrupt that, exclusive of what he had conveyed, he was solvent when the petition was filed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 57.*]

In Bankruptcy. In the matter of bankruptcy proceedings against Thomas Hughes. On motion to confirm the report of a referee and master directing the dismissal of an involuntary petition against the alleged bankrupt. Motion denied, and adjudication ordered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mr. White, for bankrupt.

Mr. Syme, for petitioning creditors.

HOUGH, District Judge. As to the exact amounts due the petitioning creditors no opinion is expressed. It is enough that they have shown, and the master has found (without objection), that they are creditors, and to an extent sufficient to satisfy the act. If, when their claims are allowed for purposes of dividends, such allowance is not satisfactory, the question of amount will come up on petition to review. On this motion the inquiry is only as to the propriety of refusing adjudication and dismissing petition.

Within four months of petition filed, Hughes conveyed, without consideration and to his wife, what seems to have been all his property. Let it be assumed that just before conveyance he was not insolvent; that is, that all his property at a fair valuation was more than enough to discharge all his debts. The wife has not testified in this matter; but Hughes, when asked why he transferred the real estate to Mrs. Hughes, said:

"The only reason is—why I did it, was that the Zeltner Brewing Company—and the way Hobby was worrying me, I thought that I would transfer it to my wife, and have her to sell the property and put the money in safe-keeping, and see what we could get to pay our debts that I owed to anybody; and so I would have a clear mind."

His own counsel then suggested:

"So that your idea was to make a transfer to her, so that she might sell the property and pay everybody whom you owed?"

And Hughes answered:

"That was the idea exactly."

The member of the bar who supervised the conveyance was asked whether the husband and wife at the time of the conveyance were "very much depressed over the condition of affairs." He answered:

"They were very much afraid of the courts and lawsuits. Not being used to legal affairs, they wanted to straighten out the thing as well as they could."

And the same witness was permitted to put on record his belief that the conveyance in question—

"was made principally on account of the fear of Mr. and Mrs. Hughes on account of a lawsuit, and that they thought Mr. Hughes might be punished in a way if he still owned this property."

Hobby was the representative of the Zeltner Brewing Company, and that corporation is the principal petitioning creditor here, and was at the time of the conveyance in question a considerable creditor, and a very insistent one. Hughes did not believe that he owed the brewing company as much money as was claimed, and in this he has been largely, if not wholly, sustained by the referee, a result confirmatory of the evidence above quoted.

The bankrupt is obviously a man of little education and probably small intelligence; but for the benefit of the business community generally he must be and is presumed to know what the rights of cred-

itors are, and his own statement of the occurrence amounts therefore to this: That he was afraid that some of his creditors might get more than he thought they were entitled to, and subject him to unwarrantable expense, if he remained the record owner of his own property, and therefore he conveyed it to his wife, so that she might sell it and pay debts, rather according to their own ideas of justice than in accordance with the views they ascribed to the creditors who were pushing them.

The question, therefore, is whether this was a conveyance "with intent to hinder, delay, or defraud" creditors, or any of them. The statute is in the disjunctive, and while it may be admitted, and is I think true, that the words "hinder" and "delay" are synonymous (*Read v. Worthington*, 9 Bosw. [N. Y.] 628), it is not necessary, on the language of the statute itself, that any intent to defraud should be present. It is enough if any creditor is intentionally to be hindered or delayed. If the intent to hinder and delay exists, a conveyance made by an embarrassed debtor with a view, known to the purchaser, of securing the conveyed property from attachment, is voidable as against creditors, even though it be honestly made, and the debtor intends, as Hughes says he did, that all creditors should be paid in full. *Kimball v. Thompson*, 4 Cush. (Mass.) 446, 50 Am. Dec. 799. This must necessarily be the correct view upon any consideration of language which traces its origin to the statute of Elizabeth; for a debtor's property is in legal theory subject to immediate process at the instance of any creditor, and a debtor will not be permitted to hinder or delay any creditor by any device which leaves his property, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of the same to the payment of his debts. It still remains true that he has hindered his debtors from applying the property in the way that they have a legal right to rely upon.

To be sure, at common law the debtor may prefer whom he pleases, and he may execute a conveyance of even all his property, for a present or antecedent consideration; but a conveyance as in this case without any consideration can have no other purpose than that of hindrance and delay, and if it has that purpose, even though no fraudulent intention is proven or suspected, it is enough to render it obnoxious to many statutes, and among others to the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

Such an act of bankruptcy as this a man may commit without being insolvent. Yet the right of petitioning creditors to an adjudication is only made out *prima facie*, when it is shown that within four months a solvent debtor has conveyed his property with intent to hinder or delay creditors. For that debtor may come in and prove as matter of fact (the burden being upon him so to do) that, when the petition was filed, he was, notwithstanding the conveyance aforesaid, solvent. This follows from a consideration of section 3c making solvency a defense to the act of bankruptcy defined in section 3a (1), in conjunction with section 1, subd. 15, which defines "insolvency," and expressly excludes from the consideration of the property which must render him solvent

anything which "he may have conveyed, transferred, etc., * * * with intent to defraud, hinder, or delay his creditors."

When this petition was filed Hughes had conveyed substantially all his property. He had conveyed it with intent to hinder and delay particularly the Zeltner Brewing Company. He says so himself. Shortly after said conveyance, the petition in bankruptcy was filed; and the question is, Was he then solvent, excluding from consideration that which he had so conveyed? Obviously he was not, and it is no answer to this position to assert that the equitable title to the property conveyed remained always in Hughes. It is the most extreme case of a conveyance in fraud of the statute of Elizabeth, when the transferee is but the alter ego of, or cover for, the transferor. The transferee may be, and in this case is, but a mere trustee for the transferor, yet nevertheless there was a conveyance, and an infraction of the statutes descended from the famous enactment of Elizabeth does not depend upon the nature of the title resulting from the prohibited transfer, but upon the intent with which such prohibited transfer was made. The intent being established, everything else follows.

It is therefore to me obvious that Hughes first made a conveyance in defiance of the act, within four months a petition was filed against him, and now he must submit to bankruptcy, unless he can show that, exclusive of what he conveyed to his wife, he was solvent when the petition was filed. This he has not done and cannot do.

Adjudication ordered.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. CITY OF MEMPHIS.

(Circuit Court, W. D. Tennessee, at Memphis. June 11, 1908.)

1. TELEGRAPHS AND TELEPHONES (§ 33*)—RATES—REGULATION BY CITY—REASONABLENESS.

Though a city independent of contract may fix telephone rates within its limits, the rates so fixed in order to be valid must be reasonable, fair, and not confiscatory.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

2. TELEGRAPHS AND TELEPHONES (§ 33*)—RATES—REASONABLENESS—DETERMINATION.

Telephone rates fixed by a city in order to be reasonable must be sufficient to pay expenses, comprising actual expenses of operation, and also annual charges that must be paid before any real profit can be realized, and, in addition, a net profit equal to that which would be realized as a business question from any other business where the capital and risk were the same.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

3. TELEGRAPHS AND TELEPHONES (§ 33*)—MUNICIPAL RATES—REASONABLENESS.

Where rates fixed by a city council for telephone service within its limits were determined without any actual consideration of the cost of the company's plant, and cost of operation and maintenance, the amount of taxes and other dues exacted by the local government, and the rapidity of deterioration due to climatic or other causes, and it appeared that if

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

carried into effect there would be no profit or distribution of dividends among the stockholders, the rates were confiscatory and invalid.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

In Equity. Bill by Cumberland Telephone & Telegraph Company against the City of Memphis to restrain an enforcement of telephone rates by the city council as confiscatory. Injunction made perpetual.

E. E. Wright and W. L. Granbery, for complainant.

Thos. H. Jackson, City Atty., for defendant.

EVANS, Special District Judge. Assuming that the city of Memphis, notwithstanding any contract it may have with the complainant, has the right and power to fix the rates which the latter may charge its customers in Memphis, this general power must nevertheless be exercised in such manner as not to violate the constitutional rights of the complainant. The rates which the city may fix must be reasonable and fair, and not confiscatory. I do not understand this proposition to be controverted. The question now is not whether the rates charged by the complainant are too high, but whether the very different rates fixed by the ordinance are so low as practically to take complainant's property away from it, and appropriate it to the use of the people of the city. The law in the premises as settled by the Supreme Court of the United States is well and accurately summarized in Beale and Wyman's late work on Railroad Rate Regulation in this language:

"Sec. 312. The reasonableness of the schedule as a whole depends, as has been seen, upon whether it yields a fair return to the carrier. This is largely a mathematical question. The carrier is entitled, first, to pay all expenses, which would include both the actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled, furthermore, to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same."

While in terms this language refers to railroad rates, it is not possible that any different rule can grow out of the fact that the ordinance in this case refers to telephone rates only. The holders of stock in the complainant company are entitled to a fair return upon their investment if the company can earn it, but the testimony leaves no doubt that the rates prescribed by the ordinance would leave practically nothing to the stockholders. Under its operation they would lose, as the testimony shows, even the 2, 3, or at best 4 per cent. per annum profit on \$1,125,000 which has been earned in late years. If to large taxation and other enforced expenditures already properly exacted the city (now the complainant's plant is fully installed) can add the burden of rates fixed arbitrarily that would so diminish earnings (though not expenses) as to leave no dividends whatever for stockholders, manifestly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the money invested by them would be used for the benefit alone of the people of Memphis, and not at all for the profit of those who made the investment under inducements offered by the city.

The Governor of one of our greatest states recently vetoed a proposed rate bill upon the ground that no real effort had been made to ascertain with accuracy those factors of exact information, etc., upon which alone such legislation could fairly and justly rest. This we believe was good reason for executive action. In this instance the city of Memphis, not only did not investigate the facts as they existed at home before enacting the ordinance (though indeed that would not of itself affect its validity), but has not done so under the spur of this litigation. It may have been that this latter course was pursued because there was no hope of overcoming the force of complainant's testimony which was taken early and promptly. At all events, that testimony is practically uncontradicted, so far as it directly bears upon the controversy. Presumably the same information would have been obtained if investigation had been made before the ordinance was enacted. True, there was an open meeting held by the committee of the legislative council, at which there were arguments, and the committee seems to have gathered statistics as to telephones in other cities throughout the country, but apparently there was no effort to get precise and detailed information as to the exact status at Memphis—the one place about which it was essential to learn. The conditions in no two cities may be alike, and it seems reasonable to say that questions as to telephone rates may in large measure be local questions to be determined upon factors, among which the most important may be (1) the cost of the plant; (2) the cost of operation and maintenance; (3) the amount of taxes and other dues exacted by the local government; and (4) the rapidity of deterioration due to climatic or other causes. If these be among the controlling factors, no one of them seems to have been considered in any detail by the city. But, whether or not any or all of them were considered in preparing the ordinance, the testimony shows that the result of operating in Memphis under it is certain. That result seems to us to be destructive of the complainant's rights under the Constitution of the United States. In Judge Clark's opinion upon the motion for the temporary injunction it is clearly indicated that that learned and lamented judge thought that the city had no power or authority to enact the ordinance for two reasons, viz.: (1) Because the state had never given the city such authority; and (2) because the city had a contract with the complainant which could not be thus impaired.

We are not to be considered as dissenting from either of those views. We have not had time to examine either proposition, nor inclination to do so, because we are entirely content to decide the case on final hearing upon the one ground herein discussed. It seems to us, upon a careful consideration of the testimony, that the temporary injunction should be made perpetual.

A final decree giving that relief and the costs of this proceeding may be prepared.

UNITED STATES v. ELGIN CHURNING CO. et al.

(Circuit Court, D. Rhode Island. December 31, 1910.)

No. 2,933.

INTERNAL REVENUE (§ 23*)—OLEOMARGARINE MANUFACTURE—SPECIAL TAX —
ELECTION—ACTION ON BOND.

Rev. St. § 3232 (U. S. Comp. St. 1901, p. 2091), provides that no person shall be engaged in or carry on any trade or business of a kind thereafter mentioned until he has paid a special tax therefor in the manner provided. Section 3233 provides for registration of persons engaged in such trades with the internal revenue collector, and sections 3238 and 3239 (page 2093) provide that such special taxes shall be paid by stamps denoting the tax which shall be exhibited in the taxpayer's place of business. *Held*, that a bond given by a manufacturer of oleomargarine as authorized by Act Cong. Aug. 2, 1886, c. 840, § 5, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230), to secure a compliance with the laws and regulations in regard to the manufacture, removal, and sale of oleomargarine, and providing that the manufacturer shall comply with all the requirements of the law, and regulations "in regard to the manufacture, removal and sale of oleomargarine" and shall not engage in any attempt to defraud the government of any tax on their manufactures, and shall render a true and correct return, etc., does not secure the manufacturer's liability for the payment of the special tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 62-67; Dec. Dig. § 23.*]

Debt on a bond by the United States of America against the Elgin Churning Company and another. On demurrer to declaration. Sustained.

Chas. A. Wilson, for the United States.

Stephen J. Casey, for defendant.

BROWN, District Judge. This is a demurrer to the declaration in an action of debt on a bond of a manufacturer of oleomargarine. The material portions of the bond are as follows:

"That whereas the said Elgin Churning Company proposes to carry on or engage in the business of manufacturer of oleomargarine at No. 66 Valley street, in the town of East Providence, in the county of Providence and state of Rhode Island:

"Now, therefore, if the said Elgin Churning Company, as aforesaid, shall comply with all the requirements of law and regulations in regard to the manufacture, removal, and sale of oleomargarine, and shall not engage in any attempt by themselves or by collusion with others to defraud the government of any tax on their manufactures, and shall render truly and correctly all the returns and inventories prescribed to the collector of the district, and shall, in accordance with law, stamp, mark, brand, and affix caution notices to all oleomargarine prepared by them before they sell the same or any part thereof and before they remove any part thereof from the place of manufacture for consumption or use, and shall not knowingly sell or expose for sale any oleomargarine not marked, stamped, and branded as required by law, then this obligation is to be void; otherwise to be in full force and virtue."

The breach of the bond set out is a failure of the manufacturer to pay the special tax of \$600.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The principal question is whether the surety can be made liable for a breach of the bond by the failure of the manufacturer to pay the special tax on the business.

The act imposes special taxes at different rates on the business of a manufacturer, of a wholesale dealer, of a retail dealer. Sections 3232-3241, inclusive, and section 3243, Rev. St. (pages 2091-2095, U. S. Comp. St. 1901), are so far as applicable made to extend to and include and apply to these special taxes. Section 3232 provides:

"No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Section 3233 provides for registration with the collector. Section 3238 provides that special taxes shall be paid by stamps denoting the tax. Section 3239 for exhibiting the special tax stamp in the place of business.

The general mode of enforcing the special taxes imposed upon a business or occupation, or upon persons engaged in such business, is the prohibition, under penalties, against carrying on the business until the special tax is paid. License Tax Cases, 5 Wall. 462, 18 L. Ed. 497. The requirement of special tax stamps denoting the payment of the special tax on the business constitutes an effective method of enforcing payment.

So far as the special tax imposed by the oleomargarine law on the occupation or business is concerned, there seems no more reason for the requirement of a bond to secure its payment by a manufacturer than by a wholesaler or retailer. The oleomargarine act requires bonds only from those persons who are producers of a product subject to tax, primarily for the purpose of securing against attempts to defraud the government of a tax on the manufactured article. While a bond seems unnecessary to secure payment of an occupation tax the amount of which is fixed by statute, it is useful in securing payment of taxes which are assessed upon the product and which can only be ascertained by determining the amount of the product.

The provisions of the statute requiring manufacturers of oleomargarine or renovated butter to file such notices, inventories and bonds, and keep such books, and render such returns of material and products, etc., as the Commissioner of Internal Revenue, with the approval of the Secretary, may require, seem designed to secure payment of the tax on the product rather than to secure payment of the tax on the occupation. In fact, so far as appears upon a hasty examination of the subject, it seems to be the general policy of the internal revenue laws to require bonds from only such special taxpayers as are engaged in the production of articles subject to tax. No instance has been brought to my attention in which a bond is required to secure a tax on an occupation as distinguished from a tax on a product, and no case is cited where a suit has been brought upon a bond for the recovery of an occupation tax.

Upon the whole, I am of the opinion that the bond whose requirement is authorized by section 5, Act Aug. 2, 1886, c. 840, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230) and which is required by regulations

pursuant thereto has no proper relation to the collection of the special taxes on the occupation, but that it is designed to secure compliance with laws and regulations in regard to the "manufacture, removal and sale of oleomargarine"; i. e., to the mode of carrying on the business as distinguished from compliance with those provisions of law which make payment a condition precedent to engaging in the business.

Upon this view the mode of enforcing payment of special taxes upon the business of a manufacturer of oleomargarine is uniform with wholesale and retail dealers in oleomargarine, and with all persons engaged in any business subject to a vocation tax. If a bond is required only of such persons as produce a taxable product, it is fair to conclude that it is to secure the payment of the tax upon their manufactures.

Demurrer sustained.

In re FERGUSON CONTRACTING CO.

Ex parte VULCAN IRON WORKS.

(District Court, S. D. New York. December 27, 1910.)

BANKRUPTCY (§ 184*)—CONDITIONAL SALES—"RAILROAD EQUIPMENT"—"ROLLING STOCK"—PERSONAL PROPERTY LAW—"RAILROAD"—REGISTRATION.

Personal Property Law N. Y. (Consol. Laws, c. 41) § 61, provides that, whenever any railroad equipment and rolling stock shall be sold, leased, or loaned under a contract which provides that the title shall remain in the vendor, lessor, or bailor until the price is paid, such contract shall be invalid as to any subsequent judgment creditor of or purchaser from such vendee, lessee, or bailee for a valuable consideration without notice, unless the contract is in writing, fully acknowledged, and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located the principal office or place of business of the vendee, lessee, or bailee, unless there is plainly marked on both sides of the locomotive or car the name of the vendor, lessor, or bailor, followed by the words "lessor," "bailor," or "vendor," as the case may be. *Held*, that the words "railroad equipment" and "rolling stock," as used in such section, were equivalent to the words "rolling stock used on a railroad," and since the term "railroad" signifies a common carrier or association engaged in hauling passengers and freight for hire, excluding logging roads, construction roads, etc., such section had no application to locomotives only fit for use on temporary construction railroads, used in connection with work of internal improvement, and hence conditional sales of such locomotives were valid as against the trustee in bankruptcy of the conditional vendee, though not recorded.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184*]

For other definitions, see Words and Phrases, vol. 7, pp. 5899-5908; vol. 8, pp. 7777-7778; vol. 7, p. 6266.]

In the matter of bankruptcy proceedings of the Ferguson Contracting Company. On petition of the Vulcan Iron Works to recover from the receiver in bankruptcy certain locomotives leased to the bankrupt under a contract of conditional sale. Petition granted.

Petition of the Vulcan Iron Works in reclamation proceedings to recover from the receiver in bankruptcy of the Ferguson Contracting Company three

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

locomotives leased to the bankrupt under conditional bills of sale and not wholly paid for at the time of the filing of the petition in bankruptcy. The receiver contends that section 61 of the personal property law of New York (Consol. Laws, c. 41) provides that all conditional bills of sale covering "railroad equipment and rolling stock," unless recorded in the register's office shall be void as against judgment creditors, and that he is entitled to retain the locomotives for the reason that under section 47 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]), a trustee in bankruptcy stands in the same position as a judgment creditor. The petitioner contends that the three locomotives in question do not come within the definition of "railroad equipment and rolling stock" as intended by the foregoing statute, for the reason that the bankrupt was not a common carrier of passengers or freight, or engaged in the railroad business, and for the further reason that the locomotives are not suitable for use upon a railroad, but only for contracting purposes.

Colby & Goldbeck (William F. Goldbeck and John Kochendorfer, of counsel), for petitioner.

Robert Hibbard, for receiver.

HAND, District Judge (after stating the facts as above). The act upon which the receiver relies, which is now section 61 of the personal property law, first appeared in 1883 in substantially the same form as now, in chapter 383, Laws of 1883. Its history does not in itself, therefore, help in its interpretation, though it is unusual, not only because it invalidates a conditional sale as against judgment creditors, unlike the general law of the state of New York, which protects only bona fide purchasers, but also because the instrument is to be recorded as a real estate mortgage. It had originally been held by the Supreme Court of New York that mortgages of a railroad covering rolling stock need not be filed as chattel mortgages; but this was overruled by the Commission of Appeals in *Hoyle v. Plattsburgh & Montreal R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595. That was in 1873, and meanwhile, by chapter 779 of the Laws of 1868, the recording act had itself been changed to provide that it should be enough to record a mortgage of a railroad and its rolling stock once as a real estate mortgage, without filing it also as a chattel mortgage. Moreover, prior to 1883 the question had arisen between the conditional vendors of railroad rolling stock and bondholders under a mortgage with after-acquired property clauses. The conditional vendors had succeeded against the bondholders, who were held to be in no better position than general creditors. *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339 (1878).

These two considerations seem to have been adequate ground for the enactment of this statute: First, because railway mortgages of rolling stock were already recorded as real estate mortgages; second, because bondholders with after-acquired property clauses could not protect themselves against secret vendors' liens upon new rolling stock necessarily substituted when the old stock wore out. While, of course, no one can say certainly that this was in fact what the statute meant, still it would seem as if there must have been some such reason for putting "railroad equipment and rolling stock" in a different position from other chattels conditionally sold. Now, if this be the explanation, the statute did not intend to cover chattels which were used upon a mere temporary road of rails, having none of the characteristics in

law of a common carrier, because none of the considerations mentioned had arisen in regard to such "equipment and rolling stock."

However, it is not necessary to this construction that the supposition mentioned be correct. Even if literally construed, the words ought not to include such chattels as these. Not every pair of rails laid on ties is a railroad. *Gibbs v. Drew*, 16 Fla. 147, 26 Am. Rep. 700. It would be extreme to construe the words in that way. "Railroad equipment and rolling stock" is equivalent to rolling stock used on a railroad. It is absurd to speak of these contractors' locomotives, incapable of any use whatsoever upon the usual railroad, as "rolling stock" of a "railroad." It would be as unreasonable to call a "road-bed" the temporary rails and ties of a contractor, which is put down to-day and taken up next week. The phrase "equipment and rolling stock" by implication infers a distinction between that and some permanent roadbed or way, which is capable of separate transfer, and is recognized as the more substantial part of the railroad. No such distinction is possible in the case at bar.

In common speech a railroad is a common carrier, an association of men who engage in the business of hauling passengers and freight. Thus the logging road used by a logging company is not a railroad. *Ellington v. Beaver Dam Lumber Co.*, 93 Ga. 53, 19 S. E. 21; *McKivergan v. Alexander*, 124 Wis. 60, 102 N. W. 332. Nor is a road of rails used in the construction of a real railroad. *Beeson v. Busenbark*, 44 Kan. 669, 25 Pac. 48, 10 L. R. A. 839. Nor a construction train. *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840.

Thus not only the natural meaning of the words, but the only discernible purpose of the act, both join in suggesting the interpretation of the petitioner, and his prayer is granted.

In re PUSCHKIN.

(District Court, E. D. New York. January 12, 1911.)

BANKRUPTCY (§ 408*) — DISCHARGE — OBJECTION — OBTAINING PROPERTY ON CREDIT — MATERIALLY FALSE STATEMENT.

A creditor, who had been selling goods to the bankrupt, to whom he owed \$250, insisted on payment in June, 1909. The bankrupt gave post-dated checks, and made a sworn statement, which contained a printed notice that it was made to obtain future credit, in which he stated that he had a stock worth \$4,500, and owed debts amounting to \$1,900, and did a business of \$8,000 a year. The checks were paid before bankruptcy, but bills subsequently sold remained unpaid, and the bankrupt filed a voluntary petition on December 24, 1909, and showed by his schedules that he then had only \$800 worth of stock, which was thereafter sold to his son-in-law for about half that sum. No explanation was given of the shrinkage, and the only explanation concerning the statement made to the creditor was that the bankrupt could not read English, and that the paper was filled out by the creditor's representative from figures given by the bankrupt, and that the totals were those of the creditor's agent. It was also shown that the bankrupt had insurance amounting to \$2,750. *Held*, that such facts required the denial of the bankrupt's application for discharge, on the objection that he had obtained property on credit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on a materially false statement in writing made by him to a person for the purpose of obtaining property on credit from such person, in violation of Bankr. Act July 1, 1898, c. 541, § 14, subd. "b," 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), and Act June 25, 1910, c. 412, § 6, 36 Stat. 839.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736; Dec. Dig. § 408.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Joseph Puschkin. On objection to bankrupt's discharge. Sustained.

Abr. A. Silberberg, for creditor.

Menken Brothers, for bankrupt.

Joseph Lichtenberg, for trustee.

CHATFIELD, District Judge. The bankrupt filed a voluntary petition upon the 24th day of December, 1909. He had been in the shoe business at a small town in this district for some three years, having previously been associated with his son-in-law, who was also in the shoe business in a nearby town. Since the sale of the bankrupt's stock, he has apparently gone back to his son-in-law's habitation, and there associated himself with the son-in-law, in some manner, in the same business. Further, the bankrupt's stock was purchased by the son-in-law, at about one-half the price at which the bankrupt valued it. The trustee in bankruptcy did all that he could to further this sale, even to the extent of asking to have it made without notice to creditors, and now the trustee in bankruptcy comes in and disavows any desire to prevent the bankrupt's discharge.

The schedules show that the bankrupt had but \$800 worth of stock, while six months before the bankruptcy he had, according to his own statements at the present time, \$2,700 (or according to the trade statement which he is claimed to have made, \$4,500). Between that time and the date of bankruptcy, he purchased more goods than he had in stock at the time of bankruptcy, and the record shows nothing whatever to account for what became of the balance. If his sales had been sufficient to cover such an amount, he has given no explanation of what became of the proceeds.

Under these circumstances, a creditor who had been selling goods to the bankrupt, and to whom he owed some \$250 at the time, insisted upon payment, in the month of June, 1909. The bankrupt gave him checks dated ahead for the amount of his balance, and made a written statement, which he swore to, and which contained a printed notice that it was made for the purpose of obtaining future credit, in which the bankrupt claimed to have a stock of \$4,500, to owe debts of \$1,900, and to do a business of \$8,000 each year.

Upon application for a discharge, this particular creditor alleged that the bankrupt had made a false statement in writing for the purpose of obtaining credit, and upon which credit was obtained, in swearing to the paper above referred to. The referee has found that this statement was false.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It appears that the bankrupt cannot read English, that he does not speak English well, and his explanation, which would seem to be plausible under ordinary circumstances, is to the effect that he gave the figures to one of this shoe firm, who filled out the totals; that he neither understood the English printing upon the paper, nor knew what the figures were which had been set down; and that his signing and swearing to the same was under a mistaken idea of fact as to the contents of the paper.

It will be seen that \$2,600 worth of stock, with \$1,900 worth of debts, would make a total of \$4,500, while, conversely, a total of \$4,500 stock with \$1,900 debts, would leave a net surplus of \$2,600; and it should also be noted that the bankrupt now places his statement of stock at exactly \$2,600, thus making such mistake possible, if the paper were not read or understood.

The special commissioner who heard the testimony found that the bankrupt made a false statement to obtain credit, and has recommended that his discharge be denied. In opposition to this is presented the testimony of the bankrupt, in which he claims that the statement was a mistake. In addition, the bankrupt argues that the dealer extended credit, not only at the time of the statement, but from time to time thereafter, and received payments on account which more than covered the purchases made at the time of swearing to the statement. Hence it is claimed that the subsequent sales were not made with any dependence upon the conditions shown by the sworn statement.

It is also pointed out that the bankrupt had insurance for \$2,750, which was nearer the amount of \$2,600 than it is that of \$4,500; but it should be observed that it is hardly probable that the bankrupt would honestly have insurance, even to a slight extent, greater in amount than his stock, while an insurance up to three-fifths of the value of a stock of goods would not be extraordinary.

The conduct of the whole proceeding would indicate that the creditor could have alleged several other grounds upon which the discharge in bankruptcy should have been denied. He could have made a definite effort to locate the large amount of missing stock; but because he has not done this is no reason why the bankrupt should be given the benefit of possible doubt, when the special commissioner has found facts which seem to be supported by the evidence, and when that possible doubt does not rise to the height of a reasonable doubt that the bankrupt obtained credit upon a statement which he did not know was misleading, in the sense that it was false.

Even if he did not appreciate the precise length of time for which he could obtain credit before making a new statement, or did not figure out and state the net amounts, but accepted the mathematics of the person writing out the affidavit, it is thought that he knew what he was signing.

It would seem that if the bankrupt thought the statement given in June was evidence against himself only for that one purchase, and that he therefore supposed himself immune when undertaking fraudulent transactions in the future, he should not be given the benefit of his supposed immunity, when the law holds him responsible for strict

accountability for his actions, and when his creditors have a right to assume that he knows the law, to the extent of honesty.

The language of the section relating to discharges, viz., Act July 1, 1898, c. 541, § 14, subd. "b," 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427); as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]), provided that a discharge shall be refused if the bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." This was the language of the law at the time the present proceeding was instituted; but by Act June 25, 1910, c. 412, § 6, 36 Stat. 839, this language has been changed to read, "obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

Under the language of the section as it formerly was, the false statement had to be made with the intent of obtaining such credit as it was planned at the time to afford a basis for. Under the language as amended, the word "such" has been omitted, and the section would seem to apply to any false statement which had to do with the extension of credit affecting the bankruptcy proceeding.

We need not consider the language of the new section, for, even under the language of the statute as it was before, the obtaining of such credit as is shown in this case was certainly based upon the condition of affairs sworn to in the statement, and the payment of the first bills, after the statement was made, only tended to further increase the deception, if the statement were false.

The discharge will be denied.

In re BERG.

(District Court, D. Massachusetts. November 7, 1910.)

No. 16,176.

1. BANKRUPTCY (§ 140*)—RECLAMATION OF GOODS—FRAUDULENT PURCHASE—BURDEN OF PROOF.

In proceedings by a seller of goods to a bankrupt to reclaim the same, on the ground that the bankrupt had obtained them by false and fraudulent representations with reference to his financial condition, knowing himself at the time to be insolvent, and intending not to pay for them, petitioner must not only show that the bankrupt had knowledge of his financial condition at the time he purchased the goods, but that he had no reasonable expectation of being able to pay for them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 303*)—SALE OF GOODS TO BANKRUPT—RESCISSION—FRAUD—EVIDENCE.

In a proceeding to recover goods sold to a bankrupt from his trustee, on the ground that they had been purchased on credit by means of fraudulent representations as to the bankrupt's financial ability, evidence held insufficient to require the vacation of a referee's finding that the credit was not extended solely upon the bankrupt's representations as to his financial ability, and that at the time of the sale the bankrupt was not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in such a condition that he had no reasonable expectation of being able to pay for the goods.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Isaac Berg. On petition of the Ohio Motor Company to review a referee's order denying its petition for reclamation of certain property from the trustee as obtained by false and fraudulent representation as to the bankrupt's financial condition. Referee's order affirmed.

Phipps, Durgin & Cook, for trustee.

Spaulding & Lewis, for petitioner.

DODGE, District Judge. This bankrupt did business in Boston under the name of Boston Constructing Company. There was really no company, and he was the sole person interested. The business was that of dealing in machinery. Adjudged bankrupt July 18, 1910, upon the involuntary petition in these proceedings, he has scheduled liabilities of \$18,274.67 and assets of \$5,115, in all. The petitioner, Ohio Motor Company, manufactures gas and gasoline engines at Sandusky, Ohio. The merchandise it seeks to reclaim is stated in its petition to consist of:

One engine, shipped to the bankrupt March 10, 1909, invoiced at \$119.

One engine, shipped July 23, 1909, damaged, originally worth \$127.

Two engines, shipped September 14, 1909, invoiced respectively at \$227 and \$339.

Six engines and a number of parts and appliances, shipped May 17, 1910; total invoice price, \$1,410.70.

It is not disputed that all of the above were in the trustee's hands when the petition to reclaim was filed on August 15, 1910.

The four engines shipped in March, July, and September, 1909, appear by the evidence to have been paid for, at least in part. For the remaining goods named in the petition the petitioner has not been paid. It offers to surrender certain acceptances and notes given in payment for them.

The petitioner bases its claim to the goods upon allegations that the bankrupt obtained them by means of false and fraudulent representations in regard to his financial condition, knowing himself to be insolvent, and not intending to pay for them.

It relies in the first place upon a written statement of his financial condition, signed by him and given to it in Sandusky December 16, 1908. The statement recites that it is made for the purpose of obtaining credit on the purchase of engines and supplies. It represents the value of his stock in trade as \$6,000, good notes and accounts \$3,000, total assets \$9,000, liabilities \$2,500, and net worth \$6,500, not including tools and fixtures worth \$1,000. This statement was made before there had been any dealings between the petitioner and the bankrupt, and when he was seeking to induce them to ship merchandise to him on credit. I find no proof that the bankrupt was insolvent at the time and none that his statement, as it stands, was not then sub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stantially true, as the referee has found it to be. The written statement contains nothing to show the nature of the liabilities said to amount to \$2,500. The petitioner's evidence is that he stated orally at the time that it did not include any outstanding notes, but was all due for merchandise, and that this statement was not true, there being at the time certain outstanding notes, representing \$225 lent to him by one Carter, upon which he was liable as indorser, and a further indebtedness to Carter for money loaned of \$300. The notes, however, did not become due until February, 1909. The bankrupt made up the statement, not from his books in Boston, but from recollection at Sandusky, and he testified that he stated it to be only approximate. I do not think I am justified on the evidence in overruling the referee's finding, or in finding that all the petitioner's subsequent shipments were induced by fraud in connection with this statement.

A series of shipments by the petitioner to the bankrupt followed in 1909, and 1910, the last one being the shipment of May 17, 1910. With the exceptions already stated, the bankrupt paid for everything thus sold him on credit, and paid the petitioner in all between \$10,000 and \$11,000. In June, 1909, being then in arrears to the petitioner for goods shipped, he asked that the amount of \$2,500, first agreed on as the limit of his credit, be extended. The petitioner extended it without any further inquiry, so far as appears, as to his then financial condition. In October, 1909, the bankrupt being still in arrears, a representative of the petitioner came to Boston, complained to him of his want of promptness in paying, and got from him a check for \$1,200. The bankrupt later requested by telegraph that this check be held for one week, which was done. The petitioner's evidence is that at the time of giving the check the bankrupt stated, in reply to inquiries, that his financial condition had not changed much since his statement of December, 1908, but was better. In point of fact it was far worse. He was then owing \$10,000 to \$12,000, and had only \$5,000 to \$6,000 worth of assets, as the referee has found. The bankrupt denies that he stated his financial condition to be better than in December, 1908, and says that he stated only that he was not flush with money, that business was dull, that these were the reasons for his delay in paying, and that he had no money in the bank. Whether the bankrupt's or the petitioner's account of what was said at this interview is the true one the referee has not found, but he has found that the bankrupt did not know his actual financial condition at the time. If he really represented himself as better off in October, 1909, than in December, 1908, it would make little difference whether he actually knew his own financial condition or not. Of course, he must be held to know what he undertook to represent; but, granting the alleged false representations in October to have been made, I do not think it proved that they induced the shipment of the merchandise in question. The shipments in March, July, and September, 1909, had been already made in October, and as to the only remaining shipment it was not made until after six months more had expired, during which there were further dealings and correspondence between the parties. The petitioner wrote the bankrupt Janu-

ary 10, 1910, a letter from which it appears that he had then failed to take care of a note or acceptance, given for merchandise shipped, when it became due, and that he had been presenting excuses for the failure. When, on April 13, 1910, he ordered the engines composing the last shipment, the bankrupt sent a letter stating that he already had orders for three of the engines and expected to have all sold when they arrived. The petitioner hesitated to make the shipment because of the bankrupt's failure to meet his note, and did not make it until May 17th, after getting a report regarding him from a commercial agency. His failure to make prompt payments before October, 1909, has already been referred to, and the petitioner also knew before that time that he was borrowing money from Carter to enable him to keep on. In view of all the circumstances attending the shipment, the conclusion seems to me reasonable that the petitioner was induced to make it, quite as much by the bankrupt's success in selling engines and the expectation that he would be able to sell all these engines without delay, as by any of the representations testified to regarding his financial condition, whether made by him in December, 1908, or in October, 1909.

Undoubtedly the bankrupt ought to have known his own financial condition, and for many purposes would have to be regarded as charged with knowledge of it; but the petitioner in this case must show that when he ordered the goods the bankrupt had no reasonable expectation of being able to pay for them. I do not think the evidence in this case requires me to overrule the conclusion of the referee that the bankrupt was not in that condition at the time here in question. There is uncontradicted evidence that down to the time of his failure he had expectations of financial assistance from various sources, and no evidence that these expectations were unreasonable. Notwithstanding any excess of his liabilities over his assets, he had been able for a considerable time to carry on business with some success, and, so far as appears, he may not unreasonably have expected to be able to do so long enough, at least, to pay for this merchandise.

The order of the referee is approved and affirmed.

BROWN v. CITY OF NEW YORK.

(Circuit Court, S. D. New York. October 5, 1910.)

1. EMINENT DOMAIN (§ 197*)—PARK—PROCEEDINGS TO ESTABLISH—DISCONTINUANCE.

Proceedings brought by public authorities of New York City to establish a park and take land for that purpose may be discontinued at any time before the confirmation of a commissioner's report, notwithstanding objections by property owners.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 527; Dec. Dig. § 197.*]

2. EMINENT DOMAIN (§ 197*)—DISCONTINUANCE OF CONDEMNATION PROCEEDINGS—ACTION FOR DAMAGES—COMPLAINT.

Plaintiff in a suit against New York City alleged that defendant in 1905 instituted proceedings to open a street through plaintiff's land. in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which assessments were levied for benefits which plaintiff was compelled to pay and did pay, but on the day succeeding that on which such assessments became a lien on the land the board of estimate and apportionment approved the action of the board of local improvement determining that all of plaintiff's land should be taken by defendant for park purposes; that defendant, at the time the assessment became a lien on the land for opening the street, knew that the land would not be used for a street; that plaintiff would never receive any benefit from the opening thereof, and proceedings for the opening of the park were carried for a long period, and on November 5, 1907, after a large amount of testimony had been taken, but before the report of commissioners had been made, the board of estimate and apportionment rescinded the resolution that the land be acquired by defendant for park purposes and discontinued proceedings; that the city had never renewed its proceedings, and never opened the street, and that because thereof plaintiff had been unable to sell her land, or utilize it for any advantageous purpose, and that defendant's act constituted a taking of plaintiff's property and rights without compensation; also that the original action of the board of local improvement in favor of opening the park had not been rescinded, and that new proceedings could be taken thereunder at any time. *Held*, that the complaint was not demurrable for want of facts.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 527; Dec. Dig. § 197.*]

At Law. Action by Mary Helen Brown against the City of New York. On demurrer to complaint. Overruled.

Norman T. M. Melliss (J. Evarts Tracy, of counsel), for plaintiff.

Archibald R. Watson, Corp. Counsel (E. J. Freedman, of counsel), for defendant.

HOLT, District Judge. This is a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action. The action is at law for damages for injuries alleged to have been caused to the plaintiff's land. The complaint alleges, in substance, that the plaintiff, a resident of New Jersey, owns certain land near Bay Ridge, Brooklyn, in the city of New York; that in 1905 the defendant instituted proceedings to open a street, called Sixty-Eighth street, through the plaintiff's land; that commissioners of estimate and assessment were appointed, who imposed on the remaining land of the plaintiff large assessments for the benefits arising to it from the opening of the street, which the plaintiff was compelled to pay and did pay; that such assessments were confirmed and became a lien upon the land on February 16, 1905; that on February 17, 1905, the next day after the assessments became a lien upon the land, the board of estimate and apportionment of the city of New York formally approved of the action of the board of local improvement for the Bay Ridge district of Brooklyn, which determined that certain land, including all of the land of the plaintiff, should be taken by the defendant for a public park. The complaint alleges that at the time of the confirmation of the report imposing the assessments for benefit, and at the time when said assessments became liens on the land, the defendant well knew that the land which it had been proposed to take for the purpose of opening Sixty-Eighth street as a street would not be used for the purpose of a public street, and that the owner of such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

land would never receive any benefit from such opening; that proceedings for opening said public park were begun and carried on for a long period, and on November 15, 1907, after a large amount of testimony had been taken, but before any report of the commissioners was made, the board of estimate and apportionment adopted a resolution rescinding the resolution that such land be acquired by the defendant for such public park, and discontinuing the proceedings; that the city has since published several maps, in which the land originally intended to be taken as a park, including the plaintiff's land, is delineated as a public park, but that in fact the city has never renewed its proceedings for the acquisition of the land as a park, and has never opened Sixty-Eighth street, and that since the board of local improvement determined that said land be taken for a park the plaintiff has been unable to sell her land, or utilize it for any advantageous purpose, and that the said acts of the defendant have substantially deprived the plaintiff of the advantageous use of said land, and constituted a taking of the plaintiff's property and rights without compensation, in violation of the Constitution of the state of New York and of the United States.

I think that, assuming the facts stated in the plaintiff's complaint to be true, as must be done upon demurrer, the plaintiff's claim to recover at least the assessments paid for opening Sixty-Eighth street has sufficient plausibility to entitle the plaintiff to have evidence given and the case tried on that issue, and that therefore this demurrer to the entire complaint should not be sustained. The complaint alleges, in substance, that at the time the assessments for benefit were imposed the city had determined, instead of opening the street, to take the entire land of the plaintiff, with other land, for a public park, and that it therefore knew that there would never be any benefit to the land from the proceedings in which the assessments were imposed. It is also alleged that the plaintiff was compelled to pay these assessments, and did pay them. It appears that on the day after these assessments became due the board of estimate and apportionment authorized and approved the creation of a park which should include the entire land of the plaintiff. This action of the board of estimate and apportionment was based on proceedings previously instituted for that purpose by the board of local improvement of the Bay Ridge district of Brooklyn, so that the city authorities had actual knowledge, at the time that these assessments were made liens upon the land, that the city did not intend to open any street through the property. The imposition of such assessments for benefit from opening the street, and the collection and retention of the money thereunder, when the city authorities had full knowledge that the proceedings to open the street were to be abandoned, amounted substantially, if the facts alleged in the complaint are correct, to what would properly be termed a fraud if the transactions were between individuals.

The plaintiff claims to recover, in addition to the amounts paid upon these assessments for benefit, general damages for injury to her property by reason of the entire proceeding. Upon the facts alleged in the complaint, the plaintiff has suffered grave injury. Her real es-

tate has been substantially tied up and rendered almost useless for years, while the city has carried on these delayed and fruitless proceedings. First a street was to be opened; then that scheme was abandoned, and a park was to be made; and then, after several years of protracted proceedings, the resolution to open the park was rescinded by the board of estimate and apportionment. The complaint alleges, in substance, that the original action of the board of local improvement of the Bay Ridge district, in favor of opening a park, has not been rescinded, and that new proceedings to open the park can be started again at any time. Meanwhile some city maps were issued which continued to designate as a park the land originally proposed to be taken, including the plaintiff's land. The complaint alleges, and it is obvious to any one familiar with the conditions attending street and park openings in New York, that this condition of affairs has made it impossible to sell the property or to improve it for years past. Such cases are common, and are familiar to all persons dealing with New York real estate. It appears to be well settled that the public authorities can discontinue any such proceeding at any time before the confirmation of the commissioners' report, and that the property owners cannot prevent such discontinuance; and it is claimed, and has been sometimes held, that it follows from such authorities that a property owner has no redress for damages caused to him by the action of the city in carrying on long and dilatory proceedings affecting the title to his property and then rescinding and abandoning them. It may be that under the laws of New York the property owner has no redress in such a case; but I think that, in view of the peculiar circumstances of this case, and the fundamental constitutional provisions for the protection of property, which includes not only the abstract legal title, but the right to use and enjoy and dispose of property, the questions raised in this case are too serious to be disposed of on demurrer, and that both parties should be entitled to a trial upon what evidence they may desire to offer.

The demurrer is overruled, with leave to the defendant to answer within 20 days upon payment of costs.

KEYSTONE TYPE FOUNDRY V. NATIONAL COMPOSITE CO.

(Circuit Court, D. Maryland. January 23, 1911.)

TRADE-MARKS AND TRADE-NAMES (§ 93*) — UNLAWFUL COMPETITION — EVIDENCE.

Where, in a suit to restrain unlawful competition in the manufacture and sale of complainant's "Caslon Bold" type, there was no evidence that defendant had ever tried to make any one believe that the type cast on its machines was the type cast by complainant, or that any one who made type on defendant's machines had sold same as complainant's product, or that defendant did anything to induce customers to believe that they were buying type made by complainant, and defendant in its catalogue avoided the use of the words "Caslon Bold" in describing the various type faces that could be made on its machine, the fact that by means of an arrangement of numbers designating the various styles of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant's type any one could be easily taught to find in complainant's catalogue the "Caslon Bold" type in controversy was insufficient to establish unlawful competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. § 93.*

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Suit by the Keystone Type Foundry against the National Compositype Company. Bill dismissed.

Ernest W. Bradford, for complainant.

Venable, Baetjer & Howard, for defendant.

ROSE, District Judge. This is a case of alleged unfair competition. The plaintiff is a Pennsylvania corporation. It makes type. The defendant is a Delaware corporation. It makes and sells machines for casting type, and makes, sells, and rents matrices with which types of different styles are cast in the said machines. It has its principal place of business in Baltimore City. Suit was brought in this district. Defendant appeared generally and demurred. The demurrer was overruled, without prejudice to the renewal of the objections therein contained at final hearing. Thereupon the defendant answered, and contested the case on its merits.

At or about the time of the institution of this suit the plaintiff in the United States Circuit Court for the District of Maine filed a bill of complaint against the Portland Publishing Company. It was stated at the bar that by agreement of all the parties the evidence in both these cases was taken at the same time. The testimony so taken was to be used in each case, so far as it might therein be competent and relevant. The case against the Portland Publishing Company has already been heard and decided by Judge Putnam. His opinion will be found in 180 Fed. 301.

On the main question involved it is unnecessary to add anything to what Judge Putnam has said. People buy the particular type face in controversy, not because it is made by the Keystone Type Foundry, but because, as complainant's witnesses themselves say:

"It is a desirable type for a wide range of job work, catalogues, and display advertising."

As another witness of complainant says:

"The form of the letters in a great many cases has been changed to make them more practical in modern printing. * * * The old form varied in form, comparative weight, and didn't allow of the new methods in type-founding."

Another witness says:

"It is one of the most popular type faces to-day."

Another of complainant's witnesses says:

"Printers, especially the higher class, are constantly looking for some new style of type, so as to be able to furnish to their customers fashionable and up-to-date printing. * * * New and original designs of faces, if they meet with approval of printers, very largely increase the sale, and very

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

largely increase the use, and therefore largely increase the amount of printing."

This type face is not covered by a design or other patent. Every one is therefore free to make and to sell it, provided that when he sells it he does nothing to lead any one to believe that what is made and sold by him was in fact made by some one else.

There is no evidence that the defendant ever tried to make anybody believe that the type cast upon its machines was type cast by the plaintiff. The record does not show that anybody who made type on its machines sold such type as the product of the plaintiff. There is no proof that the defendant did anything to help its customers make their customers believe that the latter were buying type made by the plaintiff.

The complainant relies much on the case of *Enterprise Manufacturing Company v. Landers et al.* (C. C.) 124 Fed. 924, affirmed by the Circuit Court of Appeals, Second Circuit, in 131 Fed. 240, 65 C. C. A. 587. That case was like this in one respect, and in one respect only. The defendant there, as here, sold articles which looked precisely like those made by the plaintiff. In the *Enterprise Case* the useful thing involved was a coffee mill. The defendant could make a coffee mill. It could not dress up the nonessential portions of the coffee mill made by it for the purpose of making its mill look like the complainant's mill. In this case the essential thing is the form of type face. Defendant has the right to make and use that form.

It is worth while to note that, while the coffee mill case was doubtless rightly decided, the court which did decide it says that the law was there carried to its extreme limit. See remarks of the Circuit Court of Appeals for the Second Circuit in *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 942, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269.

The only other question to be considered is whether, assuming that the words "Caslon Bold" are the complainant's common-law trade-mark, has the defendant infringed on complainant's rights therein?

I assume, for the purposes of this case, that such words do constitute a common-law trade-mark. I do not so decide. To pass on that question would require a careful study of all the type faces shown in the exhibits in this case, to determine whether the particular type face in controversy is anything other than a bold form of other type which has long been known as Caslon type. In the word "Caslon" itself it is admitted that the complainant has no proprietary rights. If it should be determined after such an examination that this type was properly and accurately described as a Caslon type, and that the addition of the word "bold" was the mere use of an ordinary descriptive term in the typographic arts to show that this was a heavy or broad faced variety of Caslon type, it might not be possible to hold that the words "Caslon Bold" could constitute a common-law trade-mark. I do not think it necessary to pass on this question. I find no evidence in the record that the defendant has used the words "Caslon Bold" to assist persons who make type on machines by the use of matrices furnished by defendant to sell the type so made. This particular type

face is a new thing. Its creators gave it the name "Caslon Bold." It has no other name. As Mr. Justice Bradley said:

"As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one. It cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles." *Celluloid Manufacturing Co. v. Cellonite Manufacturing Co.* (C. C.) 32 Fed. 94.

In this case the defendant appears to have made every effort to avoid the use of the words "Caslon Bold." In its catalogue it described the various type faces which could be made upon its machines by numbers. The complainant argues that the fact that these numbers were so arranged that by their use any one could be easily taught to find in complainant's catalogue the "Caslon Bold" type is an evidence of fraud. I do not think so. The defendant had the right to furnish machines with which to make that form of type. The most that it was called on to do was to avoid using the words "Caslon Bold" as a means of facilitating its sales or those of its customers. The few occasions upon which the defendant in any wise employed the words "Caslon Bold" seem to me to be nothing more than such casual use of the words, as was inevitable when the thing itself had no other distinctive name.

The bill of complaint must be dismissed, with costs.

SPENCER v. PIKE COUNTY.

(Circuit Court, M. D. Pennsylvania. January 18, 1911.)

No. 222, December Term, 1909.

1. COUNTIES (§ 121*)—CONTRACTS—MEMORANDUM.

An offer to furnish a county office equipment having been accepted by a resolution of the county commissioners, a contract arose, which was not affected by the subsequent signing of a memorandum by two of the three county commissioners who voted for the resolution, in their individual capacity, not purporting to act as a board or as agent for the county.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 121.*]

2. SALES (§ 379*)—DELIVERY—TENDER—PLEADING—VARIANCE.

Where, in an action for a buyer's breach of a contract of sale, plaintiff alleged delivery, and proved a tender and refusal, of the goods, there was no fatal variance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1094; Dec. Dig. § 379.*]

At Law. Action by T. E. Spencer against Pike County. On rule for judgment non obstante veredicto and for a new trial, in the alternative. Discharged.

S. B. Price, for the rule.

W. J. Fitzgerald, opposed.

ARCHBALD, District Judge. This is an action for damages for breach of a contract to buy a safe, two vault doors, and some steel file

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cases, for use in the county offices of the defendant county. The sale was effected by an offer on the part of the plaintiff, which was accepted by resolution of the county commissioners duly passed. This resolution was carried by a majority of the board on December 21, 1908; two of the commissioners voting for it, and one against. But it was rescinded on January 8, 1909, when the new board came in, and the plaintiff notified, a few days afterwards, that they would not comply. It had been requested of the plaintiff, however, that the work should be rushed, and he had therefore, in the meantime, forwarded to the manufacturers, on whom he relied, an order for the safe and the vault doors, which were to be of a special size and make, and they were subsequently shipped to the nearest railroad station, and one of the vault doors carted to the county seat, some seven miles distant, and an attempt made to deliver it there; but it was refused by the county commissioners, who would not allow it to be brought onto the grounds, and nothing further was done. The steel file cases were standard goods, and, not having been made, all that is claimed for them is the profit that the plaintiff would have derived.

The only defense which needs serious consideration is that the agreement with the plaintiff was reduced to writing and signed, and should therefore have been offered in evidence in that form, by which, if it had come in, it would be found that the plaintiff had no case. But the writing referred to¹ was not the contract between the parties, nor

¹ The following is a copy of this writing:

"State of Pennsylvania, }
County of Pike. }

Milford, Dec. 21.

"T. E. Spencer, New York: Please send us as soon as convenient one Miller safe No. 21, with steel chest approximately inside 66 inches high, 55 inches wide, 20 inches deep, two sets of No. 3 vestibules, three sets of steel cases as per plans for commissioners' office as per illustration catalogue or plan on back hereof, if any, necessary alterations allowed. Ship via ———, all goods to be delivered in Milford, Pa., and rent same to undersigned on following terms: \$4,650. \$650 on arrival of goods, and the balance in payment of \$1,000 each year December 1st, notes of certificates with interest given for time payments and interest payable annually on the time payments.

"It is agreed above sums are to be paid as rent for said safe. When the full amount of \$4,650 and interest is paid you are to give me bill of sale of safe. If note is not forwarded to you at expiration of 25 days from date of invoice the rent shall become due at the expiration of 30 days from date of bill, and agree to accept and pay draft of amount mentioned below, and are not to countermand or attempt to annul this contract.

"It is agreed that the title of said safe shall not pass until notes are paid or safe paid for in cash, but shall remain your property until that time. In default of payment of said rent you or your agent may take possession and remove said safe without legal process. All claims for damages arising from such removal being hereby waived. You are to retain any payments made for use of safe. Nothing but shipment or delivery constitutes an acceptance of this contract.

"It is also hereby expressly agreed and understood that the foregoing embodies all the agreements made between us in any way, hereby waiving all claims or verbal or other agreements of any nature not embodied in this contract. A receipt of a duplicate hereof is hereby acknowledged. Agents not authorized to make collections. Amount, \$4,650.

"Yours truly,

W. H. Clune.
"H. S. Albright."

indeed, under the evidence, could it have been. It appears that after the resolution had been passed by the board the plaintiff drew up this paper, and it was signed by the two commissioners who had agreed to buy; the other having left the room. The purpose of it seems to have been, in order that the plaintiff, for his own protection, might have something to show the bargain which had been made. But that was all. It was written by him on a printed blank, which he seems to have had, and it assumed the form of an order for the articles, describing them briefly, and giving the price, there being an agreement at the foot of it, in fine print, that until the full amount had been paid no title was to pass, and that whatever was paid was to be taken merely as rent. The two commissioners who signed it signed not for the county, or in their official capacity, but in their individual names; the third commissioner not being there. This could not bind the county, and the plaintiff was justified in treating it as of no effect. The commissioners were not authorized to go outside of the resolution which had been passed while the board was in session, nor could they vary from it after the meeting had adjourned, even though they constituted a majority of the board. It is true that the resolution was to make a contract with the plaintiff, which possibly implied that a formal contract was to be drawn up and executed. But it was complete without this as it stood, and under no circumstances could there be a different contract entered into, such as this would have been. Nor is the memorandum, which the plaintiff scratched off and the two commissioners signed, to be regarded as nullifying what had been previously done. It certainly was not so intended, and is not to be so held. It may have had a certain purpose, but it was not that. The plaintiff therefore correctly declared for and relied on the real contract in the case, an acceptance by resolution of the proposal which he had made, which was the only one by which the county was bound.

It is further claimed that there is a variance between the allegation of delivery in the plaintiff's statement and the proofs. It is no doubt true that, where a sale and delivery is charged, it must be proved as laid, and that this is not sustained by evidence of an attempted delivery and a refusal to accept, which, if relied on, must be specially pleaded. *Brand v. Henderson*, 107 Ill. 141, 147; *Outwater v. Dodge*, 7 Cow. (N. Y.) 85; 1 Chitty, Plead. *358. But the plaintiff's statement does not offend against this rule. The substance of what is there said is that the plaintiff delivered the safe and the vault doors to the commissioners at Milford, the county seat, and arranged to obtain and install the file cases, but that the commissioners refused to accept the same, or any of them, notifying the plaintiff that they would not perform. The delivery which is so spoken of refers, of course, to the tender or attempted delivery which was made, which the commissioners, it is averred, refused; this averment precluding the idea that anything else was meant. In no sense was a complete delivery asserted, and it could not have been so understood. There was thus no variance between the allegations and the proofs, nor anything by which the defendant could have been misled.

The rules for judgment non obstante and for a new trial are discharged.

COLONIAL TRUST CO. v. WALLACE et al.

(Circuit Court, S. D. New York. December, 1910.)

RAILROADS (§ 30*)—INSOLVENCY—RECEIVERS—REORGANIZATION—OWNERSHIP OF BONDS DEPOSITED WITH REORGANIZATION COMMITTEE—"WITHIN."

On the appointment of a receiver for a railroad company, defendants formed themselves into a reorganization committee, and invited the first mortgage bondholders to deposit their bonds with the committee for mutual protection, and as preliminary to the preparation of a reorganization of the corporation. The deposit agreement gave the committee title to the bonds, with power to dispose of them in acquiring the railroad property either before or after formulating a plan, and also declared that any holder of a certificate of deposit might within 60 days after first publication of the plan withdraw his bonds on paying his pro rata share of the committee's expenses and be relieved from the obligation of the agreement, etc. The agreement, however, imposed no obligation on the committee to prepare and present a plan at any time; the committee reserving the right to return the deposited bonds. *Held*, that the word "within," as used in the clause "within sixty days" from the publication of the plan of reorganization, must be construed in the sense of "before," and hence depositing bondholders, on becoming dissatisfied with the acts of the committee before any plan had been formulated or promulgated, were entitled to withdraw from the agreement and to a surrender of their bonds.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7497-7502.]

In Equity. Suit by Colonial Trust Company against James N. Wallace and others. On motion for a preliminary injunction. Granted.

Samuel Untermeyer, for complainant.

John D. Milburn, Walter F. Taylor, Albert Rathbone, and Joline, Larkin & Rathbone, for defendants.

NOYES, Circuit Judge. The plaintiff, with other holders of the bonds of the Wabash Pittsburg Terminal Railway Company, deposited its bonds with the defendants as a bondholders' committee under an agreement apparently looking toward the preparation by such committee of a plan of reorganization. The defendants, however, did not agree to prepare a plan of reorganization and assumed no obligation whatsoever to the plaintiff, except, under certain conditions, to return its deposited bonds. The defendants also expressly reserved the right to terminate the agreement at their pleasure. The plaintiff has demanded the return of its bonds and has offered to pay its proportionate share of the expenses of the committee.

The right of possession is an incident of ownership. An owner may transfer this right upon such terms and for such time as he may see fit. An owner of bonds or other securities may deposit them with a committee and confer upon it the right of possession for a stipulated period or for the time necessary to accomplish a desired result. He may go further and agree in advance that his bonds shall be subjected to any plan of reorganization which the committee may adopt. But the converse of these propositions is equally true. An owner retains the right of possession unless he parts with it. If he transfers pos-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 183 F.—57

session he may retake it, unless he has expressly agreed to part with it for a stipulated period or unless an agreement to that effect can be inferred.

In the present case I am unable to find, upon any theory, any provision in the agreement in question requiring the depositors to leave their bonds with the committee for any stated period or until the preparation of a plan of reorganization or until the termination of the agreement by the committee at its pleasure.

Upon the theory suggested by the defendants, that the real purpose of the agreement was not the preparation of a plan of reorganization, but merely mutual protection, there is no provision either express or by necessary inference preventing a dissatisfied depositor from withdrawing his bonds whenever he so desires. Upon this theory the provision giving him the right to withdraw after the preparation of a plan of reorganization is immaterial, for no such plan might be contemplated. There is no provision expressly barring the right of withdrawal, and it cannot be inferred that this right is barred during the time necessary to accomplish a desired object, for there is no definite object to be accomplished. Certainly an agreement which one party may determine at his pleasure should not be strained to hold another party indefinitely.

Upon the other theory—which would seem to be the correct one—that the primary purpose of the agreement was the preparation of a reorganization plan, although the committee assumed no duty whatever to prepare one, the same conclusion must be reached. The provision that a depositor may withdraw his bonds after the publication of a plan of reorganization upon the payment of his share of the expenses is not necessarily inconsistent with his right to withdraw upon like condition before such publication. The question is not so much what he is authorized to do, but what he has agreed that he should not do. Furthermore, I am of the opinion, in view of the circumstances disclosed by the agreement, in view of the fact that the agreement was prepared by the committee, and of the further fact that the committee assumed no obligation and could terminate the agreement at its pleasure, that the word “within” in the provision that a depositor might withdraw his bonds “within sixty days” from the publication of the plan of reorganization should be given the meaning of the word “before.” Under these conditions it is quite within well-settled principles of construction to interpret the provision as authorizing the depositors to withdraw their bonds at any time before the expiration of 60 days from the publication of the plan. An opposite construction would make the agreement altogether one-sided and might operate most unjustly. It would require a depositor to await the action of a committee with whose work he was dissatisfied, and from whose plan of reorganization he expressed his intention in advance to dissent. It would seem to deprive him of the right to possess his own property merely to allow time to go by, for with the obligation to have his bonds ready for return upon the publication of the plan it is not shown that the committee would be substantially prejudiced by anticipating such return. And in this connection it should also be noted that this obligation to return

the bonds operates as a distinct limitation upon the powers of the committee and materially affects the broad and sweeping powers conferred by the agreement which might otherwise seem inconsistent with the right of a depositor to retake his bonds.

The interpretation placed upon the provision relating to the return of bonds after the publication of a reorganization plan is thought not to be inconsistent with the decision of the Court of Appeals of the state of New York in *Industrial, etc., Co. v. Tod*, 180 N. Y. 215, 73 N. E. 7, construing a similar provision. The cases are distinguishable by the fact that in that case the court held that the defendants had assumed the duty of preparing a plan of reorganization. If the committee in this case had bound itself to prepare a plan it might well be that the depositors would be bound to give them time to prepare it.

No claim of fraud or bad faith on the part of any of the defendants is presented and the questions arising on this motion have been determined as the result of the interpretation placed upon the agreement as a whole and upon its particular provisions.

The plaintiff is not now asking for any mandatory order, but is, in effect, asking for the preservation of the existing situation pending the litigation. I think that it is entitled to the preliminary injunction which it prays for, and it is so ordered.

THE AMELIA.

(District Court, S. D. Alabama, S. D. December 22, 1910.)

No. 1,271.

EXEMPTIONS (§ 48*)—SEAMAN'S WAGES—ATTACHMENT IN STATE COURT—EFFECT—"SEAMAN."

Rev. St. § 4536 (U. S. Comp. St. 1901, p. 3082), provides that no wages due or accruing to any seaman shall be subject to attachment or arrest from any court, and that every payment of wages to a seaman shall be valid at law notwithstanding any attachment thereof. *Held*, that such section was applicable as well to a seaman operating on coastwise vessels as on merchant vessels generally, and hence it was no answer to a libel in admiralty against a tug engaged in the coasting trade for a seaman's wages earned thereon that the wages had been attached by garnishment.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 70; Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6374-6375.]

In Admiralty. Libel by Andrew Nodop against the tug *Amelia* for seaman's wages. Decree for libelant.

J. W. Tharp, for libelant.

Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. The libelant was a seaman on the tug *Amelia*, running in the Mobile river and bay and Mississippi sound, in the state of Mississippi, being thus engaged in the coastwise trade. He claims the sum of \$53.32 is due him for wages for services rendered in September, 1910. The respondent does not deny the claim

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for wages, but the owner and claimant of the tug refused to pay the claim, and sets up that libellant's wages had been attached by garnishment process served upon him for \$46.55. The process had been issued in accordance with the usual course of procedure in the courts of Alabama. Libellant thereupon filed his libel for the recovery of his full wages, and caused the tug to be seized by the marshal. The sum claimed in the garnishment proceeding did not cover the full amount of libellant's wages, and the claimant in his answer in this cause set up the above facts, and paid into court the balance of the wages by him admitted to be due to the libellant at the time of the filing of the answer.

The question submitted to the court is whether the wages earned by a seaman in the coastwise trade of the United States are subject to arrest by garnishment process at the instance of a creditor of the seaman in an action at law brought in a state court, and whether, therefore, the sum of \$46.55 arrested by the garnishment process shall be allowed as a credit to the claimant in this action. Section 4536 of the Revised Statutes (U. S. Comp. St. 1901, p. 3082) of the United States provides:

"That no wages due or accruing to any seaman shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman shall be valid in law notwithstanding any attachment thereon."

This provision is general in its terms, and is applicable to all wages earned by seamen whatever the nature of the voyage, unless said provision conflicts with, or may vary from, some act of Congress passed since the 1st day of December, 1873, and which has not been repealed or so amended as to avoid any conflict with or variance from said provision, or unless it shall be considered that any such conflicting act has no application to the question involved in this cause. Said section 4536 was a part of the shipping commissioner's act (Act June 7, 1872, c. 322, 17 Stat. 262). Act June 9, 1874, c. 260, 18 Stat. 64 (U. S. Comp. St. 1901, p. 3064), struck from Act June 7, 1872, every provision therein relative to coastwise vessels, except those in the coastwise trade between the Atlantic and Pacific coasts, and the lake-going trade and trade between the United States and British North American possessions. In 1878 the Revised Statutes of the United States were adopted under an act of Congress. By it the act of June 7, 1872, including the provisions of said section 4536, became a part of the Revised Statutes, under title 53, Merchant Seamen, c. 3. This merchant seamen statute is a general and permanent one, dealing with the shipping of seamen, their wages, and effects, discharge, protection, relief, etc. We find in this statute no distinction or discrimination made between the seamen engaged in merchant ships belonging to the United States as to their protection in the coastwise trade generally and the particular coastwise trade mentioned in the act of June 9, 1874. Is not this fact strongly persuasive that Congress intended to put all seamen engaged in the coastwise trade on the same footing as to their treatment, and their protection in reference to their wages? When, as suggested by the Supreme Court, we liberally interpret the statute with a view to effecting the protection intended to be extended to a

class of persons "whose improvidence and prodigality have led to legislative provisions in their favor," and when we read section 4536 in connection with and "construe it in the light of the provisions of the title of which it is a part," it seems to me clear that it was intended by the statute to prevent the seizure of the seaman's wages under attachment or arrestment. Such I understand to be the substance and effect of the opinion of the Supreme Court of the United States in *Wilder v. Inter-Island Nav. Co.*, 211 U. S. 239, 29 Sup. Ct. 58, 53 L. Ed. 164.

In *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, the Supreme Court said:

"Contracts with sailors for their services are exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water."

And:

"If the necessities of the public justify the enforcement of a sailor's contract by exceptional means, justice requires that the rights of the sailor be in like manner protected."

Congress no doubt recognized this just rule when it passed Act Aug. 19, 1890, c. 801, 26 Stat. 320 (U. S. Comp. St. 1901, p. 3065), which provides that:

"When a crew is shipped for an American vessel in the coastwise trade.
* * * an agreement shall be made with each seaman engaged as one of such crew in the same manner as is provided by the Revised Statutes,
* * * and such seamen shall be discharged and receive their wages as provided by section * * *"

—and also by other sections named of which 4536 is one.

However, in the case of *McCarty et al. v. Steam Propeller City of New York*, in the United States District Court for the Southern District of New York (4 Fed. 818), Benedict, J., held that an attachment suit wherein a seaman's wages had been attached was not a valid plea to a libel in the admiralty court for the same wages, but that the libellant should have judgment for the whole wages due him. His opinion is an able and logical one, and his decision is sustained by such weighty and just considerations as to my mind are conclusive that, irrespective of any statute, seamen's wages under the maritime law ought to be held exempt from attachment in suits at common law.

In *Ross v. Bourne* (D. C.) 14 Fed. 858, Judge Nelson held that "the right of a seaman to sue in the admiralty court for his wages is not taken away or suspended by an attachment of his wages in an action at law," and referring to thirteenth admiralty rule [U. S. Comp. St. 1901, p. 2867] said:

"No one would for a moment contend that the attachment suit should have the effect to deprive the seaman of his lien on the vessel and freight."

The protection to the seaman extends to proceedings in aid of execution after judgment as well as to attachment before judgment. *Wilder v. Inter-Island Navigation Co.*, supra.

Decree for libellant for amount of wages due.

In re PALMER WINDOW GLASS CO.

(District Court, M. D. Pennsylvania. January 12, 1911.)

No. 1,224, In Bankruptcy.

1. CORPORATIONS (§ 638*)—FOREIGN CORPORATIONS—RIGHTS IN OTHER STATES.

Where a New Jersey corporation was duly registered and entitled to do business in Pennsylvania, it was entitled to exercise all its corporate powers in Pennsylvania, subject only to the restraint put upon it by law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2529; Dec. Dig. § 638.*]

2. ALIENS (§ 6*)—ACQUISITION OF REAL ESTATE—CONVEYANCE.

An alien may acquire real estate by purchase and may convey the same to a purchaser, even though the estate which he conveys is defeasible in proceedings instituted by the state to escheat it.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 5-10; Dec. Dig. § 6.*]

3. CORPORATIONS (§ 655*)—FOREIGN CORPORATIONS—PURCHASE AND SALE OF REAL ESTATE—MORTGAGE—VALIDITY.

Where a foreign corporation authorized to do business in Pennsylvania had charter power to acquire and mortgage real estate, its acquisition of real estate in Pennsylvania and mortgage thereof to secure its bonds was valid as against all persons, with the possible exception of the state in a proceeding to escheat the same, on the theory that a foreign corporation is prohibited by Act Pa. April 26, 1855 (P. L. 329) § 5, from holding or conveying real estate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2576, 2577; Dec. Dig. § 655.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Palmer Window Glass Company. On certificate of referee to review an order relating to the distribution of the proceeds of real estate constituting part of the bankrupt's estate. Petition to review dismissed. Decree allowing the proceeds to bondholders confirmed.

George L. Roberts and A. F. Jones, for general creditors.

W. K. Sweatland and F. D. Gallup, opposed.

ARCHBALD, District Judge. The real estate of the bankrupt has been sold by the trustee, and the question is who is entitled to the fund realized. It would go naturally to the first mortgage bondholders, but their right is disputed by general creditors, on the ground that the bankrupt, being a foreign corporation, had no power to hold or convey real estate. The bankrupt is a New Jersey corporation, but was duly registered and entitled to do business in Pennsylvania. And, being incorporated for the purpose of making glass, was authorized by Act April 19, 1901 (P. L. p. 86), to hold real estate to an amount necessary and proper for its corporate uses. This act, however, was an amendment to Act June 16, 1893 (P. L. p. 460), which is said to be unconstitutional, because it attempted to amend existing statutes without reciting them. And the act of 1901, as thus resting on an invalid law, is claimed to be of no validity. It is also claimed that it merely gives authority to hold real estate and not to mortgage it.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

But it is not necessary to follow out this argument; there being other considerations which are controlling.

The contention is that, the corporation having no authority, the mortgage is absolutely invalid. But that is based upon a misconception. Having complied with the registration laws, the bankrupt company was entitled to exercise its corporate powers in Pennsylvania, subject only to the restraints by law put upon it. And that it possessed the power, under its charter, to acquire and to mortgage real estate, there can be no question. It may be that its title was defeasible (Act 26 April, 1855, § 5 [P. L. 329]), unless there were enabling statutes to cure it. But the commonwealth is the only one that could take advantage of that. It is not open to general creditors. It has been settled from the earliest times that an alien may acquire real estate by purchase. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313. And may convey to a purchaser, even though the estate which he conveys is defeasible. *Fairfax v. Hunter*, 7 Cranch, 603, 3 L. Ed. 453; *Sheaffe v. O'Neil*, 1 Mass. 256. And the case of an alien and a corporation is not to be distinguished. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313. Even where the title of a corporation is inalienable, it can pledge it by mortgage; the power to pledge not being determined by the quality of its title. *St. Johns Church v. Steinmetz*, 18 Pa. 273. The title acquired in the present instance was good as to every one but the commonwealth. It may have been liable to escheat, but that is all that could be said of it. And, the corporation having the right to acquire and convey, it had the right to mortgage. It is settled by a long line of decisions that the want of capacity in a corporation, foreign or domestic, to hold and dispose of land, can only be asserted by the state, and not by individuals. *Goundie v. Northampton Water Co.*, 7 Pa. 233; *Pittsburg and Connellsville Railroad v. Allegheny County*, 63 Pa. 126; *Hagerman v. Empire Slate Co.*, 97 Pa. 534; *Bone v. Delaware & Hudson Canal Co.*, 18 Wkly. Notes Cas. (Pa.) 125; *Williams v. Hintermeister* (C. C.) 26 Fed. 889. It was within the charter powers of the bankrupt in the present instance, as already stated, to acquire the real estate in question, and to mortgage it, as it did, for the benefit of bondholders. The title which it had, such as it was, has been disposed of by the trustee, and those to whom it was pledged, as security for the bonds which they took, are entitled by virtue of the lien which they had to the money which was realized. The mortgage, in other words, was good, whatever may be said of the title. The mistake is in confusing the one with the other.

The petition of review is dismissed, and the action of the referee is confirmed, sustaining the claims of bondholders.

UNITED STATES ex rel. DICKMAN v. WILLIAMS, Com'r.

UNITED STATES ex rel. BRAUN v. SAME.

(District Court, S. D. New York. November 18, 1910.)

1. ALIENS (§ 39*)—EXCLUSION—AUTHORITY OF CONGRESS.

Congress has an absolute, inherent right to exclude and deport aliens as a part of its sovereign power, and hence the fact that an alien has resided in the United States for a long period and intends to make his residence permanent did not affect the government's right to exclude him, if in the judgment of Congress such exclusion was proper.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 39.*]

2. ALIENS (§ 40*)—EXCLUSION—STATUTES—CONSTITUTIONALITY.

Act Cong. March 26, 1910, c. 128, § 2, 36 Stat. 264, amending Alien Exclusion Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), so as to provide for the exclusion of a female alien practicing prostitution, after such alien shall have entered the United States, without reference to the term of residence, is not unconstitutional as infringing on the police power of the state.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 40.*]

3. ALIENS (§ 51*)—DEPORTATION—FEMALE PROSTITUTES.

Where a female alien residing in the United States practiced prostitution after the amendment of Alien Exclusion Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), as amended by Act Cong. March 26, 1910, c. 128, § 2, 36 Stat. 264, she was subject to deportation without reference to the length of her prior residence in the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 111; Dec. Dig. § 51.*]

4. ALIENS (§ 54*)—EXCLUSION OF ALIENS—FAIR TRIAL.

Where certain alien prostitutes on being arrested in deportation proceedings were each granted a hearing on the question of deportation, and there voluntarily testified, and each admitted facts essential to authorize an order of deportation, an objection that they were not accorded a fair trial was untenable.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Habeas corpus by the United States, on the relation of Rose Dickman and on the relation of Margaret Braun, alias Alice Braun, alias Margaret Burger, to obtain relators' discharge from custody of William Williams, Commissioner of Immigration at the port of New York, under deportation warrants. Writs dismissed.

Charles W. Bacon, for petitioners.

Henry A. Wise, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty.

HOLT, District Judge. These are writs of habeas corpus to determine the legality of the detention of two women who have been ordered deported on the ground that they are alien prostitutes. Each of these women had been in the country more than three years before their arrest. Rose Dickman arrived in the United States on September 13, 1904, and Margaret Braun on July 10, 1907, and each of them

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has resided in this country ever since. Rose Dickman was arrested on July 12, 1910, and Margaret Braun on September 14, 1910. The claim that both these women were aliens and were practicing prostitution is not disputed. The alleged grounds of their claim to be entitled to be discharged are that that part of the act of March 26, 1910 (Act March 26, 1910, c. 128, § 2, 36 Stat. 264) which provides that any alien who shall be found practicing prostitution after such alien shall have entered the United States may be deported is unconstitutional, and that, if constitutional, it is not retroactive, and does not apply to aliens who immigrated into this country before the act was passed.

The right of Congress to exclude and deport aliens from the country is absolute. It is an inherent part of the sovereign power. *Fon Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Turner v. Williams*, 194 U. S. 289, 24 Sup. Ct. 719, 48 L. Ed. 979; *United States v. Bitty*, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543. Congress could provide for the exclusion of every alien in the country or of any class of aliens. An alien who has decided to permanently reside in this country and who has acquired what is called a domicile of residence undoubtedly is entitled to the same protection of life, liberty, and property as a citizen; but the fact that an alien has resided in this country for a long time or intends to make such residence permanent does not affect in any way the right of the government to exclude him, if, in the judgment of Congress, such exclusion is proper. *Fon Yue Ting v. United States*, *supra*. The case of *Keller v. United States*, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, cited for the petitioners, which held that the portion of the act of 1907 (Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 [U. S. Comp. St. Supp. 1909, p. 450]), which made it a felony to harbor in any house for the purpose of prostitution any alien woman within three years after she shall have entered the United States, was unconstitutional, has no real application to this case. The attempt of Congress to make it a felony for any man in this country to harbor or support such a woman at any time within three years after her arrival, although he may not have known that she was an alien, and although she may have first entered upon an immoral life long after she arrived in the country, was held by the Supreme Court to be unconstitutional as an attempt to legislate on a subject over which the states in the exercise of the police power had sole jurisdiction. See *United States v. Palan* (C. C.) 167 Fed. 991. But the question whether a citizen of this country can be punished by federal law for establishing illicit relations with an alien woman after her arrival in this country is essentially different from the question whether such alien woman can be excluded by federal law from the country.

The only question in this case is whether Congress has adopted legislation which authorizes the exclusion of the petitioners. Section 3 of the act of 1907 provided that any alien woman or girl practicing prostitution at any time within three years after she shall have entered the United States shall be deported. Under this section, an alien woman could not be deported for practicing prostitution later than three years after she had entered the country; and before the act of 1910

there was no act authorizing the general deportation of an alien for such a reason regardless of the length of time she had resided here. The act of 1910, however, provides that any alien practicing prostitution after such alien shall have entered the United States shall be deported. Under this act, in my opinion, it is of no consequence when the alien arrived in this country. It applies to a woman who came here 30 years ago as much as to one who came 3 years ago. There is a question, however, whether it applies to a woman who has not practiced prostitution since the act went into effect. The act of 1910 is an amendment of sections 2 and 3 of the act of 1907. That act, among other things, withdrew the three-year limit in the act of 1907. Section 28, Act 1907, provides:

"That nothing contained in this act shall be construed to affect any prosecution, suit, action or proceedings, brought, or any act, thing or matter, civil or criminal, done or existing at the time of the taking effect of this act; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

This section in my opinion applies to the provisions in the act of 1910, which are incorporated, as amendments, into the act of 1907, and my present impression is that under these provisions the fact that an alien may have practiced prostitution more than three years after her arrival in this country and before the passage of the act of 1910 would not make her liable to deportation, and that, in order to bring such a case within the provisions of the act of 1910, proof must be produced that the alien had practiced prostitution either within three years after her arrival or after the passage of the act. But it is not necessary to definitely pass upon this question because it appears from the evidence in the case, and by the admissions of both these women under examination that they had continued the practice of prostitution later than March 26, 1910, the date of the passage of the act.

The point that these women have not had a fair trial because they were compelled to testify seems to me entirely untenable. The acting Secretary of Commerce and Labor in the order of arrest of each of these women directed that the inspector should grant each of them a hearing on the question of deportation. They were granted such hearing and voluntarily testified, and in each case admitted the facts essential to authorize the order of deportation.

My conclusion is that the writ in each of these cases should be dismissed.

UNITED STATES v. HEINZE.

(Circuit Court, S. D. New York. September 10, 1909.)

1. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—WILLFUL MISAPPLICATION OF FUNDS—INDICTMENT.

An indictment against an officer of a national bank under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), for willful misapplication of funds of the bank, must allege facts showing a conversion of such funds; and an indictment which charges that defendant, as president, with intent to defraud the bank, and for the benefit of himself and others unnamed, caused the bank to discount single name commercial paper, and that the bank lost the amount paid on the discount, does not charge an offense.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 973; Dec. Dig. § 257.*]

2. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—WILLFUL MISAPPLICATION OF FUNDS—INDICTMENT.

An indictment, under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), which charges defendant, as president of a national bank, with willful misapplication of its funds, with intent to defraud the bank, and for the benefit of himself and others, by causing the bank to discount a note signed only by a person known to him to be insolvent, and that the bank lost the amount paid on such discount, sufficiently charges a fraudulent conversion, and is good.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 973; Dec. Dig. § 257.*]

Indictment against F. A. Heinze. On demurrer to indictment. Sustained as to certain counts, and overruled as to others.

See, also, 177 Fed. 770.

Henry A. Wise, U. S. Atty.

Wm. J. Wallace, John B. Stanchfield, and John C. Tomlinson, for defendant.

HOUGH, District Judge. With respect to indictments for misapplication, under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), I have expressed fully my views in the Morse Case, 161 Fed. 429, on the first indictment against this defendant (161 Fed. 425). The present discussion has not rendered it necessary (so far as I can see) to say much more.

This indictment seems to me to charge, in counts 1-15, this, and no more, viz.: That with intent to defraud the bank of which he was president, and for the benefit of himself and others unnamed, defendant caused the bank to discount single name commercial paper, and the bank lost the amount paid on the discount. The sixteenth count varies from the others only in stating that the person responsible on the discounted note was insolvent, to the knowledge of defendant at the time of discount.

The crime of which defendant is guilty, if guilty at all, is "willful misapplication." The one characteristic or essential of this crime on which the Supreme Court has always insisted is "conversion." No method of being guilty, without "converting" the money, funds, or credits of the bank has been pointed out. This word "conversion" has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

supplied the legal measure, which the court has not been able to find in "willful misapplication." If the facts stated in an indictment do not set forth a case of conversion, the indictment is bad, and a general allegation of wrongful intent will not cure it. Taking the first count, for example; could the bank have maintained an action for conversion against the recipient of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts 1-15 are demurrable.

The sixteenth count is also asserted to be bad, under the Britton decision in 108 U. S. 193, 2 Sup. Ct. 525, 27 L. Ed. 703; but this was explained in the Fish Case, 24 Fed. 585, in the manner I have tried to summarize on page 433 of 161 Fed. Does this count sufficiently charge that the discount was originally procured by fraudulent means? And does or can it amount to a conversion for a bank president, for his own benefit, to discount the note of a known insolvent? It appears to me that both questions should be answered affirmatively, and the demurrer to the sixteenth count overruled.

It is much to be hoped that this decision will be reviewed. Anything more unsatisfactory than the ruling cases on "willful misapplication" I have rarely met.

MITCHELL COAL & COKE CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. January 4, 1911.)

No. 4.

CARRIERS (§ 36*)—DISCRIMINATION IN RATES—REBATE—REMEDIES—JURISDICTION—INTERSTATE COMMERCE COMMISSION.

An action against a carrier for discrimination in rates and granting unlawful rebates to plaintiff's competitors, affecting not only the plaintiff, but other shippers in the same region, cannot be first instituted in a federal Circuit Court; the Interstate Commerce Commission having exclusive original jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the interstate commerce act is unjust or unreasonable, unjustly discriminatory, preferential, or prejudicial, and this though the regulation or practice complained of had ceased.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

Action by the Mitchell Coal & Coke Company against the Pennsylvania Railroad Company. On motion to dismiss for want of jurisdiction. Granted.

Joseph Gilfillan and George S. Graham, for plaintiff.

Francis I. Gowen and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. The facts of this case will be found in 181 Fed., at page 403. Since the opinion there reported was filed, the Court of Appeals for the Third Circuit has disposed of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

case referred to on page 410—Morrisdale Coal Company v. Pennsylvania Railroad Co. (C. C.) 176 Fed. 748—and has decided that:

"The Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice affecting rates, or an existing regulation or practice of any other kind affecting matters sought to be regulated by the act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial; and the courts cannot, by mandamus, injunction, or otherwise, control or modify any order of the commission, made by it in the due performance of its merely administrative functions."

In my opinion this decision requires me to sustain the pending motion to dismiss for want of jurisdiction. The suit is founded upon the defendant's practice of granting unlawful rebates to the plaintiff's competitors, and affects, not only the plaintiff, but other shippers in the same region. It was a regulation or practice affecting rates, and the fact that it may have ceased does not affect the primary jurisdiction of the Interstate Commerce Commission.

Neither is the court prevented from granting the motion by the facts (1) that the parties agreed to a hearing before a referee, and (2) that the motion was not made until after the referee had reported, and the court had heard argument upon objections to his report. Substantially the same situation was presented in the Morrisdale Case. There the suit had been tried before a jury and a verdict for the plaintiff had been rendered. The motion to dismiss was not made until after the defendant's rule for judgment notwithstanding the verdict had been argued and submitted to the court for determination. The reasons that influenced the Circuit Court and the Court of Appeals in the Morrisdale Case to hold that the commission has primary jurisdiction of such a controversy are equally influential here, and cannot be overcome by the fact that the parties, either expressly or impliedly, have agreed either to a jury trial or to a hearing before a referee in the first instance.

The motion is granted, and the suit is hereby dismissed for want of jurisdiction.

UNITED STATES v. CALOGERA.

(Circuit Court, S. D. New York. December 22, 1910.)

CUSTOMS DUTIES (§ 99*)—REFUNDING DUTIES PAID—APPEAL.

An importer, having paid certain duties under protest, employed petitioners as attorneys to recover the same, under an agreement to pay them one-half of whatever was recovered. They appealed to the Board of General Appraisers, which held the goods to be duty free, whereupon the collector appealed to the Circuit Court, where the decision was affirmed. *Held*, that the Circuit Court's jurisdiction was appellate only, and, having been completely exercised by affirmance, there was then no suit pending, nor money in the hands of any officer of the court sufficient to confer jurisdiction to grant the petition of the importer's attorneys for an order directing the collector to pay over to them one-half of the funds in his hands, under their agreement with the importer.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 229; Dec. Dig. § 99.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application by the United States to review the decision of the Board of General Appraisers holding that certain olives imported into the United States by G. P. Calogera were not subject to duty. Petition by Brown & Gerry, attorneys for the importer, for an order directing the collector of the port to pay over to them one-half of the amount paid under protest by the importer as duties, under an agreement that the attorneys should have one-half of whatever was recovered as compensation for their services in resisting the collection of such duties. Denied.

See, also, 175 Fed. 578.

Henry A. Wise, U. S. Atty.
Brown & Gerry, for Calogera.

WARD, Circuit Judge. Goods imported by one Calogera were assessed for duties by the collector at the rate of 15 cents per gallon. The importer paid under protest, and appealed to the Board of General Appraisers, which reversed the decision of the collector and held the goods to be duty free. Thereupon the collector applied to the Circuit Court of the United States for this district to review the decision of the board, which court affirmed it. A reliquidation of the duties shows the sum of \$5,136.35 to be due by the United States to Calogera.

Brown & Gerry acted as Calogera's attorneys throughout, under an agreement whereby they were to receive one-half of whatever was recovered. They now petition this court in the original proceeding for an order directing the collector to pay over to them one-half the sum in his hands by virtue of this agreement. But the jurisdiction of the court in that matter was appellate only, and has been completely exercised. There is no suit now pending, and there never was any money judgment, nor any fund in the hands of the court, or of any officer of the court. The petition must be regarded as an original proceeding asking this court to pass upon the rights of Brown & Gerry to a lien upon Calogera's funds, without his presence, and to summarily direct an administrative officer of the United States to pay over money in his hands to a third party. No authority is shown for such a proceeding.

The prayer of the petition is denied.

In re SALVATOR BREWING CO.

(District Court, S. D. New York. October 3, 1910.)

No. 10,631.

1. BANKRUPTCY (§ 166*)—CORPORATIONS—TRANSFER OF ASSETS—FRAUD.

Where an insolvent corporation more than four months before bankruptcy transferred to director creditors certain mortgages and liquor tax certificates in order to give such directors a preference over other creditors, the transfer was invalid under New York Stock Corporation Law

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(Laws 1890, c. 564) § 48, prohibiting any stock corporation from making any transfer of its property when insolvent with intent to give a preference over any creditor, and under the general law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*]

2. CORPORATIONS (§ 542*)—DIRECTOR CREDITORS—PROTECTION.

Though directors of a corporation may loan money or credit to it and take security therefor when the corporation is temporarily embarrassed, if they act in good faith they cannot at a time when insolvency is impending transfer the corporation's property to themselves as security for loans previously made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.*]

3. BANKRUPTCY (§ 178*)—INSOLVENCY—CREDITOR DIRECTORS—SECURITY—GOOD FAITH—EVIDENCE.

A corporation on impending insolvency renewed notes which certain of its directors had indorsed, and assigned to the directors as security certain mortgages and liquor tax certificates. The only entry of the transaction in the corporation's books was a resolution authorizing the assignment in the directors' minutes. No entry of the execution of the assignment was made, and the mortgages and certificates appeared as assets on the books. They were also entered as assets in the auditor's balance sheet several months after the alleged assignment, and the mortgages and certificates remained in the company's safe and were dealt with freely by it. *Held*, that the transfer was colorable merely, and not in good faith, and was therefore unsustainable as against the corporation's other creditors in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 178.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Salvator Brewing Company. On report of a special master revising a decree setting aside an assignment of mortgages and liquor tax certificates by the corporation and certain of its director creditors. Report confirmed.

Henry A. Rubino, for trustee.

Holm, Whitlock & Scarff (Victor E. Whitlock, of counsel), for claimant.

HOLT, District Judge. The provisions of the bankrupt act (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), making preferences created under certain circumstances within four months of the bankruptcy proceedings void, have obviously no application to this case. The transactions alleged to have constituted a preference took place more than four months before the petition was filed. But I think that the alleged assignment of the mortgages and liquor tax certificates on June 26, 1907, was void under section 48 of the New York stock corporation law (Laws 1890, c. 564), which prohibits any stock corporation from making any transfer of its property when insolvent with intent to give a preference to any creditor. The evidence satisfies me that the bankrupt was insolvent at that time, and admittedly the intent and effect of the transfer was to give the directors a preference over other creditors.

Even if there had been no such state statutes, I think the transfer would have been invalid under general principles of law. Directors

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of a corporation can loan money or credit to it and take security for such loan from it, even when such corporation is temporarily embarrassed, when acting in good faith, in order to enable the corporation to overcome temporary embarrassments and to carry on its business, and in the expectation that the corporation will ultimately continue as a solvent concern. But directors of a corporation who have loaned it money or credit cannot, when they find the danger of insolvency impending, transfer its property to themselves as security for their claims. In my opinion this was what was done in this case. The indebtedness to the directors existed. No new debt was created. The renewal of the notes and their indorsement was a mere extension of an existing liability. Nor was the transaction done in good faith in the legal sense. The only entry of the transaction in the company's books was the resolution authorizing the assignment in the directors' minutes. No entry of the execution of the assignment was made. The mortgages and certificates appeared as assets on the books. They were entered as assets in the auditor's balance sheet in December, 1907. The mortgages and certificates remained in the company's safe and were dealt with freely by the company. The alleged delivery of them to Meyer was merely colorable, and was, in my opinion, no delivery at all. All the other tangible assets were mortgaged. The price of malt had suddenly nearly doubled, and the term of credit on which it could be bought had been reduced from 90 to 30 days. The company was selling its beer at ruinously low prices. The balance sheet for the year showed a heavy loss. From every point of view the future of the business looked dark. All these circumstances indicate, in my opinion, that the directors, in attempting to take, as security for their liability as indorsers, all the remaining free assets of the company, were acting, in apprehension of the possible insolvency of the company, in their personal interest, in order to obtain a preference over other creditors, and were not, in good faith, simply affording temporary aid to enable the company to go on and establish ultimately a successful business.

The report of the special master is confirmed, with costs.

In re RATHMAN.

RATHMAN v. BOOTH.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1910.)

No. 106, Original. No. 3,366.

(Syllabus by the Court.)

1. BANKRUPTCY (§ 288*)—ADVERSE CLAIM—NO JURISDICTION TO DETERMINE ADVERSE CLAIM BY SUMMARY PROCEEDINGS WHEN PROPERTY IN POSSESSION OF CLAIMANT—FACTS—CONCLUSIONS.

B. had mortgages on property of a bankrupt mortgagor more than four months before the petition in bankruptcy was filed. Within the four months the mortgagor made a general assignment, and the assignee took possession and administered the property until the receiver of the state court in a suit to foreclose the mortgages took it from him. A month after the adjudication in bankruptcy, but before the trustee was appointed, the mortgagee commenced a suit in the proper state court to foreclose his mortgages, and served his process on the mortgagor and the assignee who was in the possession of the property. The state court appointed a receiver who took the mortgaged property from the assignee. That court then rendered a decree of foreclosure sale, and caused the property to be sold thereunder to B. and confirmed the sales. After all this had been done, a trustee in bankruptcy was appointed, who more than four months after his appointment filed a petition in the bankruptcy court for an order on B. to show cause why he should not pay to the trustee the value of the mortgaged personal property he bought at the foreclosure sale and why he should not permit a redemption of the real estate upon the payment of an amount less than the amount he paid therefor at that sale. Prior to the filing of this petition, the bankruptcy court had not, through the act of any of its officers, such as referees, receivers, or trustees, demanded or taken possession of any of the mortgaged property as the property of the bankrupt.

Held: (1) The bankruptcy court had no jurisdiction to determine in a summary proceeding the merits of the claim of B. under the mortgages and the decree and sales thereunder.

(2) That court had jurisdiction to determine in such a proceeding whether his claim was frivolous or substantial, and whether he or the trustee in bankruptcy was in actual possession of the property, and when it found this claim was substantial, and that he was in possession of the property in controversy, it rightly dismissed the petition of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

2. BANKRUPTCY (§ 293*)—CONSENT REQUISITE TO JURISDICTION OF DISTRICT COURT OF CONTROVERSIES ARISING UNDER SECTION 70E.

Under section 23b of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1312), the District Court has no jurisdiction of controversies between trustees and adverse claimants arising under section 70e of the law as amended in 1903, "unless by consent of the proposed defendant."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 183 F.—58

3. BANKRUPTCY (§ 293*)—THE CLAIMANT OF A LIEN, AN "ADVERSE CLAIMANT."

A claim of paramount or other title is not essential to the character of an adverse claimant within the meaning of section 23 as amended, in distinguishing between controversies at law and in equity between trustees as such and adverse claimants and controversies arising in proceedings in bankruptcy.

One who has a substantial claim to a lien created by a bankrupt upon his property before the petition is filed is equally an adverse claimant with one who claims absolute title.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

4. BANKRUPTCY (§ 288*)—SUMMARY JURISDICTION CONDITIONED BY POSSESSION TAKEN BY ACT OF OFFICER OF BANKRUPTCY COURT.

The jurisdiction of the bankruptcy court to determine in a summary proceeding adverse claims created before the filing of the petition in bankruptcy to liens upon and titles to property claimed by the trustee as that of the bankrupt is conditioned and limited by its actual possession thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

5. BANKRUPTCY (§ 288*)—POSSESSION BY AN ASSIGNEE FOR CREDITORS WITHOUT MORE IS INSUFFICIENT TO ESTABLISH IT.

The test of the summary jurisdiction is that the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of the res as the property of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

6. BANKRUPTCY (§ 288*)—JURISDICTION BY SUMMARY PROCEEDING TO TAKE POSSESSION AND THEN BY LIKE PROCEEDING TO DETERMINE ADVERSE CLAIMS.

The bankruptcy court has jurisdiction by summary proceeding to take from assignees and receivers for general creditors in insolvency or winding up proceedings appointed after four months prior to the filing of petitions in bankruptcy, from officers of courts attaching or replevying within that time, and from others holding for the bankrupt property claimed to be that of the bankrupt, and then by virtue of the possession thus taken to determine adverse claims to it by a like proceeding.

But the bankruptcy court may not thus take possession from a receiver appointed by another court in a suit to enforce a lien antedating the filing of the petition in bankruptcy, or thereby draw to itself jurisdiction summarily to determine the validity of such a lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

7. BANKRUPTCY (§ 188*)—FILING OF PETITION NOT CAVEAT, INJUNCTION, OR ATTACHMENT AGAINST HOLDERS OF PRIOR LIENS OR TITLES.

The declaration in *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275 (46 L. Ed. 405), that the filing of the petition in bankruptcy "is a caveat to all the world and in effect an attachment and injunction," has been so limited by subsequent decisions of the Supreme Court that it has no application to those holding substantial claims antedating the filing, to liens upon or titles to property claimed as that of the bankrupt. In the absence of proper proceedings to make such claimants parties to the bankruptcy proceeding, they are strangers thereto, and their claims are unaffected thereby.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286-295; Dec. Dig. § 188.*]

Appeal from the District Court of the United States for the District of South Dakota.

In the matter of the estate of William T. Harvey, bankrupt. Petition by Frederick W. Rathman, trustee, against Maud Booth, administratrix of the estate of J. S. Booth, for rule to show cause. Judgment for defendant, and petitioner appeals. Dismissed.

Shull, Farnsworth & Sammis and Davis, Lyon & Gates, for appellant.

W. J. Hooper and French & Orvis, for respondent.

Before SANBORN and VAN DEVANTER, Circuit Judges, and REED, District Judge.

SANBORN, Circuit Judge. Has the United States District Court sitting in bankruptcy jurisdiction against the objection of a respondent who is in possession of real and personal property under a sale pursuant to a decree of a state court of foreclosure of mortgages that were made by the mortgagor more than four months before the petition in bankruptcy against him was filed, to adjudicate summarily on an order to show cause, the claim of the trustee in bankruptcy that the mortgages, the decree, and the sale were void, that the trustee recover of the respondent the value of the personal property which he purchased under the decree, and that the trustee be permitted to redeem the real estate from the mortgage and the foreclosure sale by paying the amount which the respondent paid for it at the sale less the amount which the mortgagor realized from the sale of a portion of the mortgaged property before the foreclosure sale of the balance to the respondent?

This question is presented by a petition of the trustee to revise an order of the court below which dismissed his petition for an order to show cause, on the ground that without the consent of the respondent and without a plenary suit that court had no jurisdiction to try and determine summarily the adverse claim of the respondent challenged by the petition. The material facts set forth in the petition for the summary adjudication are these: Harvey, the bankrupt, owed J. S. Booth \$3,000, for which, in June, 1907, he had given to Booth his promissory note and two mortgages to secure the payment of the note, one on a town lot and his store building situated thereon, and the other on his stock of merchandise with which he was trading. Harvey, with Booth's knowledge and consent, continued to trade with the stock after the chattel mortgage was given, to buy new goods and mingle them with the mortgaged stock, and to sell out of the stock of merchandise, pay the expenses of conducting the business and the price of the purchases of new goods until November, 1907, when he made a general assignment for the benefit of his creditors to one Alexander. The assignee took possession of both the real estate and the personal property and proceeded to sell the merchandise and convert it into money until some time after the sale to Booth in April, 1908, under the decree of the foreclosure of the mortgages, when, upon the demand of the trustee, he delivered to him that portion of the personal property which consisted of purchases after the mortgage was made and which had not been mortgaged, and the trustee proceeded to sell these purchases

and to distribute their proceeds to the creditors. The chattel mortgage did not cover after-acquired property, and it contained no provision authorizing the mortgagee to take possession of the merchandise mortgaged. Between the date of the assignment and the foreclosure sale and on December 30, 1907, a petition for the adjudication of Harvey, a bankrupt, was filed, and on January 22, 1908, he was so adjudged. On February 24, 1908, while Alexander, the assignee, was in possession of both the real and personal property, Booth commenced a suit in the circuit court for Gregory county, in South Dakota, to foreclose his mortgages and caused the summons and complaint therein to be served upon Harvey and upon the assignee. In the regular course of proceedings that state court rendered a decree of foreclosure and sale of the property on March 31, 1908, took possession thereof by means of a receiver, and pursuant to this decree the mortgaged property was sold, conveyed, and delivered by the proper officer of that court to Booth, the purchaser at the foreclosure sales. There is no averment in the petition and no evidence that any receiver, marshal, or other officer of the District Court ever demanded of Booth, or of Alexander, any of the mortgaged property, or that they were ever notified or aware of the proceedings in bankruptcy before the foreclosure sales were made and confirmed by the state court. It was not until April 28, 1908, that the trustee in bankruptcy was appointed, and during the foreclosure proceedings the title and the possession of the property was in the assignee, Alexander, subject to the lien of the mortgages. And it was not until September 16, 1908, more than four months after the foreclosure sales and the possession of Booth, that the trustee filed his petition for this order to show cause. That petition contains averments of the legal conclusions that Alexander, the assignee, was holding the mortgaged property during this time for the bankrupt, that the title to it vested in the trustee as of the date of the filing of the petition, that the officers of the state court and Booth, although the former took and delivered to Booth and the latter at the time the petition for the order to show cause was filed had possession of the property, were never entitled to possession, and that the foreclosure proceedings were void. The order issued upon this petition required the respondent to show: (1) Why the chattel mortgage and the certificate of sale of the real and personal property should not be avoided; (2) why he should not pay to the trustee the value of the mortgaged personal property that he bought at the foreclosure sale; (3) why he should not credit on his certificate of sale of the real estate the amount of the sales of personal property made by the mortgagor, Harvey, before the assignee, Alexander, took possession; and why he should not allow the trustee to redeem the real estate by paying the balance.

It is important that, before entering upon a discussion of the question of jurisdiction, we have clearly in mind the controversies which the trustee presented for adjudication by his petition for this order to show cause. He presented no controversy over the possession by the trustee, or by Booth, of the real or personal property, either for preservation, or for administration or distribution. He did not ask the possession, and the respondent was not called to show cause why he should not deliver the possession of any of the property to the trustee.

What the trustee asked by the petition was the final adjudication of (1) his claim to recover of the respondent for the latter's alleged conversion of the personal property which he bought at the foreclosure sale thereof, the legal damages in conversion, the value of the property converted at the time of its conversion, a claim triable by jury, and (2) his claim to redeem the real estate from the mortgage thereon, whose validity is not challenged, and the foreclosure thereof by paying less than the amount for which this property was purchased by Booth at the foreclosure sale, a claim judicable in a suit in equity on a bill to redeem. And the respondent, who, at the time the petition for the order to show cause was presented, was and for months had been in undisturbed possession of both the real and the personal property, claims adversely that he is not liable for the conversion of the personal property because he was the owner of it from the time of his purchase of it at the foreclosure sale, and that the real estate may not be lawfully redeemed from his purchase at the foreclosure sale by the payment of less than the amount which he paid at the sale therefor with lawful interest. Are these claims summarily judicable by the United States District Court against the protest of the respondent without action at law or suit in equity, or the pleadings or proceedings for the protection of the defendant prescribed by the law for the conduct of such suits?

The bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, 798 (U. S. Comp. St. Supp. 1909, pp. 1308, 1312), provides, in section 2, subdivision 7, that the District Courts shall have jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The exception in this subdivision is of cases involving those controversies between trustees in bankruptcy and adverse claimants specified in section 23 of the law. *Bardes v. Hawarden Bank*, 178 U. S. 524, 532, 533, 535, 536, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Wall v. Cox*, 181 U. S. 244, 246, 21 Sup. Ct. 642, 45 L. Ed. 845; *Bush v. Elliott*, 202 U. S. 477, 480, 481, 26 Sup. Ct. 668, 50 L. Ed. 1114. In the original law that part of section 23 which relates to this question read in this way:

"Jurisdiction of United States and State Courts.—(a) The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

But section 8 of the act of 1903 amended the latter subdivision by adding to it the words "except suits for the recovery of property under section 60, subdivision b, and section 67, subdivision e." Section 60, subdivision b, and section 67, subdivision e, relate to the avoidance of preferences given within four months of the filing of the pe-

tition in bankruptcy and the avoidance of conveyances and transfers of property made by the bankrupt within four months of the filing of the petition with intent to delay or defraud creditors. These subsections are irrelevant to the questions in the case in hand because no such preference, transfer, or conveyance is charged to have been made by the bankrupt within four months of the filing of the petition here, and the amendment of section 23b by the Act of 1903 gives to the District Court no jurisdiction of the controversies in the case at bar.

Section 70e read in the original act:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it is transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

Section 16 of the act of February 5, 1903, amended this subsection by adding thereto these words:

"For the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court, which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

But under section 23, as amended, the court of bankruptcy has no jurisdiction of controversies between trustees and adverse claimants arising under section 70e, "unless by consent of the proposed defendant." For it is only such controversies arising under section 60b and 67e that are by the amendment excepted from the requirement of such consent. *Hull v. Burr*, 153 Fed. 945, 948, 949, 950, 83 C. C. A. 61, 64, 65, 66; *Skewis v. Barthell* (D. C.) 152 Fed. 534, 536, 537; *Gregory v. Atkinson* (D. C.) 127 Fed. 183, 185; *Palmer v. Roginsky* (D. C.) 175 Fed. 883.

Hence the question in this case is whether the controversies between the contestants are controversies at law and in equity between the trustee and an adverse claimant, as distinguished from controversies arising in proceedings in bankruptcy, within the meaning of section 23 of the bankruptcy law. If they are the former, the bankruptcy court may not, and, if they are the latter, it may, adjudicate them summarily without subpoena, summons, pleadings, and evidence according to the principles, rules, and practice in actions at law and suits in equity.

Whether these controversies are the one or the other, the bankruptcy court undoubtedly had jurisdiction under the order to show cause (1) to investigate and determine whether or not it had, at the time the petition for the order to show cause was filed, or at any other time, actual possession of the property which is the source of the issues here in question (*First National Bank v. Title & Trust Company*, 198 U. S. 280, 284, 288, 289, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051), and (2) whether the respondent Booth had a substantial or only a frivolous and baseless adverse claim (*Mueller v. Nugent*, 184 U. S. 1, 15, 22 Sup. Ct. 269, 46 L. Ed. 405; *Louisville Trust Company v. Comingor*, 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413). It made this investigation, found that the property was not and had not been

in its possession as the property of the bankrupt, that Booth was in possession of and that he had an actual and substantial bona fide claim to it. In view of these findings, it dismissed the trustee's petition on the ground that it was without jurisdiction to determine the merits of the issues it presented. Its decree of dismissal seems to be justified by the decisions of the Supreme Court. *Bardes v. Hawarden Bank*, 178 U. S. 524, 532, 533, 538, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 24, 25, 26, 22 Sup. Ct. 293, 46 L. Ed. 413; *Skilton v. Codington*, 185 N. Y. 80, 85, 77 N. E. 790, 113 Am. St. Rep. 885; *Frank v. Vollkommer*, 205 U. S. 521, 522, 526, 528, 529, 27 Sup. Ct. 596, 51 L. Ed. 911; *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; *Harris v. First National Bank*, 216 U. S. 382, 385, 30 Sup. Ct. 296, 54 L. Ed. 528; *Babbitt v. Dutcher*, 216 U. S. 102, 113, 30 Sup. Ct. 372, 54 L. Ed. 402; *Bush v. Elliott*, 202 U. S. 477, 478, 481, 26 Sup. Ct. 668, 50 L. Ed. 1114; *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 29, 31, 40, 41, 27 Sup. Ct. 681, 51 L. Ed. 945.

The case in hand is presented to this court both by a petition to revise and by an appeal, but it is not alleged in the petition nor claimed in the assignment of errors that there was any error in the finding of the court below that neither the bankruptcy court nor any of its officers were ever in possession of the property which is the source of the controversies as the property of the bankrupt, either at the time the petition for the order to show cause was filed, or at any other time. The petition for the order to show cause itself shows that none of them was ever in possession of the mortgaged personal property and that the only possession of the store building the trustee ever had was that obtained by him from the assignee after the foreclosure sales to Booth, that this possession continued only a few days while he was selling the personal property that was not mortgaged, and that Booth claimed that during this time the trustee was in possession, not as trustee of the property of the bankrupt, but as his tenant, and demanded rent of him for his occupancy. An occupancy so fleeting and uncertain, without any order of the bankruptcy court to take the property occupied, or any consent of the adverse claimant that the trustee should take it as the property of the bankrupt, by virtue of his authority as trustee, was insufficient to condition or affect the determination of the question of jurisdiction now in hand. As was said of the possession of the proceeds of a sale of mortgaged property under an agreement of the parties and an order of the court by a temporary receiver in bankruptcy in *Frank v. Vollkommer*, 205 U. S. 521, 522, 523, 529, 27 Sup. Ct. 596, 599 (51 L. Ed. 911), this possession "was not in the circumstances in any sense sufficient to change the ordinary rule giving the state courts jurisdiction any more than the constructive possession in every case created by adjudication."

Again, this fugitive and immaterial possession of the store for the few days while he was selling the mortgaged personal property was voluntarily surrendered by him before this proceeding was instituted. And the time when possession conditions the jurisdiction of the bankruptcy court in such a case as that in hand is the time when the proceeding that challenges the title, right, or lien of the adverse claim-

ant is commenced, in this case September, 1908, and at that time Booth was in possession and the trustee was not. The case must therefore be determined on the established fact that Booth was in actual possession of the property which is the source of the controversies here in issue when this proceeding was commenced, and that neither the bankruptcy court nor any of its officers ever had any possession thereof as the property of the bankrupt.

The respondent was an adverse claimant. The time which conditions the determination of the question whether or not one is an adverse claimant is the time when the proceeding is instituted which controverts his claim, and that time was September, 1908. It is, however, immaterial in this case whether the time of determining the existence of the adverse claim and of the possession of the property is the time of the challenge of Booth's claim, or the time of the filing of the petition in bankruptcy. Booth had possession of and claimed title under his certificates of foreclosure to the personal property for the conversion of which this proceeding is brought, and to the real estate subject only to the right of redemption of the latter at the time the petition for the order to show cause was presented in September, 1908. But he was, at the time the petition in bankruptcy was filed, and ever after, an adverse claimant within the meaning of the bankruptcy law, because he claimed a mortgage lien upon this property made by the bankrupt more than four months before the petition in bankruptcy was filed. A claim of paramount or absolute title is not essential to the character of an adverse claimant. One who has a substantial claim to a lien created by a bankrupt upon his property before the petition in bankruptcy is filed is equally an adverse claimant with one who claims absolute title thereto.

In *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 281, 289, 291, 25 Sup. Ct. 693, 695 (49 L. Ed. 1051), the trustee in bankruptcy sought by a summary proceeding to try the validity of a lien on personal property created by a pledge of it by the bankrupt. Objection to the jurisdiction of the bankruptcy court was made and sustained on the ground that the lienholders were adverse claimants and that the validity of their liens could be tried only by plenary suits at law or in equity. The Supreme Court said that the distinction between controversies at law and in equity and controversies arising in a proceeding in bankruptcy "existed under the prior bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. *Smith v. Mason*, 14 Wall. 419, [20 L. Ed. 748]; *Marshall v. Knox*, 16 Wall. 551 [21 L. Ed. 481]; *In re Bonesteel*, 7 Blatchf. 175 [Fed. Cas. No. 1,627], Mr. Justice Nelson; *Knight v. Cheney*, 14 Fed. Cas. 760, Mr. Justice Clifford; *In re Ballou*, 4 Ben. 135 [Fed. Cas. No. 818], Mr. Justice Blatchford, then District Judge; *In re Marter*, 16 Fed. Cas. 857, Mr. Justice Brown, then District Judge. The present act was plainly framed in recognition of the principle of these cases." The bankruptcy court had found that the lienholders were in possession of

the property and were entitled to the proceeds of the sale of it. The Supreme Court decided that the decree of the District Court was not appealable, but remanded the case to that court, for further proceedings in conformity with its opinion, and said:

"In our view the District Court should have declined upon the findings to retain jurisdiction."

The proposition that the holder of a substantial claim to a lien created by a bankrupt upon his property is as much an adverse claimant as a claimant of absolute title, thus announced by the Supreme Court, is sustained by the following authorities: *Jaquith v. Rowley*, 188 U. S. 620, 621, 625, 626, 23 Sup. Ct. 369, 47 L. Ed. 620; *Harris v. First National Bank*, 216 U. S. 382, 383, 385, 30 Sup. Ct. 296, 54 L. Ed. 528; *In re McMahon*, 77 C. C. A. 668, 669, 147 Fed. 684, 685; *Skilton v. Codrington*, 185 N. Y. 80, 84, 85, 77 N. E. 790, 113 Am. St. Rep. 885; *Frank v. Vollkommer*, 205 U. S. 521, 522, 526, 529, 27 Sup. Ct. 596, 51 L. Ed. 911; *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 484, 485, 490, 51 C. C. A. 1; *In re Silberhorn* (D. C.) 105 Fed. 899. It is not denied that in the multitude of decisions relating to this subject authorities may be found to the contrary. *Goodnough Mercantile Co. v. Galloway* (D. C.) 156 Fed. 504, 509; *In re Briskman* (D. C.) 132 Fed. 201, 202. But they are borne down by the decisions of the Supreme Court and by the great weight of authority and of reason. The question of jurisdiction here in issue must, therefore, be decided on the facts that Booth was in the possession of the property which is the subject of the controversies, that neither the bankruptcy court, nor any of its officers, were ever in possession of it as the property of the bankrupt, and that Booth had an adverse claim to it that was neither frivolous nor colorable, but substantial and made in good faith.

How, then, may the trustee escape from the decisions that have been cited, from the declarations of the Supreme Court that the jurisdiction of the bankruptcy court summarily to determine claims to liens upon and title to property claimed as that of the bankrupt arises out of its actual possession of the property (*Murphy v. John Hofman Company*, 211 U. S. 562, 568, 569, 570, 29 Sup. Ct. 154, 53 L. Ed. 327; *First National Bank v. Title & Trust Co.*, 198 U. S. 281, 282, 291, 292, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 24, 25, 22 Sup. Ct. 293, 46 L. Ed. 413), and is exclusive of all other courts because the actual possession draws to it the legal custody of the property, although otherwise such claims would be cognizable by other courts, the opinion of the Court of Appeals of the Sixth Circuit, delivered by Judge, now Mr. Justice Lurton, in *Re McMahon*, 147 Fed. 684, 685, 77 C. C. A. 668, 669, that "the controlling fact in the matter of the jurisdiction of the bankruptcy court is that the actual possession of the premises upon which McMahon asserts an adverse lien was in Enos, the trustee in bankruptcy of Campbell, the bankrupt mortgagor," and the decision of the Supreme Court in *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 41, 27 Sup. Ct. 681, 685, 51 L. Ed. 945, that "when the petition in the present case was filed the bank had a valid lien upon these policies for the pay-

ment of its debt. The contracts under which they were pledged were valid and enforceable under the laws of New York where the debt was incurred and the lien created. The bankruptcy act did not attempt, by any of its provisions, to deprive a lienor of any remedy which the law of the state vested him with; on the other hand, it provided (section 67d) 'liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.' *Mueller v. Nugent*, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405], is not to the contrary as explained in *York Mfg. Co. v. Cassell*, 201 U. S. 344 [26 Sup. Ct. 481, 50 L. Ed. 782]?" Counsel for the trustee answer on the ground that the filing of the petition in bankruptcy followed by the adjudication without more gave the bankruptcy court constructive possession of the property and vested it with jurisdiction to determine all claims of title to or liens upon it, although the actual possession of it was never acquired by the bankruptcy court, or any of its officers, but was permitted to pass without notice of the proceedings in it from the assignee, who had possession of it when bankruptcy proceedings were instituted, to the state court and its officers, and through them and its decree of foreclosure sale to the purchaser at that sale where it rested when this proceeding was commenced. In support of this contention they call attention to these propositions and authorities:

(1) The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of controversies between the trustee and such claimants over liens upon and the title to property claimed by the trustee as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bankrupt. *Murphy v. John Hoffman Company*, 211 U. S. 562, 569, 570, 29 Sup. Ct. 154, 53 L. Ed. 327; *White v. Schloerb*, 178 U. S. 542, 545, 546, 548, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *In re Eppstein*, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; *Thomas v. Woods*, 173 Fed. 585, 587, 590, 97 C. C. A. 535, 537, 540, 26 L. R. A. (N. S.) 1180; *Mound Mines Company v. Hawthorne*, 173 Fed. 882, 886, 97 C. C. A. 394, 398; *Goodnough Mercantile & Stock Co. v. Galloway* (D. C.) 156 Fed. 504, 509; *In re McMahon*, 77 C. C. A. 668, 669, 671, 147 Fed. 684, 685, 687; *Whitney v. Wenman*, 198 U. S. 539, 549, 553, 25 Sup. Ct. 778, 49 L. Ed. 1157.

(2) Assignees for the benefit of creditors and receivers for the benefit of creditors in insolvency or in winding-up suits appointed after four months prior to the filing of a petition in bankruptcy are not adverse claimants, but are only representatives of the bankrupt and his unsecured creditors within the meaning of section 23 of the bankruptcy law, because they have and claim no lien upon, right to, or interest in the property in themselves for which they have given a valuable consideration. From them and from others holding the property of the bankrupt for him, including officers of other courts, who replevin or attach it without claim of lien upon, or right to, the prop-

erty in themselves, the bankruptcy court may by summary proceeding take the actual possession of the property and then, when it has thus acquired the actual possession, may by summary proceedings determine the validity of claims or liens upon and titles to it. *Mueller v. Nugent*, 184 U. S. 1, 14, 15, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Watts and Sachs*, 190 U. S. 1, 27, 23 Sup. Ct. 718, 47 L. Ed. 933; *White v. Schloerb*, 178 U. S. 542, 545, 546, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *Davis v. Bohle*, 1 Am. Bankr. Rep. 412, 415, 92 Fed. 325, 34 C. C. A. 372; *In re Hecox*, 164 Fed. 823, 825, 90 C. C. A. 627, 629; *In re Briskman* (D. C.) 132 Fed. 201; *In re Weinger, Bergman & Co.* (D. C.) 126 Fed. 875, 876; *In re Alton Mfg. Co.* (D. C.) 158 Fed. 367; *Randolph v. Scruggs*, 190 U. S. 533, 536, 23 Sup. Ct. 710, 47 L. Ed. 1165; *Matter of Cameron, Currie & Co.*, 20 Am. Bankr. Rep. 790. But this rule is inapplicable even in cases of a general assignment within four months of the proceedings in bankruptcy where the general assignee claims a right in himself to a lien upon or title to property assigned and taken possession of by him as assignee for commissions earned or moneys expended under the assignment. *Louisville Trust Company v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. Again, this rule is irrelevant in the case at bar in any event because no proceeding was ever commenced, or act done by the bankruptcy court, or by any of its officers, to take, and none of them ever did acquire, possession of the mortgaged property as the property of the bankrupt.

(3) Authorities are also cited to the effect that the bankruptcy court may by a like proceeding take away from a receiver of a state court, appointed to enforce a substantial claim of a mortgage or other lien upon the bankrupt's property, the actual possession thereof first acquired by him and may then proceed to adjudicate the claims to liens. *In re Kaplan* (D. C.) 16 Am. Bankr. Rep. 267, 144 Fed. 159; *In re Knight* (D. C.) 125 Fed. 35. But these decisions are overborne by the highest authority and by the reason of the case. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 24, 25, 22 Sup. Ct. 293, 46 L. Ed. 413; *Eyster v. Gaff*, 91 U. S. 521, 522, 525, 23 L. Ed. 403; *Metcalf v. Barker*, 187 U. S. 165, 172, 175, 176, 177, 23 Sup. Ct. 67, 47 L. Ed. 122; *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 484, 485, 490, 51 C. C. A. 1. In *Louisville Trust Co. v. Comingor*, a general assignment was made by the bankrupt within four months preceding the filing of the petition in bankruptcy, and the assignee thereby became an officer of the state court, holding and administering the trust under its orders. The bankruptcy court appointed a receiver, and the assignee turned over to him the balance of the proceeds of the sales he had made above his disbursements save \$3,398.90, which he retained for his fees as assignee, and \$3,200, which he had paid to his counsel for their services to him as assignee. In a summary proceeding the bankruptcy court ordered him to show cause why he should not pay these amounts over to its receiver, and, over his objection that it had no jurisdiction so to do, it determined the merits of the controversy and ordered him to pay the amounts to the trustee in bankruptcy. But the Supreme Court held that the assignee was an adverse claimant of these amounts, that the District Court was without juris-

diction to determine the merits of his claim in a summary proceeding, and said:

"We think it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights. *Marshall v. Knox*, 16 Wall. 556 [21 L. Ed. 481]; *Smith v. Mason*, 14 Wall. 419 [20 L. Ed. 748]. The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding. We have just held in *Mueller v. Nugent*, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405], that the District Court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed. And according to the conclusion reached the court will retain jurisdiction, or decline to adjudicate the merits."

And it affirmed a reversal of the order of the District Court which had been made by the Circuit Court of Appeals.

(4) Counsel also cite, and seem to place reliance upon, *Bryan v. Bernheimer*, 181 U. S. 188, 194, 195, 197, 21 Sup. Ct. 557, 45 L. Ed. 814, and *In re Knight* (D. C.) 125 Fed. 35, two cases in which the bankruptcy court in summary proceedings required purchasers from an assignee and a receiver to surrender to the bankruptcy court the property they had bought. But, as we have shown, the latter case is contrary to the decisions of the Supreme Court that a mortgagee, and hence an officer appointed in a suit to foreclose the mortgage to hold the property for the mortgagee, is an adverse claimant, and to its decisions that a bankruptcy court has no jurisdiction to determine the merits of the claims of such claimants in possession of the property to liens created thereon before the petition in bankruptcy was filed. Moreover, the purchaser from the receiver in the *Knight* Case had not paid for the property he bought, and that property was not covered by the mortgage, but was sold to him by the receiver as the general assignee. The decision in *Bryan v. Bernheimer* does not rule the question of jurisdiction at issue in this case because *Bernheimer* was the purchaser at a general assignee's sale and not under a sale under a decree of court to enforce a lien created before the petition in bankruptcy was filed, because *Bernheimer* consented to the form of procedure and requested the decision of the merits of his claim in the summary proceeding, and because he knew that a petition in bankruptcy had been filed before he voluntarily purchased at the assignee's sale. 181 U. S. 197, 21 Sup. Ct. 557, 45 L. Ed. 814. Booth, on the other hand, claims under a lien in existence more than four months before the petition in bankruptcy was filed. He has persistently challenged the jurisdiction of the bankruptcy court, and neither he nor the receiver appointed by the state court in the suit to foreclose his mortgage, nor the state court that rendered the decree and confirmed the sales to him, ever had any notice of the filing of the petition in bankruptcy, or of any of the proceedings thereunder, until after the sales under the foreclosure decree were made and confirmed. They were not parties to but strangers to those proceedings.

(5) But counsel insist here that the filing of the petition in bankruptcy "is a caveat to all the world and in effect an attachment and injunction," and they cite *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405, and the numerous opinions of the courts

that repeat this statement. But the later decisions of the Supreme Court adjudge that this statement applies only to parties who have no substantial claim of a lien upon or a title to the property of the bankrupt, and that, against those who have such claims of existing liens or titles when the petition in bankruptcy is filed, that filing is neither a caveat nor an attachment, that it creates no lien, and that until the bankruptcy court by some act of one of its officers takes actual possession of the property, or makes such claimants parties to the proceeding by some order or process, or notice of the proceeding comes to them, their liens, titles, and remedies are unaffected thereby, and they are strangers to the proceeding. *Jaquith v. Rowley*, 188 U. S. 620, 625, 23 Sup. Ct. 369, 47 L. Ed. 620; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 352, 353, 26 Sup. Ct. 481, 50 L. Ed. 782; *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 41, 27 Sup. Ct. 681, 51 L. Ed. 945.

(6) In cases in which the bankruptcy court finds it absolutely necessary so to do for the preservation of the estate, it may by summary proceedings take possession of the property claimed to belong to the bankrupt as his property, in whosoever's hands it may be, upon the filing of the petition in bankruptcy and before a trustee is appointed, under clause 3 of section 2 of the bankruptcy law. But the bankruptcy court took no such possession, nor any other possession of the property as the property of the bankrupt in the case in hand.

These propositions, the authorities above, and many others cited by counsel for the trustee and examined, fail to convince that the filing of the petition in bankruptcy and the adjudication, without any acquisition or demand of possession of the property by any officer of the bankruptcy court, or any notice of the proceeding therein to the mortgagee, the state court, its receiver, or the purchaser at its foreclosure sale, conferred upon it jurisdiction to determine by a summary proceeding the merits of Booth's adverse claim to the mortgage liens upon the property at the time the petition in bankruptcy was filed, or his adverse claim at the time the petition for the order to show cause was filed to the moneys which the trustee thereby seeks to recover from him for the conversion of the personal property, and to the real estate subject to the possible right of the trustee to redeem from the foreclosure sale thereof by paying the amount Booth paid therefor at that sale.

If the commencement of bankruptcy proceedings without more, without any act of the bankruptcy court, or any of its officers, to give notice to adverse claimants, or to reduce the property claimed to belong to the bankrupt to the possession of the officers of that court as his property, gives it constructive possession, and hence a legal custody that enables it to determine by summary proceedings the merits of adverse claims to liens and titles to such property in the actual possession of others, then no case could ever arise in which any other court could have jurisdiction by plenary suit to determine the merits of such claims, for in every case a bankruptcy proceeding is commenced, and the only ground on which the jurisdiction to determine summarily the merits of such claims is sustained is that the bankruptcy court's legal custody of the property excludes the juris-

diction of every other court and gives it the power to determine summarily all claims to liens upon, or interests in, the property in such custody. But this theory flies in the face of the settled rule repeatedly announced by the Supreme Court that the actual possession by the bankruptcy court is the indispensable condition of its exclusive and of its summary jurisdiction here. In *Bardes v. Hawarden Bank*, 178 U. S. 524, 536, 20 Sup. Ct. 1000, 1005 (44 L. Ed. 1175), the court held that the clause of section 23 of the bankruptcy law giving jurisdiction of controversies at law or in equity between trustees as such and adverse claimants to the Circuit Courts in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants "indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

In *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 281, 282, 291, 292, 25 Sup. Ct. 693, 49 L. Ed. 1051, there was a petition and an adjudication in bankruptcy, and the appointment of a receiver therein who filed a petition for the sale of certain property as that of the bankrupt, and alleged that he had taken possession thereof. Lienholders objected to the jurisdiction of the bankruptcy court and denied the possession of the receiver. The District Court found that he had no possession, and the Supreme Court declared that that finding was fatal to the jurisdiction of the District Court to determine summarily the merits of the claims of the lienholders.

In *Louisville Trust Company v. Cominger*, 184 U. S. 18, 24, 25, 22 Sup. Ct. 293, 46 L. Ed. 413, the property in controversy was in the possession of a general assignee in insolvency, to whom it had been assigned within four months of the filing of the petition in bankruptcy; but the decision of the Supreme Court was the same, that in the absence of actual possession taken from the general assignee by some officer of the bankruptcy court that court had no jurisdiction to determine summarily the adverse claim of the assignee to commissions and expenses on his behalf.

In *Murphy v. John Hofman Company*, 211 U. S. 562, 569, 570, 29 Sup. Ct. 154, 157 (53 L. Ed. 327), that court said:

"The jurisdiction in such cases arises out of the possession of the property and is exclusive of all other courts, although otherwise the controversy would be cognizable by them."

And after reviewing *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, and *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, declared that:

"The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of the res, as the property of the

bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of any other court."

Here is the touchstone of the exclusive and of the summary jurisdiction of the bankruptcy court to determine the merits of adverse claims to liens upon and titles to property claimed to belong to the bankrupt. It is the taking possession of the property, as the property of the bankrupt, by the act of some officer of the bankruptcy court, such as a referee, a receiver, or a trustee. This is the touchstone of its summary jurisdiction, unless indeed the declaration of the Supreme Court in *Babbitt v. Dutcher*, 216 U. S. 102, 113, 30 Sup. Ct. 372, 377, 54 L. Ed. 402, deprives it of the power to acquire this summary jurisdiction to determine adverse claims to liens upon and titles to property of the bankrupt created by mortgages and conveyances made prior to the filing of the petition in bankruptcy, even by acquiring possession of the property. In that case the Supreme Court declares that:

"Where there is a claim of adverse title to property of the bankrupt based upon a transfer antedating the bankruptcy, * * * a plenary suit must be brought either at law or in equity by the trustee in which the adverse title can be tried and adjudicated."

Under either rule the court below had no jurisdiction to determine in a summary proceeding the merits of the claim of Booth. Under the former rule that court had never through the act of its officers, such as referees, receivers, or trustees, taken possession of the property which is the source of the controversies here presented, as the property of the bankrupt. Under the latter rule a mortgage is a transfer, and the adverse claim of Booth is "based on a transfer antedating the bankruptcy," and "a plenary suit must be brought either at law or in equity by the trustee in which the adverse claim of title can be tried and adjudicated."

Nor is this result either unjust or unreasonable. More than four months before the petition in bankruptcy was filed Booth had mortgages upon the property that is the source of this controversy, and he had the right to foreclose those mortgages by a plenary suit in the state court for any default in payment of the debt. His mortgagor's assignment deprived him of none of those rights. That assignment was not under all circumstances illegal. It was voidable only in case bankruptcy proceedings were commenced within four months after it was executed. *Randolph v. Scruggs*, 190 U. S. 533, 537, 23 Sup. Ct. 710, 47 L. Ed. 1165. Such proceedings were commenced and an adjudication was made. But Booth was not a party to those proceedings. He had no notice of them and was a stranger to them. The bankruptcy court might, and upon a proper showing by the unsecured creditors who commenced the proceedings in that court it undoubtedly would, have taken possession of this property by its marshal, or by its receiver; but it was not required to, and it did not do so. If the liens upon the property were valid and amounted to the value of the mortgaged property, it was the duty of the bankruptcy court

to refuse to take possession of and to administer that property. In *re Harralson*, 179 Fed. 490, 492, 103 C. C. A. 70. It did not take possession, and more than a month after the adjudication Booth found his mortgaged property in the possession of the general assignee who was selling the personal property under the assignment to him. No receiver or trustee had been appointed in the bankruptcy proceedings, and the title and possession of the mortgaged property were in the assignee, for it is not until the appointment and qualification of the trustee that the title vests in him as of the date of the adjudication (section 70a), and there was no certainty that a trustee ever would be appointed. In fact, none was appointed until after the foreclosure sales had been made and confirmed by the state court. In this state of the case, Booth commenced his suit in the state court to foreclose the mortgage and served his process upon the bankrupt and the assignee, the only persons that had either title or possession of the mortgaged property. That court appointed a receiver who took from the assignee the possession of the mortgaged property and under the decree of foreclosure of that court sold it to Booth, and that court confirmed the sale. It was the intention of the bankruptcy law to allow adverse claimants to property, or parties having liens, to establish their rights by suits in courts of plenary jurisdiction and not to subject them to summary disposition in the bankruptcy court unless when the claims are frivolous or made in bad faith. *Bardes v. Hawarden Bank*, 178 U. S. 524, 537, 20 Sup. Ct. 1000, 1004, 44 L. Ed. 1175, where the Supreme Court quotes from its decision in *Eyster v. Gaff*, 91 U. S. 521, 525, 23 L. Ed. 403, under the act of 1867, the statements that:

"The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."

In *Hiscock v. Varick Bank*, 206 U. S., at page 41, 27 Sup. Ct., at page 685 (51 L. Ed. 945), the Supreme Court declared that:

"The bankruptcy act did not attempt by any of its provisions to deprive a lienor of any remedy which the law of the state vested him with."

To the same effect are *Skilton v. Codington*, 185 N. Y. 80, 85, 77 N. E. 790, 113 Am. St. Rep. 885; *Frank v. Vollkommer*, 205 U. S. 521, 522, 526, 529, 27 Sup. Ct. 596, 51 L. Ed. 911.

Conceding, however, but neither deciding nor admitting, that the bankruptcy court might have enjoined the suit in the state court, might have taken the mortgaged property from the receiver of that court and have administered it, the fact remains that it did not do so, and that it and the creditors who were parties to that proceeding must have known from the bankrupt's inventory of this property of the possession and the continuing sales of this mortgaged property by the assignee and the receiver of the state court. In *William Openhym & Sons v. Blake*, 157 Fed. 536, 539, 87 C. C. A. 122, 125, this court sustained, and the Supreme Court affirmed its decision, the demand of an adverse claimant founded on a rescission of a contract

and an identification of goods effected by an action in replevin against a receiver of a state court commenced after the commencement of bankruptcy proceedings, and said:

"While the bankruptcy court refrained from taking possession of the goods, the appellant should not suffer. The goods were in the custody of the law, and the acts of the state court and its receiver were presumably for the benefit of the estate."

The state court that conducted the foreclosure suit could not take notice of the bankruptcy proceeding. It was the duty of that court to proceed to a decree of foreclosure as between the parties before it until by some proper pleading or application in the case in that court it was informed of the bankruptcy proceedings. Having jurisdiction of the mortgagee, of the mortgagor, and of his grantee, who had title and possession of the mortgaged property, how can its decree be treated as void? *Eyster v. Gaff*, 91 U. S. 521, 525, 23 L. Ed. 403. Could the creditors who conducted the proceeding in the bankruptcy court, represented here by the trustee, sit by with knowledge of the possession of the mortgaged property in the receiver of the state court until four months after the mortgagee and the state court, that were strangers to the bankruptcy proceedings, sold and delivered the property under a foreclosure decree to a purchaser, without being estopped by that decree or sale, or by their silence and inaction? The merits of this case are not now here for consideration, but these questions demand answers from the court that eventually acquires jurisdiction to determine them, and the facts which have been briefly reviewed demonstrate the substantial basis of Booth's adverse claim and present persuasive reasons for the rule which assures a trial of the merits of that claim in a plenary suit at law or in equity under the rules of pleading, of practice and of evidence, that wisdom and experience have found most conducive to the discovery of the truth and the administration of justice.

The trustee, out of abundance of caution, presents this case by appeal and by petition to revise. The appeal must be dismissed because the order below was not reviewable by appeal, and the petition to revise must be dismissed because the order of the court below was right and it had no jurisdiction to determine in a summary proceeding the merits of the adverse claim of Booth.

It is so ordered.

MORRISDALE COAL CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. November 17, 1910.)

No. 1,352.

1. CARRIERS (§ 36*)—INTERSTATE COMMERCE ACT—REMEDY FOR VIOLATION—JURISDICTION OF COURTS.

The effect of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended, including the amendment by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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1149), as construed by the Supreme Court, is not merely to suspend the right of a shipper to maintain an action at law to recover damages resulting from an unreasonable rate or discriminating regulation or practice established by an interstate carrier while such rate or regulation remains in force, but to supersede such right entirely, and substitute therefor the remedy provided by the act itself; and the shipper's independent right of action in a court is not revived by the abolition of the unlawful rate or regulation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

2. CARRIERS (§ 36*)—INTERSTATE COMMERCE ACT—REMEDY FOR VIOLATION—JURISDICTION OF COURTS—DISCRIMINATION IN DISTRIBUTION OF CARS.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended, including the amendment by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), a party claiming to be injured by a discriminatory rule for the distribution of coal cars by an interstate railroad cannot maintain in a court of law an action for the recovery of damages before the Interstate Commerce Commission has investigated the case, and determined by its report that the rule is or was discriminatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

3. COURTS (§ 405*)—FEDERAL COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.

If a case in a District or Circuit Court is dismissed by final judgment or decree, either for want of jurisdiction of the parties or for want of power as a federal court to take jurisdiction of the subject-matter, without the decision of any other question, so that the only question presented by the record is such question of jurisdiction, the judgment or decree can be reviewed by the Supreme Court only, on appeal or writ of error, with a certificate from the lower court of the question of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1099; Dec. Dig. § 405.*]

Jurisdiction of Circuit Courts of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6, *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

4. COURTS (§§ 385, 405*)—FEDERAL COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS—SUPREME COURT.

If a case in a District or Circuit Court goes to trial or hearing on a question of jurisdiction and on the merits, and the question of jurisdiction is one concerning either the jurisdiction of the parties or the power of the court as a federal court to take jurisdiction of the subject-matter, the party dissatisfied with the final judgment or decree, whether plaintiff or defendant, may waive all errors on the merits, and take the case directly to the Supreme Court on appeal or error, with a certificate from the lower court of the question of jurisdiction, or he may assign errors on the merits and on the question of jurisdiction, and take the whole case on appeal or error to the proper Circuit Court of Appeals. In the latter proceeding, the Circuit Court of Appeals may certify the question of jurisdiction to the Supreme Court, and defer decision upon the other questions until the answer of the Supreme Court shall have been received.

[Ed. Note.—For other cases, see Courts, Dec. Dig. §§ 385, 405.*]

5. COURTS (§ 405*)—FEDERAL COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.

If a case in a District or Circuit Court is dismissed by final judgment or decree for want of jurisdiction, either after a hearing on a question of jurisdiction only or after a hearing or a trial on a question of jurisdiction and the merits, and the question of jurisdiction is not one concerning jurisdiction of the parties or concerning the power of the court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as a federal court to take jurisdiction of the subject-matter of the action, but is a question of jurisdiction relating to the general authority of the court as a judicial tribunal, the party dissatisfied with the judgment or decree, whether plaintiff or defendant, may have the judgment or decree reviewed on appeal or error by the proper Circuit Court of Appeals only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1099; Dec. Dig. § 405.*]

6. COURTS (§ 405*)—FEDERAL COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.

An action at law in a federal court was tried on the merits before a jury and a special verdict rendered, subject to the determination of the law by the court. Pending a motion for judgment on the verdict, defendant filed a motion to dismiss on the ground that the court was without jurisdiction of the subject-matter of the action, which motion was sustained and judgment rendered thereon for the defendant. *Held*, that such judgment was reviewable on a writ of error by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

Buffington, Circuit Judge, dissenting on the question of jurisdiction.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action at law by the Morrisdale Coal Company against the Pennsylvania Railroad Company. Judgment for defendant (176 Fed. 748), and plaintiff brings error. Affirmed.

William A. Glasgow, Jr., for plaintiff in error.

Francis I. Gowen, for defendant in error at first argument.

John G. Johnson, for defendant in error at second argument.

Before BUFFINGTON and LANNING, Circuit Judges, and BRADFORD, District Judge.

LANNING, Circuit Judge. This action was dismissed by the Circuit Court for want of jurisdiction. See 176 Fed. 748. It is an action by the plaintiff, Morrisdale Coal Company, to recover from the defendant, Pennsylvania Railroad Company, damages for the alleged violation of section 3 of the act to regulate commerce, approved February 4, 1887, which declares that:

"It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Act Feb. 4, 1887, c. 104, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155).

The claim of the plaintiff is that the distribution of coal cars amongst the mines of the Clearfield coal region of Pennsylvania, in which the plaintiff's mines are located, and the mines in other coal regions, during the years 1900 to 1905, inclusive, was unduly and unreasonably prejudicial and disadvantageous to the plaintiff. The rule under which that distribution was made was abolished by the railroad company on January 1, 1906, when it adopted and put into

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

operation a new rule of distribution. The action in this case was commenced March 3, 1908, more than two years after the rule of distribution now complained of had been abolished. The judgment of the Circuit Court was based on its understanding of the interpretation of the act to regulate commerce by the Supreme Court in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, and two or three other cases to be later referred to.

The Abilene Case was one in which an action was instituted to recover from the railroad company a sum of money equal to what the Abilene Cotton Oil Company declared was the excess over a reasonable charge which it had been compelled to pay to the railroad company for the transportation of cotton seed. It was conceded in the opinion of the Supreme Court that at common law such an action would lie, and that the act to regulate commerce should not be construed as taking away the right unless such construction was imperatively required. But taking into consideration the remedial provisions of the act, and the destruction of them which would result from allowing a court and jury, without reference to prior action by the Interstate Commerce Commission, to find an established rate to be unreasonable, it was decided that, if the power existed in both courts and the commission to hear originally complaints in cases of alleged preferences in rates, an established schedule of rates might be found reasonable by the commission and unreasonable by a court, and thus give rise to a conflict which would render the enforcement of the act impossible. Referring to section 9 of the act, which provides that any person claiming to be damaged by any common carrier subject to the provisions of the act may either make complaint to the commission or bring suit for the recovery of damages in any District or Circuit Court of the United States of competent jurisdiction, but that he shall not have the right to pursue both of such remedies, the court said:

"We think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can consistently with the context of the act be redressed by courts without previous action of the commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of."

The conclusion of the court was that a shipper seeking reparation predicated upon the unreasonableness of an established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone, it was declared, is vested with power originally to entertain proceedings for the alteration of an established schedule.

The plaintiff in the present case has primarily invoked redress through the Circuit Court, and not through the Interstate Commerce Commission. But since the opinion in the Abilene Case dealt with the rule of procedure for the recovery of damages in a case of alleged unreasonable rates, while in the present case we deal with the rule of

procedure for redress in a case of an alleged unreasonable regulation for the distribution of cars not in operation when the action was commenced, the question arises whether the construction of the statute which excluded the Abilene Case from the class of cases that may be primarily instituted in a court also excludes such a case as the one now in hand. To answer the question, we must determine, first, whether a distinction exists between the Abilene Case and the present case by reason of the fact that the action in the present case was not commenced until after the rule complained of had been abolished; and, if not, then, second, whether a distinction exists by reason of the fact that in the Abilene Case the rule complained of was one affecting rates, while in the present case it is one concerning the distribution of cars. As to whether the doctrine of the Abilene Case is inapplicable because the present action was not commenced until after the rule complained of had been abolished, it is contended, as we understand the plaintiff's argument, that at common law the Morrisdale Coal Company had a right of action against the Pennsylvania Railroad Company for damages sustained by the former company by reason of the enforcement against it of the old rule, and that the effect of the act to regulate commerce was merely to suspend that right while the rule was operative. Consequently, it is argued, the common-law right of action was revived on January 1, 1906, when the new rule was substituted for the old one. For present purposes, we deem it unnecessary to consider what right at common law, if any, the coal company may have had in the absence of the act to regulate commerce. While section 22 of the act has a clause which declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," it was held in the Abilene Case that that section could not "in reason be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the act." What was really done by the Pennsylvania Railroad Company on January 1, 1906, was to change or modify its rule for the distribution of cars. If a common carrier can defeat the power of the Interstate Commerce Commission to inquire into the reasonableness of its rates or regulations by voluntarily changing or modifying them, frequent changes or modifications would very seriously impair the efficiency of the commission and the purposes of the act. It is clear that Congress intended by the legislation embodied in the act to regulate commerce, and the amendments thereof passed prior to January 1, 1906, to confer upon the Interstate Commerce Commission very large powers in investigating the accounts and regulations of common carriers subject to the provisions of the act, and in requiring obedience to those provisions. So plenary is the administrative power of the commission that in the Abilene Case it was said that:

"Although an established schedule of rates may have been altered by a carrier voluntarily, or as the result of the enforcement of an order of the commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and award-

ing reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

It does not follow from what has been said that the commission was bound, under the statute as it existed prior to 1906, to investigate every claim for damages against a common carrier founded on a violation of the statute by the enforcement of a rule not in existence when the complaint was made. Section 16 of the act, as amended June 29, 1906, declares that:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order; provided, that claims accrued prior to the passage of this act may be presented within one year." Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165) as amended by Act June 29, 1906, c. 3591, § 5 (U. S. Comp. St. Supp. 1909, p. 1159).

Although previous to 1906 there was in the act no express limitation of time within which a proceeding before the commission should be commenced, before the amendment as well as after it a claim for damages might have been barred by lapse of time. An order by the commission to pay damages was but a recommendation. Payment could have been enforced only by an action in some court. As the court would regard the statute of limitations, the commission would do so. Such evidently was the view of the commission as to claims accrued before the amendments of 1906. *Cattle Raisers' Association v. C., B. & Q. R. Co.*, 10 Interst. Com. R. 83; *Missouri & Kansas Shippers' Association v. A., T. & S. F. Ry. Co.*, 13 Interst. Com. R. 411. The object of the limitation above quoted was to shorten the period within which claims for damages might be filed, saving, however, to any claimant whose claim had accrued more than two years before the amendment took effect a year within which to present his claim. "The intent of the proviso (in the amendment) is, in our opinion," said the commission in *Nicols, Stone & Myers Co. v. L. & N. R. Co.*, 14 Interst. Com. R. 199, 206, "to prevent such a construction of the preceding part of this provision as to cut off claims upon previously accrued causes of action as to which the two years had already run, or so nearly so that it would be impracticable for the claimants to present their claims within such period."

We conclude, therefore, that if, except for the act to regulate commerce, the *Morrisdale Coal Company* would have had a common-law right of action against the *Pennsylvania Railroad Company* for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time and the coal company given a substituted right of procedure before the commission, at any time within one year after June 29, 1906, for a determination by the commission of the question whether the rule complained of was discriminatory, unless, indeed, the commission has no power, under the act, to determine whether a rule for the distribution of cars is discriminatory.

In considering what power, if any, the commission has over rules for the distribution of cars, it is to be observed that section 3 of the act declares it to be unlawful for any common carrier to subject any party to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; that section 12 authorizes and requires the commission to execute and enforce the provisions of the act; that section 13 imposes on the commission the duty of investigating complaints concerning anything done or omitted to be done by any common carrier subject to the provisions of the act; that section 14 requires the commission to make a report in writing of each of its investigations and to embody therein its decision, order, or requirement, and, in case damages are awarded, the findings of fact on which the award is made; that section 15 authorizes and empowers the commission to investigate alleged unreasonable rate charges, and alleged unreasonable or discriminatory regulations or practices, and to prescribe what shall be just, fair, and reasonable; that section 16 provides that the commission, where upon a complaint filed under section 13 it has determined that the complainant is entitled to an award of damages, shall make an order "directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named"; that, if payment shall not be made within the time limit of the order, the complainant may commence an action in a Circuit Court of the United States for the recovery of his damages; and that on the trial the order of the commission "shall be prima facie evidence of the facts therein stated," and that section 10 of the amendment of March 2, 1889 (Act March 2, 1889, c. 382, 25 Stat. 862 [U. S. Comp. St. 1901, p. 3172]), authorizes Circuit and District Courts of the United States to issue writs of mandamus against common carriers in certain cases of violation of the act. Unless these provisions are to be restricted by construction, they seem to require the commission, not only to determine what are just and reasonable rate schedules, but, also, what are just and reasonable regulations and practices, and to ascertain and award damages, where they have been sustained, in every case in which it finds that an unjust rate schedule or an unjust regulation or practice has been in operation.

In *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292, a case in which the Pitcairn Coal Company applied in the first instance to the United States Circuit Court for the District of Maryland, after the amendments of 1906 had gone into effect, for a mandamus to compel the Baltimore & Ohio Railroad Company to alter its rule for the distribution of cars, Mr. Justice White, after referring to the *Abilene Case*, said:

"The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by section 15, as enacted by the amendment of June 29, 1906, the commission is empowered, indeed, it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the commission, if it finds reason so to do, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action."

And in construing section 23 (section 10 of the amendment of March 2, 1889, concerning the power of courts to issue writs of mandamus) with the other provisions of the act it was said:

"It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section in the cases which it embraces must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the Commission or enjoined by the courts."

Accordingly it was decided that the Circuit Court did not have original jurisdiction to determine the legality of the rule of the Baltimore & Ohio Railroad Company for the distribution of coal cars, and the petition for a writ of mandamus was ordered to be dismissed.

In *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280, the complaint was also against an alleged discriminatory rule for the distribution of coal cars. There application for redress was originally made to the commission. It made an order requiring a change in the rule. Subsequently the United States Circuit Court decreed an injunction against the enforcement of certain provisions of the commission's order. In the Supreme Court it was contended that while section 15 of the act, as amended in 1906, confers upon the commission authority upon complaint duly made to declare a rate or practice affecting rates illegal and to establish a new and reasonable rule or practice affecting such rates for a term not exceeding two years, it has no relation to complaints concerning preferences or discriminations that do not affect rates. In other words, the contention was that the commission had no authority to make an order requiring a change in the rule for the distribution of cars because such a rule does not affect rates. But it was declared that such a construction would frustrate the very purpose of the act. "The antecedent construction which the interstate commerce act had necessitated," said the court, referring evidently to the *Abilene Case*, "and the remedial character of the amendments adopted in 1906, all serve to establish the want of merit in the contention relied upon. In addition, to adopt it would require us to hold that Congress in enlarging the powers of the commission over rates had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this court has hitherto pointed out, it was the great and fundamental purpose of Congress to further." Accordingly the decree for injunction was reversed.

These cases conclusively establish the doctrine that the Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice

affecting rates, or an existing regulation or practice of any other kind affecting matters sought to be regulated by the act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, and that the courts cannot, by mandamus, injunction, or otherwise, control or modify any order of the commission made by it in the due performance of its merely administrative functions. Of course, there may be cases involving constitutional or legal rights in which judicial questions for the determination of the courts may be presented. It is also the established doctrine that, where the subject-matter of the complaint is an alleged unreasonable or prejudicial rate charge, the commission has the power, after determining that the charge was excessive, to award damages to the complainant. In such case the award would probably be a mere matter of calculation, and would be a sum equal to the difference between the charge found to be reasonable and the charge actually made by the carrier. In a case where the alleged discriminatory rule has relation to the distribution of coal cars, it is obvious that, if the commission sustains the complaint and prescribes what shall thereafter be a reasonable rule of distribution, an award of damages to the complainant for injuries sustained under the operation of the discriminatory rule cannot be a mere matter of calculation. It has therefore been held by a majority of the commission in *Hillsdale Coal & Coke Co. v. Pennsylvania R. R. Co.*, decided March 7, 1910, that it has no authority or power to assess and determine the measure of damages in such a case as the one now before us. The view of the majority of the commission was that the only damages it may assess are rate damages, or damages that can be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought to be charged. The same view had been previously expressed by a majority of the commission in *Joynes v. Pennsylvania R. R. Co.*, 17 *Interst. Com. R.* 361. "As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices," said the majority through Mr. Commissioner Harlan, "and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the commission is divided, as in the case to which we have just alluded (the *Joynes Case*). The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant; that being a judicial question for the courts." Inasmuch, however, as the case now before this court had been decided by the Circuit Court before the *Hillsdale Coal & Coke Company's Case* was decided by the commission, it concluded to hear argument on the question of damages to the end that, if the commission should award damages, the question of its power so to do might ultimately come before the courts for their consideration.

As already suggested, the letter of the statute seems to confer upon the commission the power to assess damages in every case of discriminatory practices. Its procedure in making the assessment constitutes no part of a judicial proceeding. In a court of law its findings and order are but *prima facie* evidence of the damages sustained. We do not find it necessary, however, to decide at present the question on which the members of the commission are divided. If judicial action shall be taken in the *Hillsdale Coal & Coke Company's Case*, the court

whose jurisdiction will be invoked will doubtless be the court from which our present case has come. We have not had the benefit of any argument on the question. It is not even suggested in the record or briefs of this case. For the present, it is sufficient for us to say that in our opinion a party claiming to be injured by a discriminatory rule for the distribution of coal cars cannot maintain in a court of law an action for the recovery of damages before the Interstate Commerce Commission has investigated the case and determined by its report that the rule is or was discriminatory. The determination of that question, at least, involves only the performance of administrative functions which, under the act, are to be performed by the commission, and not by any court. Whether after the commission has found such a rule to be discriminatory it is its duty to proceed to assess the damages, if any, which the complaining party has sustained, or whether they are to be recovered by an action in some court without any preliminary assessment by the commission, is a question which, since it has not been argued before us and since its decision is not necessary to the disposition of the case we now have in hand, we should not at present decide.

For the reasons stated, the judgment of the Circuit Court will be affirmed, with costs.

Supplemental Opinion.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. After the foregoing opinion had been prepared, but before it was filed, the defendant in error presented its petition for the dismissal of the writ of error on the ground that, under the provisions of sections 5 and 6 of the act establishing circuit courts of appeals (Act March 3, 1891, c. 517, 26 Stat. 827, 828 [U. S. Comp. St. 1901, p. 549]), we have no appellate jurisdiction of this case. The provisions referred to are:

"Sec. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: (1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. * * *

"Sec. 6. That the Circuit Court of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Courts and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

To the plaintiff's statement or declaration in the court below the defendant filed the pleas of the general issue and the statute of limitations. The case went to trial on the merits before the court and a jury, and a special verdict was taken in the following form:

"We find as a fact that the amount of the plaintiff's claim is correct and is contained in its Exhibit 2, and is

Principal	\$51,640.60
Int.	15,515.49
Total	<u>\$67,156.09</u>

"Said amount being ascertained in the way and manner in said exhibit set forth, together with the evidence explaining and referring to the same.

"If the court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the court the plaintiff may be entitled to recover.

"If, however, the court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

Concerning the requests to charge, the court said:

"The points of the plaintiff and defendant, respectively, are not answered specifically, and to such failure to answer the points specifically an exception is sealed both to plaintiff and defendant."

In none of the defendant's points was the question of the jurisdiction of the Circuit Court raised. Some time after the rendition of the verdict, and before judgment had been entered, the defendant moved that the Circuit Court dismiss the action for want of jurisdiction. That motion having been argued, and the Circuit Court having concluded that it should be granted, final judgment was entered "in favor of defendant and against the plaintiff in accordance with the opinion of the court." This judgment, which we will assume is one dismissing the action for want of jurisdiction, having been brought to this court by the writ of error which we are now asked to dismiss, the case was argued here on the assignments of error filed by the plaintiff without a suggestion from the defendant that we had no appellate jurisdiction of the case.

We think the following rules may be deduced from the adjudicated cases:

1. If a case in a District or Circuit Court is dismissed by final judgment or decree, either for want of jurisdiction of the parties or for want of power as a federal court to take jurisdiction of the subject-matter, without the decision of any other question, so that the only question presented by the record is such question of jurisdiction, the judgment or decree can be reviewed by the Supreme Court only, on appeal or writ of error, with a certificate from the lower court of the question of jurisdiction.

In support of the rule as thus stated, we refer to: *Davis & Rankin Bldg. & Mfg. Co. v. Barber*, 60 Fed. 465, 9 C. C. A. 79, where defendants demurred to plaintiff's declaration on the ground that the liability of the defendants upon the contract sued on was several and not joint, and that, being so construed, the claim against each defendant was less than the minimum sum necessary to give the court jurisdiction of the subject-matter of the action, and where, the court sustaining that view and dismissing the action for want of jurisdiction, the Circuit Court of Appeals of the Seventh Circuit, concluding that the case should have been taken directly to the Supreme Court, dismissed its writ of error for want of appellate jurisdiction. *Cabot v. McMaster*, 65 Fed. 533, 13 C. C. A. 39, where the action went to trial before the Circuit Court without a jury, and that court, without deciding the merits of the controversy, dismissed the action because the amount in controversy was less than the minimum sum necessary to give jurisdiction to the court, and where the Circuit

Court of Appeals of the Seventh Circuit dismissed the writ of error sued out of that court for want of appellate jurisdiction. *Chappel v. United States*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, where the writ of error from the Supreme Court to a District Court was general, and not limited to any definite question of jurisdiction, and brought up the whole case, including a question concerning the constitutionality of a law of the United States, and where the Supreme Court, while retaining appellate jurisdiction because under the provision of subdivision 5 of section 5 of the act establishing Circuit Courts of Appeals that court has such jurisdiction in any case in which the constitutionality of a law of the United States is drawn in question, said that, in order to bring a case within subdivision 1 of section 5 of the act, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to the Supreme Court. *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, where defendant moved to set aside the service of a summons upon him, and where, the District Court overruling his motion and entering final judgment against him because he chose to stand on his motion and not to plead, the Supreme Court refused to dismiss the writ of error, which had issued from it directly to the District Court, and disposed of the case on the error assigned. *Evans-Snider-Buel Co. v. M'Caskill*, 101 Fed. 658, 41 C. C. A. 577, where a plea to the jurisdiction of the Circuit Court was filed setting up that the defendant was not a resident of the district in which he was sued, the plea sustained and the action dismissed, and where the writ of error from the Circuit Court of Appeals of the Eighth Circuit was dismissed for want of appellate jurisdiction. *Excelsior Wooden-Pipe Co. v. Pacific Bridge Co.*, 109 Fed. 497, 48 C. C. A. 349, where, after issue had been joined on a bill to restrain infringement of certain letters patent, and after the defendants had applied to the Circuit Court for an order extending the time for the completion of their proofs, and the complainant had moved for a decree on the pleadings and papers filed in the case, the court called for argument on the question of its jurisdiction of the controversy, and subsequently, without deciding either of the motions previously made, dismissed the case for want of jurisdiction, on the ground that the case was one arising on contract, and not under the patent laws of the United States, and was not a case in which there was a diversity of citizenship, and where the Circuit Court of Appeals of the Ninth Circuit dismissed the appeal to that court because error could not be assigned on the Circuit Court's refusal to extend the defendants' time for completing their proofs, nor on its refusal to enter a decree upon the pleadings, and because upon the record the question of the jurisdiction of the Circuit Court only was in issue—a decision concurred in by the Supreme Court, which subsequently, in 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910, entertained an appeal and reversed the Circuit Court. *Hays v. Richardson*, 121 Fed. 536, 57 C. C. A. 598, where the dismissal was on the ground that the attachment of the defendant's property, by which the action was initiated, was illegal, and where, no other question being tried or decided in the court below, the writ of

error from the Circuit Court of Appeals of the Ninth Circuit was dismissed for want of appellate jurisdiction. The Steamship Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, where a District Court dismissed a libel for salvage services on the ground that there can be no lien for services in extinguishing a fire on a vessel while in a dry dock, and therefore because the District Court, as a court of admiralty, had no jurisdiction of the case, and where the Supreme Court on an appeal taken directly to it held that, as the question of the jurisdiction of the District Court as a federal court was the only question decided by it, the direct appeal to the Supreme Court was proper. The Alliance, 70 Fed. 273, 17 C. C. A. 124, where a District Court dismissed a libel in admiralty for want of jurisdiction without the decision of any other question, and where the Circuit Court of Appeals of the Ninth Circuit dismissed the appeal taken to that court on the ground that it should have been taken to the Supreme Court. St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196, 60 C. C. A. 80, where the Circuit Court dismissed the action because of invalid service of a summons upon the defendant and consequent want of jurisdiction of the defendant, and where the Circuit Court of Appeals of the Eighth Circuit dismissed the writ of error from that court on the ground that the Supreme Court had exclusive appellate jurisdiction of the case. Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1031, where the Circuit Court dismissed a bill because of want of jurisdiction of the defendant by reason of invalid service of the subpoena ad respondendum, and where the Supreme Court, on an appeal direct to it, retained appellate jurisdiction. Davis v. C., C. C. & St. L. Ry., 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, where the Circuit Court dismissed the action on defendant's objection that the attachment of its property was illegal, and that the court had therefore not acquired jurisdiction of the person or the property of the defendant, and where the Supreme Court refused to dismiss the writ of error which took the cause, with a certificate of the question of jurisdiction only, directly to that court, it saying that it concurred with the views of the Circuit Court of Appeals of the Eighth Circuit when, in dismissing the writ of error from that court in the same case, it declared that the case was not distinguishable in respect of its essential characteristics from one where there has been an illegal service of summons upon a defendant. Lehigh Valley Railroad Company v. Cornell Steamboat Company, Claimant of Steam Tug Ira M. Hedges (decided by the Supreme Court on November 7, 1910) 218 U. S. 264, 31 Sup. Ct. 17, 54 L. Ed. 1039, where a libel in admiralty was brought to enforce contribution for the damages resulting from a collision of vessels which the libellant, by reason of a common-law judgment against it, had been compelled to pay, where exceptions to the libel were filed, and the libel dismissed on the ground that the District Court, as a court of admiralty, had no jurisdiction to enforce such a contribution, where an appeal was taken directly to the Supreme Court, and where that court asserted its jurisdiction of the appeal.

2. If a case in a District or Circuit Court goes to trial or hearing on a question of jurisdiction and on the merits, and the question of jurisdiction is one concerning either the jurisdiction of the parties or the power of the court as a federal court to take jurisdiction of the subject-matter, the party dissatisfied with the final judgment or decree, whether he be plaintiff or defendant, may waive all errors on the merits, and take the case directly to the Supreme Court, on appeal or error, with a certificate from the lower court of the question of jurisdiction; or he may assign errors on the merits and on the question of jurisdiction, and take the whole case, on appeal or error, to the proper Circuit Court of Appeals. In the latter proceeding the Circuit Court of Appeals may certify the question of jurisdiction to the Supreme Court, and defer decision upon the other questions until the answer of the Supreme Court shall have been received.

In support of the rule as thus stated we refer to: *McLish v. Roff*, 141 U. S. 662, 12 Sup. Ct. 118, 35 L. Ed. 893, where the defendant filed a demurrer to the jurisdiction of the court below on the ground that, as it appeared by the complaint that the plaintiff and defendant were both citizens of the Chickasaw Tribe of Indians, the court had no jurisdiction of the parties, and also on the ground that the courts of that tribe had exclusive jurisdiction, where the court overruled the demurrer and required the defendant to proceed with the trial of the cause upon the merits, and where the Supreme Court, while dismissing the writ of error sued out of that court directly to the trial court on the ground that it was sued out before the entry of final judgment, said, however, that:

"When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case."

United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87, where the board of general appraisers imposed a gauging charge on imported molasses, where the Circuit Court reversed the board on the ground that such charge had been abolished, where on a writ of error from the Circuit Court of Appeals to the Circuit Court the United States assigned for error that the decision of the Board of General Appraisers was final and conclusive, and that the Circuit Court had no jurisdiction, and also assigned errors on the merits, and where the Supreme Court, after answering in the affirmative the question whether the Circuit Court had jurisdiction to hear and determine the points of law and fact involved in the decision of the Board of General Appraisers, which had been certified to the Supreme Court by the Circuit Court of Appeals, left the latter court to exercise appellate jurisdiction on the merits of the case. *Crabtree v. Madden*, 54 Fed. 426, 4 C. C. A. 408, where the complaint was demurred to because it did not state a cause of action, because the court had no jurisdiction of the parties, and because the plaintiff had no legal capacity to sue, where the demurrer was sustained and the action dismissed, where the writ of error brought up to the Circuit Court of Appeals the whole case, including the question whether the complaint stated a cause of action,

where, on a motion to dismiss the writ of error on the ground that the only question presented by the record was the question of jurisdiction of the court below and that the jurisdiction of the Supreme Court to review that question was exclusive, the Circuit Court of Appeals said that the writ of error brought up the whole case, and that, if it should be of the opinion that the court below had jurisdiction of the subject-matter and the parties, there would remain for its determination the question whether the complaint stated facts sufficient to constitute a cause of action, and where, accordingly, it refused to dismiss the writ, but proceeded to consider the case, and affirmed the lower court because that court had no jurisdiction. *Wirgman v. Persons*, 126 Fed. 454, 62 C. C. A. 63, where the decree in favor of the complainants was appealed by the defendants, and errors were assigned on the question of jurisdiction and on the merits, and where the Circuit Court of Appeals of the Fourth Circuit asserted its appellate jurisdiction, notwithstanding counsel on both sides stipulated, before the argument in the Circuit Court of Appeals was commenced, to confine themselves to the question of jurisdiction.

3. If a case in a District or Circuit Court is dismissed by final judgment or decree for want of jurisdiction, either after a hearing on a question of jurisdiction only or after a hearing or a trial on a question of jurisdiction and the merits, and the question of jurisdiction is not one concerning jurisdiction of the parties or concerning the power of the court as a federal court to take jurisdiction of the subject-matter of the action, but is a question of jurisdiction relating to the general authority of the court as a judicial tribunal, the party dissatisfied with the judgment or decree, whether he be plaintiff or defendant, may have the judgment or decree reviewed, on appeal or error, by the proper Circuit Court of Appeals only.

In support of this rule we refer to: *Smith v. McKay*, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731, where the defendants filed an answer to the complainant's bill, averring, amongst other things, that the complainant had a plain, adequate, and complete remedy at law, which objection was overruled, where the case was heard on pleadings and proofs and final decree rendered against the defendants, where appeal was taken directly to the Supreme Court, and error assigned on the refusal of the Circuit Court to dismiss the suit for want of jurisdiction, and where the Supreme Court dismissed the appeal on the ground that the objection was not the want of power in the Circuit Court to entertain the suit, but the want of equity in the complainant's bill. *Blythe v. Hinckley*, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783, where one of the grounds for dismissing the bill of the complainant was that the complainant's remedy was at law, and not in equity, and therefore not a decision that the Circuit Court had no jurisdiction as a court of the United States, and where the Supreme Court for that reason, and for another which did not involve the jurisdiction of the Circuit Court as a federal court, dismissed the appeal that had been taken directly to the Supreme Court. *Louisville Trust Co. v. Knott*, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159, where a Circuit Court refused to order its receiver to surrender his possession of certain property to a receiver appointed by a state court, the single question

being which of the two courts had acquired prior jurisdiction, and where the Supreme Court dismissed the appeal taken to that court on the ground that the case presented no question involving the jurisdiction of the Circuit Court as a federal tribunal, but simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other. *Bache v. Hunt*, 193 U. S. 523, 24 Sup. Ct. 547, 48 L. Ed. 774, where on an intervening petition filed by Hunt in a foreclosure suit in which Bache was a defendant Bache filed a plea to the jurisdiction of the court over the subject-matter of the petition and of his person, where the Circuit Court overruled the plea and rendered a decree against Bache, and where the Supreme Court dismissed the appeal taken directly to that court, saying that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal, and not in respect of its power as a court of the United States, and that the established rules of practice as to bringing in parties to ancillary or pro interesse suo proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. *United States v. Larkin*, 208 U. S. 333, 28 Sup. Ct. 417, 52 L. Ed. 517, where a District Court dismissed the information filed for the forfeiture of certain jewels on Larkins' plea to the jurisdiction of the court that the jewels had been wrongfully taken by an agent of the government into the district where the information was filed, and where the Supreme Court dismissed the writ of error which had issued out of that court directly to the District Court on the ground that the question involved was not the jurisdiction of the United States courts as such, but whether the District Court in which the information was filed, or the District Court in which the jewels were first found, had jurisdiction.

The first of these rules applies to a case where the lower court decides nothing but a question of jurisdiction. That question may be one concerning jurisdiction of the parties (as where no valid service of a summons upon a defendant is made, or where the initial step in an action is an illegal attachment of the defendant's property), or it may be one concerning the power of the lower court, as a federal court, to take jurisdiction of the subject-matter of the action (as where there is no proper diversity of citizenship of the parties, or where the matter in dispute does not exceed in value the sum of \$2,000, or where there is a question as to whether a claim may be enforced in a court of admiralty).

The second rule applies to a case where there has been a decision in the lower court on the merits and also on a question concerning that court's jurisdiction of the parties, or concerning its power to take jurisdiction of the subject-matter of the action.

The third rule applies to a case where the lower court has decided a question of jurisdiction, either with or without deciding the merits; such question of jurisdiction being one concerning its general authority as a judicial tribunal, and not a question concerning jurisdiction of parties or of subject-matter, as, for example, whether a remedy should be sought at law or in equity, or which of two courts having concur-

rent jurisdiction first acquired jurisdiction, or which of two federal courts of equal rank, but in different localities, has jurisdiction.

The case now in hand went to trial on the merits. The jury passed upon the merits by rendering a special verdict awarding damages for the plaintiff against the defendant, if the court should be of the opinion that the law was with the plaintiff, and, if it should be of the opinion that the law was with the defendant, then giving its verdict to the defendant. The Circuit Court concluded that the Interstate Commerce Commission had original jurisdiction in the case, and therefore it refused to enter judgment for the plaintiff on the special verdict, and entered judgment dismissing the action for want of jurisdiction. The question of jurisdiction was one concerning the jurisdiction of the Circuit Court as a federal court. Errors were assigned on the question of jurisdiction and also on the merits. The errors assigned were that the Circuit Court erred (1) in dismissing the action for want of jurisdiction; (2) in dismissing the action for want of jurisdiction and entering judgment in favor of defendant; (3) in not entering judgment in favor of the plaintiff for the sum of \$67,156.09; (4) in not affirming the plaintiff's first point by charging the jury as to the duty of the Pennsylvania Railroad Company concerning the distribution of cars; and (5) in not affirming the plaintiff's second point by charging the jury as to the method of ascertaining the damages sustained by the plaintiff. In the argument in this court on the errors assigned counsel for the plaintiff contended that the Circuit Court had jurisdiction of the case, that the defendant's rule for the distribution of cars illegally discriminated against the plaintiff, and that the damages sustained by the plaintiff were the full amount named in the special verdict. The defendant, on the other hand, contended that the Circuit Court did not have jurisdiction of the case; that, if it did, still the plaintiff offered no evidence from which a jury could find that it did not receive all the cars it would have been entitled to under such a rule as that for which it contended; that the defendant's rule for the distribution of cars was not illegally discriminatory; and that the method by which the damages were estimated by the jury was erroneous. Both parties argued at length both the question of jurisdiction and the questions concerning the merits. This they properly did, because those questions were presented by the assignments of error. Had we concluded that the Circuit Court erred in dismissing the action for want of jurisdiction, it would have been our duty, not only to reverse the judgment of the Circuit Court, but to decide whether the plaintiff was entitled to judgment on the special verdict. The case comes therefore within the provisions of the second rule above given. The defendant had the right to assign errors on the merits and on the question of jurisdiction, and to bring the whole case to this court. This it did. Consequently the case is properly here and the motion to dismiss the writ of error must be denied.

BUFFINGTON, J. (dissenting). As this court's own jurisdiction over this case is here involved, and I firmly believe it has no jurisdiction, I deem it my duty to record my dissent. In the court below the Morrisdale Coal Company brought suit against the Pennsylvania Rail-

road. The railroad was an interstate carrier, and the plaintiff coal company required cars for interstate coal shipments. The Pennsylvania Railroad furnished coal cars to different coal regions, over its system, one of which was the Clearfield region, in which plaintiff's mines were located. Plaintiff alleges the railroad "failed and refused to assign to the Clearfield coal region for use therein the fair proportion of the entire number of coal cars of said railroad company to which said region was entitled." That raised the question of the regulation of car division between different coal regions of the Pennsylvania Railroad system. The daily production capacity of the Clearfield region was rated at 18,000 to 19,000 tons of coal, and the statement alleged the railroad failed to furnish on demand "the plaintiff's due proportion or daily allotment of cars which were or should have been assigned to shippers in the said Clearfield coal region for the transportation of coal." The plaintiff therefore alleged that by the failure on the part of the defendant to give the plaintiff its proper allotment of cars during the period aforesaid, undue and unreasonable preferences and advantages were given to the other mines and collieries in the said Clearfield coal region, and to shippers in other coal regions, over the plaintiff, in that said mines and collieries were thereby accommodated with car supply and facilities for the shipment of coal greater than those which should be properly allotted to them when compared with the facilities allotted to the plaintiff. The case proceeded to trial, and on November 17, 1909, a special verdict for the plaintiff was found, subject to the court's determination of the law. On November 29th the plaintiff moved for entry of judgment on this verdict. Pending this motion, which was never disposed of, the defendant moved the court on January 31, 1910, to dismiss the action for want of jurisdiction; its motion being as follows:

"And now, this 31st day of January, 1910, the defendant moves the court to dismiss this action for want of jurisdiction to entertain the same."

This motion to dismiss the court below in an opinion reported at 176 Fed. 748, and in which the question of jurisdiction alone was discussed, held the suit involved the proper car regulation and car distribution of the railroad, that this was an administrative question for the Interstate Commerce Commission, and the Circuit Court was without jurisdiction. Its opinion, which, as we have said, neither discussed nor disposed of the merits of the case or the plaintiff's motion for judgment, concluded with the statement:

"The defendant's motion to dismiss the suit for want of jurisdiction must be granted."

Thereafter the defendant filed a *præcipe* as follows:

"Enter judgment in the above case in favor of the defendant and against the plaintiff in accordance with the opinion of the court filed."

And in pursuance thereof judgment was entered as follows:

"And now, this tenth day of February, 1910, in accordance with *præcipe* filed, judgment is hereby entered in the above-entitled case in favor of the defendant and against the plaintiff in accordance with the opinion of the court."

On motion of plaintiff's counsel, the court allowed the plaintiff the only exception asked for, viz.:

"Exception to the action of the court in granting defendant's motion to dismiss this suit for want of jurisdiction."

It will thus be seen that the court heard, decided, and decreed no question save that of jurisdiction, and was in a position to certify that the only question in the case was one of jurisdiction. Under such facts to what court did a writ lie to review such jurisdictional judgment. If plain words can point out plain paths, section 5 of the act of March 3, 1891, makes the Supreme Court in such case the sole reviewing tribunal, for it provides:

"That appeals or writs of error may be taken from the district court or from the existing Circuit Courts direct to the Supreme Court in the following cases; (1) In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Now the case in hand falls literally within this provision; the jurisdiction of the court below was in issue; it was challenged by a motion to dismiss for want of jurisdiction; that issue was decided; a judgment was entered dismissing the case for want of jurisdiction, and exception was taken to the judgment dismissing for want of jurisdiction. *United States v. Jahn*, 155 U. S. 112, 15 Sup. Ct. 39, 39 L. Ed. 87, was a case where, as here, jurisdiction was in issue, and the decision was against jurisdiction. The case went direct to the Supreme Court and was said by that court in speaking of its jurisdiction to review under section 5:

"If in such a case a final judgment were rendered because of want of jurisdiction, that judgment could be reviewed by this court upon a certificate of the circuit court, while if the jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction might be brought up directly, the Circuit Court of Appeals would undoubtedly have jurisdiction to review the case upon the merits."

The extract quoted above covers exactly the case in hand. The court below entered judgment for the want of jurisdiction, and therefore the writ lay direct to the Supreme Court. Had the Circuit Court sustained jurisdiction and passed on the merits, the defendant would have had alternative remedies, but that state of facts never arose, hence the writ lay to the Supreme Court and that court alone. The authority of *United States v. Jahn* has not been questioned or qualified in any subsequent case. It is true, as stated by Judge Sanborn in *St. Louis Co. v. American Co.*, 125 Fed. 199, 60 C. C. A. 83, there are expressions in some later opinions of the Supreme Court that the jurisdiction by section 5, *supra*, is "the jurisdiction of the Circuit and District Courts as such (*Mexican Central Ry. Co. v. Echman*, 187 U. S. 432, 23 Sup. Ct. 212, 47 L. Ed. 245), and that 'appeals or writs of error may be taken directly from the circuit court to this court in cases in which the jurisdiction of those courts is in issue—that is, their jurisdiction as federal courts—the question

alone of jurisdiction being certified to this court' (Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783)," but as he well says:

"* * * These statements have never been crystallized into a settled proposition of law, and they have never formed the basis of any decision. * * * That section does not limit the question of which it treats to those which condition the jurisdiction of the federal courts as such as distinguished from those which condition the jurisdiction of all courts. It is broad and general in its terms. It contains no exception, and, as the congress made no exception, the legal presumption is that it intended to make none, and it is not the province of the courts to enact one. * * * Where the complainants failed in the Circuit Court and the Supreme Court refused to review their failure, they failed not for want of jurisdiction in the trial court, but for want of equity, for want of facts constituting causes of action, for want of merits in their cases. * * * Our conclusion is that the Supreme Court has jurisdiction under section 5 of the act creating the Circuit Courts of Appeals to review by writs of error or appeals taken directly to that court from the United States Circuit Court every question which involves the jurisdiction of the latter court, whether that question is peculiar to the federal courts as such or common to all courts. * * * The result is that this writ of error was sued out to review a judgment of a Circuit Court which sustained an objection to its jurisdiction and dismissed the action on that ground, that the Supreme Court had jurisdiction to review that judgment by writ of error direct to the Circuit Court, and therefore this court has no such jurisdiction."

This decision was cited and followed in the Eighth Circuit and a writ of error dismissed in *Davis v. Cleveland Co.*, 156 Fed. 775, 84 C. C. A. 453, the court saying the Supreme Court alone had power to review the case. The latter case was then taken to the Supreme Court, which court refused to dismiss the writ and decided the case as reported in 217 U. S. 172, 30 Sup. Ct. 463 (54 L. Ed. 708, 27 L. R. A. [N. S.] 823). In its opinion that court approved the decision of the lower court, saying:

"For these propositions the court cited *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 428 [25 Sup. Ct. 740, 49 L. Ed. 1111]; *United States v. Jahn*, 155 U. S. 109 [15 Sup. Ct. 39, 39 L. Ed. 87]; *St. Louis Cotton Compress Co. v. American Cotton Co.*, 125 Fed. 195 [60 C. C. A. 80]; and, as we have seen, dismissed the case on the ground that this court alone had the power to review the decision of the circuit court. We concur in the views of the Circuit Court of Appeals, for which also may be cited *Kendall v. American Automatic Loom Co.*, 198 U. S. 477 [25 Sup. Ct. 768, 49 L. Ed. 1133]."

In view, therefore, of the Supreme Court exercising jurisdiction in the *Davis* and *Kendall* Cases which involved questions common to all courts, and of its citing in support of its action *St. Louis Co. v. American Co.*, we are warranted in regarding the holding in the latter case that section 5 "does not limit the questions of which it treats to those which condition the jurisdiction of the federal courts as such as distinguished from those which condition the jurisdiction of all courts" as a construction approved by the Supreme Court.

In the light of these decisions, it is clear the Supreme Court and that court alone could review the judgment in this case, and that the motion in the Circuit Court of Appeals to dismiss for want of jurisdiction should prevail. Its refusal to dismiss is justified by the majority opinion on the ground that the plaintiff brought the case here for review on the merits as well as the jurisdictional question. The answer to that contention is simply that the case is not before

this court on the merits, and this for the simple reason that the court below did not pass on the merits, and there is therefore nothing to review but its judgment against the plaintiff for want of jurisdiction. The error of the assumption that the case is before this court for review of the merits is shown by the fact that this court does not dispose of the merits or discuss them in its opinion, but affirms the judgment of the court below, and holds it rightly decided the case on the question of want of jurisdiction. It seems to me the plain duty of the Court of Appeals to dismiss this case for want of jurisdiction, and, because it has assumed a jurisdiction the law vests in the Supreme Court alone, I am constrained to record this my dissent.

AMERICAN STEEL & WIRE CO. v. TYNAN et al.

(Circuit Court of Appeals, Third Circuit. January 28, 1911.)

No. 81 (1,246).

1. JUDGMENT (§ 256*)—FORMAL REQUISITES—CONFORMITY TO STATUTE.

Under Act Pa. May 12, 1897 (P. L. 62), which provides that, when a right of action for a wrongful injury to the person of a child shall accrue to the child and also to the parent, a single action shall be brought in the names of both, in which separate verdicts shall be returned determining the right of each and separate judgments entered thereon, a single judgment rendered in such a case for the sum of the two separate verdicts cannot be sustained in view of the plain requirement of the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

2. MASTER AND SERVANT (§ 286*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.

Where a minor servant was required by the master to work on an elevated platform supported at one corner by a rope which had been in use for a year without inspection, and the rope broke, causing the employé to fall and receive an injury, there was sufficient evidence of the master's negligence to warrant the submission of that question to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

3. PARENT AND CHILD (§ 7*)—RIGHT OF MOTHER TO SUE FOR INJURY TO MINOR CHILD.

Under the common law as ruled in Pennsylvania, a mother has no right of action for an injury to a minor son not resulting in death.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 91; Dec. Dig. § 7.*]

4. PARENT AND CHILD (§ 7*)—RIGHT OF MOTHER TO SUE FOR INJURY TO MINOR CHILD—PENNSYLVANIA STATUTE.

Act Pa. June 26, 1895 (P. L. 316), relating "to husband and wife who are the parents of minor children, enlarging and extending the power, control and authority of the mother over their minor children under certain circumstances," provides in section 1 "that hereafter a married woman who is the mother of a minor child, and who contributes by the fruits of her own labor or otherwise toward the support, maintenance and education of her said minor child, shall have the same and equal power, control and authority over her said child and shall have the same and equal right to its custody and services as is now by law possessed by her husband, who is the father of said minor child." As construed by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Supreme Court of the state, such provision gives a wife and mother the right to sue for injury to her minor child when she has been deserted by her husband and was supporting the child at time of the injury; but it cannot be given a construction broad enough to authorize such an action by a mother who became a widow and has married again, and who was not contributing to the support of the minor at the time of his injury.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 7.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Charles Tynan and another against the American Steel & Wire Company. Judgment for plaintiffs, and defendant brings error. Reversed in part.

W. A. Seifert and Samuel McClay, for plaintiff in error.

Thos. M. & Rody P. Marshall, for defendants in error.

Before GRAY and LANNING, Circuit Judges, and J. B. McPHERSON, District Judge.

J. B. McPHERSON, District Judge. In the present suit, which was brought to recover damages for personal injury suffered by Charles Tynan, a minor servant of the American Steel & Wire Company, the minor and his mother were joined as plaintiffs. This procedure is directed by the Pennsylvania act of May 12, 1897 (P. L. 62), which provides, in its first section, that:

"Whenever any injury, not resulting in death, shall be wrongfully inflicted upon the person of a child, and a right of action for such wrongful injury accrues to the child and also to the parent, these two rights of action shall be redressed in only one suit, brought in the names of the parent and the child."

The second section declares that:

"Separate verdicts shall be rendered, one verdict determining the right of the child, and the other verdict determining the right of the parent, and separate judgments shall be rendered thereon with the right to separate executions."

The command of this section was not fully obeyed in the court below; for, although the jury found separately in favor of the minor and of his mother, only one judgment was entered, and this was for the sum of the two verdicts. Considering the plain language of the statute, this judgment cannot be sustained. But as a reversal merely for this reason would only result in the entering of two judgments, and as such entry would probably be followed by a new writ, or writs, of error, we shall treat the record as if the proper entries had been made, and both judgments were now before us.

The gravamen of the action is the company's negligence, and this was provisionally established by the verdicts. But, as a motion was duly made under the Pennsylvania act of April 22, 1905 (P. L. 286), for judgment in favor of the company upon the whole record notwithstanding the verdicts, the court's refusal of the motion requires us to consider whether there was any evidence of the company's negligence that ought to have been submitted to the jury. So far as the contributory negligence of the minor is concerned, it seems to be conceded that he is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not to be charged therewith. No argument was presented upon that point, and we therefore pass it without further comment. And we think that not much more need be said concerning the question upon which stress was laid, namely, whether the jury should have been allowed to pass upon the averment that the company had been negligent. A review of the testimony has satisfied us that this averment was supported by evidence that required its submission, and that the court's instructions upon this subject were correct. The minor was ordered to do certain work upon an elevated platform, which was supported at one of its four corners by a rope that was made of wire and some variety of cord. It had been in place for about a year, and its situation was such that, in addition to the strain that was put upon it by use, it might also be somewhat weakened by chafing, although the chafing was probably not severe. Moreover, it was exposed to escaping steam, and there was evidence that rope such as this, if subjected to damp, might not be safe for more than a year. It was not proved that the rope had been inspected since it was first put up, although there was testimony that it had been tested after the accident and had then showed a satisfactory degree of strength. But the rope did break, and the minor was thrown to the ground; and, under the evidence just referred to, we think it was for the jury to say whether the company had fulfilled its obligation to exercise due care in furnishing and maintaining a reasonably safe place for the work of its servants. Upon this branch of the case the trial judge would not have been justified in giving a binding instruction in favor of the company.

The difficulty arises upon the charge concerning the measure of damages. No points upon this subject were presented by either party, and therefore the court was only bound to give such instructions as would furnish adequate and correct guidance to the jury. So far as relates to the instructions about the damages that might be awarded to the minor, there is no assignment of error to their accuracy or sufficiency that need be noticed, and for this reason, if for no other, they need not be considered. But exceptions were duly taken, and error is assigned, to the rulings that sustained the mother's right to recover, and the question thus raised must receive attention. Her right rests wholly upon the Pennsylvania act of June 26, 1895 (P. L. 316). If the common law, as it is understood in this state, were to determine the question, it would undoubtedly deny the right. This proposition is settled by *Railway Co. v. Stutler*, 54 Pa. 375, 378 (93 Am. Dec. 714), where a mother sued to recover damages for injury to her minor son, not resulting in death, but was refused relief; the court saying:

"The son, a young man 18 years of age, lived with his mother, and occasionally earned money for her by small jobs of labor, and she nursed him after he was hurt, and furnished medical attendance. The evidence was sufficient, had the action been by a father, to establish the relation of master and servant, and it is in right of such a relation, rather than in her character of parent, that the mother claims damages in this action. There was no evidence of an express contract between the mother and son by which she was entitled to his services, and at law she has no implied right to them.

"A father is bound by law to support and educate his children, and is entitled to the correlative right of service; but a mother, not being bound to the duty of maintenance, is not entitled to the correlative right of service, and

the relation of mistress and servant can be constituted between them only as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it. *South v. Denniston*, 2 Watts [Pa.] 477; *Leech v. Agnew*, 7 Barr [7 Pa.] 21."

The court added, in answer to the argument that her right to recover might be based on her obligation under the poor laws to support her son in case he should need help:

"By the act of June 16, 1836, the mother of every poor person not able to work, if she be of sufficient ability, may be charged to relieve such poor person at a rate to be prescribed by the court of quarter sessions, under pain of forfeiting a sum not exceeding \$20 a month; but her right to such an action as the present cannot be rested upon this contingent liability. It is true that the injury her son received increases the probability of his becoming chargeable upon her under the statute; but no liability has yet attached, and no statutory proceeding has yet been instituted. If the action was grounded upon such a statutory liability, it would be set forth in the declaration, and the damages would be limited to the statutory measure."

And the opinion concludes:

"Thus, then, this case stands: An action by a mother who has no common-law right to the services of her son and no special contract which constitutes her his mistress. But, if she really stood in that relation to him, her action is founded upon breach of a contract to which she was a stranger and which was not made in her service, as that in *Alton's Case* (Jurist of August, 1865, p. 672) was made in the course of the master's business. It belongs not to the category of actions for seduction, and no precedent has been shown to justify it, whilst the English judges declare that in that country, so fertile in precedents, not one exists for such an action. When to these considerations we superadd the legislation which, both in England and in this country, has been necessary to give mothers a right of action for negligence that causes the death of a child, it seems very obviously our duty to declare that the action ought not to have been sustained, and that the judgment must be reversed."

If, however, the injury had resulted in death, it was held by the same court at the same term (*Railroad Co. v. Bantom*, 54 Pa. 495, 497) that the mother would have had a right of action—not at common law, however, but solely by the force of the Pennsylvania act of 1855 (P. L. 309), as the court explained:

"Thus far the Legislature have compelled us to go. We keep step with them, and limit the mother's right to a case of death, and not of maiming, because they have changed the rule of the common law no further than this. Where the injury does not result in death, we decided at the present term, in *Railway Co. v. Stutler*, ante, page 375 [93 Am. Dec. 714], that the mother has no right of action for loss of a son's services; but where it does result in death we sustain the action by virtue of the act of Assembly. For the discrepancy of these rules we are not responsible."

These cases were cited to the court in *Kelly v. Traction Co.*, 204 Pa. 624, 626, 54 Atl. 482, 483, and were recognized as authority for the proposition that where a minor is injured, and both parents are living, the father alone can sue. Upon this point the court said:

"When the boy was hurt, his father, Patrick Kelly, was living. The suit was originally brought by the father in his own right and as the next friend of his son. The cause of the father's action was the alleged negligence of the traction company, resulting in injuries to the minor son, in consequence of which his services would be lost to the father during his minority. The cause

of action arose May 6, 1897. At that time there was nothing for which the mother could have sued, and the appellant was guilty of nothing subsequently which gave her a cause of action against it. The boy was not killed, but simply injured, and in such a case the cause of action is in the father alone, as we have held, for reasons which need not be repeated here, in *Fairmount & Arch Street Passenger Railway Co. v. Stutler*, 54 Pa. 375 [93 Am. Dec. 714], and in *Pennsylvania Railroad Co. v. Bantom*, 54 Pa. 495. This cause of action was not split by the death of the father, and until the Legislature gives the mother the right to sue in a case of injury to a minor child, caused by the negligence of another and not resulting in death, we cannot give it to her."

But, as this case arose after the act of 1895 had been passed, the statute was presented to the court as the basis of the mother's right to recover. To this argument the court replied:

"The act of June 26, 1895 (P. L. 316) gave Mrs. Kelly no right to sue. It simply gives a wife, under certain circumstances, equal power, control, and authority with the father over a minor child, and an equal right to its custody and services. It does not appear from the testimony that the family circumstances were such at the time of the injury as gave Mrs. Kelly, under the act of 1895, this equal right with her husband in the power, control, and authority over her child and to his custody and services."

Whatever may have been meant by the court in the use of this language, the case has been distinguished in *O'Brien v. Philadelphia*, 215 Pa. 407, 64 Atl. 551, and, as that decision is relied upon to support the mother's right, it must be carefully examined. It is clear that the two cases in 54 Pa. were still recognized as stating the common law correctly, for Chief Justice Mitchell begins his opinion by saying:

"The right of action of a father for injury to a child was based on his duty of support and his consequent right to the services of the child. The common law, which paid no heed to merely sentimental considerations or matters of feeling, put the action on the basis of master and servant. Even the most serious of all, the seduction of a daughter, was redressed as an injury to the father as master, *per quod servitium amisit*. The mother, being under no obligation to support, had no corresponding right to service. This was the state of the law when the act of June 26, 1895 (P. L. 316), was passed."

Turning, then, to the statute in order to inquire how far it has extended the mother's right, it is to be observed that the act relates, as the title declares, "to husband and wife who are the parents of minor children, enlarging and extending the power, control and authority of the mother over their minor children, under certain circumstances." Under the state Constitution the title forms part of an act, and it is therefore often looked to for aid in construing the enacting clauses. From the title, as well as from the body of the act, it is clear that the mother's power, control, and authority over her minor children were not made fully, or at all times, equal to the father's. They were merely enlarged and extended, and this, not in all cases, but only "under certain circumstances." The primary purpose of the statute, as the Chief Justice goes on to say, was "to enlarge the rights of the mother in cases of dispute between the parents of a minor child. This is apparent from the second section, which subjects all such disputes to the discretionary authority of the courts." The section is as follows:

"That in all cases of dispute between the father and mother of such minor child, as to which parent shall be entitled to its custody or services, the judges of the courts shall decide, in their sound discretion, as to which par-

ent, if either, the custody of such minor child shall be committed, and shall remand such child accordingly; regard first being had to the fitness of such parent and the best interest and permanent welfare of said child."

But, while this section gives no such right as is now sought to be exercised, the first section goes somewhat further and does give the mother a right to sue under certain circumstances. This section declares:

"That hereafter a married woman, who is the mother of a minor child and who contributes by the fruits of her own labor or otherwise toward the support, maintenance and education of her said minor child shall have the same and equal power, control and authority over her said child and shall have the same and equal right to its custody and services as is now by law possessed by her husband, who is the father of said minor child; provided, however, that the mother of said minor child is otherwise qualified as a fit and proper person to have the control and custody of said child."

Concerning this section, Chief Justice Mitchell declares:

"But unless we totally disregard the clear meaning in the language used, we must give the act a wider application. The mother who without compulsion voluntarily does what the father is under legal obligation to do, i. e., supports the child, 'shall have the same and equal right to its custody and services, as is now by law possessed by' the father. In the present case, if the father were now supporting the child, his right of action could not be questioned. As he is not doing so, but the mother is, her right to the services is by the statute the same as his would be, and her right to sue for their loss must necessarily be the same. What would be the result if both parents had been supporting the child, and were now disputing the right to sue for loss of services, we need not now consider."

He then proceeds to distinguish *Kelly v. Traction Co.*, and shows that in that case the father and mother were both alive when the son was injured, and apparently were living in the family relation; that the father had therefore a paramount right to recover the damages; and that there was no evidence to show that the mother had ever acquired a right of action under the act of 1895, which she could assert—as she was allowed by the trial court to assert it—by taking her husband's place on the record after his death and recovering as the minor's mother in her own right after the husband's death. Moreover, it is plain enough that *O'Brien's Case* differed from the case of *Kelly* in another important respect, for Mrs. *O'Brien's* husband had deserted her 10 years before the injury to her daughter, and she was supporting the child by her own exertion. She was, therefore, at all points within the first section of the act. She was a married woman, the mother of a minor child, and was supporting the child by the fruits of her own labor. But, even so, if her husband had been helping to support the child, there would have been a question, as the court recognized, whether he or she would have had the right to sue for the loss of service. As he had deserted her, however, and was not asserting any claim to the damages, her right to recover was affirmed.

When this writ of error was first argued we were inclined to believe that *O'Brien's Case* might perhaps justify the inference that the scope of the act was wide enough to include a widow (as well as a wife) who was the mother of a minor child. If a wife whose husband had deserted her might sue, the argument was not without force that a

wife whose husband had died should have a similar right. But the re-argument and further reflection have satisfied us that we should not indulge the supposition that the Pennsylvania Supreme Court intended the act to have so broad an interpretation. The rule is well known that a federal court, in construing the legislation of a state, is bound to accept the construction announced by the state's highest tribunal. If no such construction has been announced, the federal court must interpret the law for itself, although it may be obliged afterwards to surrender its position in favor of a subsequent and conflicting interpretation by the Supreme Court of the state. It is this situation that confronts us now. The Pennsylvania court, evidently with some reluctance, has felt constrained to decide that the first section of the act of 1895 gave the wife and mother a right to sue in a case where she was supporting the minor at the time of the injury, although the husband and father was still living—it appearing, also, that the husband had deserted his wife, was not supporting the child, and was making no claim to the right of action for loss of the child's services. To hold that this decision should be extended to the case of a mother whose husband has long been dead, who has married again, and was not maintaining the minor at the time of the injury—as was the case here—is not a necessary inference from the opinion of the Pennsylvania court, and does not seem to be warranted by the language of the statute. The title does not embrace every parent of a minor child, but is confined to “husband and wife who are the parents of minor children”—apparently contemplating that the marriage must still exist, and that both parents must be living. (What the effect of a divorce may be, need not now be determined.) Under the Pennsylvania Constitution, which requires that the subject of every bill must be clearly expressed in the title, it is always permissible to examine the title for aid in construing the body of a statute. In the present instance there seems to be complete harmony between these two parts of the law. The title speaks of “husband and wife who are the parents of minor children,” and it seems clear that these persons reappear in the first section as “a married woman” and “her husband.” This section is evidently dealing with a situation where “a married woman who is the mother of a minor child,” and by labor or otherwise contributes to its support, maintenance, and education, may come into conflict with the legal right to the custody and services of the child possessed before the passage of the act by “her husband who is the father of such minor child.” Obviously such a conflict can only arise if both parents are living; and this view is strengthened by the statement that her right shall be “the same and equal right” as the husband and father possesses—this phrase contemplating two rights existing at the same time—and is further strengthened by a proviso, which immediately follows and denies her the right altogether unless in the conflict between the two rights she is found to be a fit and proper person to have the control and custody of the child. The same thought appears beyond dispute in the second section, for this is expressly confined to cases of dispute between “the father and mother of such minor child as to which parent shall be entitled to its custody or services,” and can only bear the meaning that both parents must be living.

The principal purpose of the act—and it may well be that this was the only purpose in the mind of the Legislature—is to put the mother under certain circumstances on an equality with the father, when both parents are claiming, or at all events, are able to claim, the power, control, and authority over the child; and although the probably undesigned breadth of the language used has compelled the Supreme Court of Pennsylvania to permit a mother sometimes to sue for injuries to a minor, this permission is not yet unlimited and unqualified. Until the state court shall hold otherwise, we must follow our own judgment and confine the statute to cases where both parents are living.

The conclusion at which we arrived upon the original argument has not been altered, and the judgment then entered will stand, namely:

It is therefore ordered that the judgment be reversed, with instructions to the Circuit Court to enter judgment on the verdict that was rendered in favor of the minor, and to enter judgment for the company, notwithstanding the verdict, upon the finding in favor of the minor's mother. It is also ordered that the plaintiff in error pay the costs in this court.

CHICAGO, B. & Q. R. CO. v. WEIL et al.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1911.)

No. 2,896.

1. EQUITY (§ 175*)—PLEA—COMPLAINANT'S RIGHT TO TAKE ISSUE.

Where, after the filing of an alleged plea in bar, which was in the nature of a plea in abatement, complainant brought the case on for hearing on the plea, and, after a partial allowance thereof, made timely and appropriate motion for leave to take issue thereon, the court erred in denying such leave, and in dismissing the bill as to the defendant as to whom the plea was sustained.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 411; Dec. Dig. § 175.*]

2. ABATEMENT AND REVIVAL (§§ 8, 9*)—OTHER ACTION PENDING—PROCEEDINGS IN EQUITY—IDENTITY OF PARTIES, CAUSE OF ACTION, AND RELIEF.

The B. Ry. Co., an Iowa corporation, commenced a suit in a state court in September, 1905, against four of the defendants joined in the present suit, to restrain them from dealing in nontransferable railroad tickets; the bill charging that defendants had been and were violating complainant's rights, and were threatening and intending to continue to do so. A final decree of injunction was granted for complainant in that suit, but whether any of the defendants subsequently violated or threatened to violate the rights of the complainant was not determined. Two years thereafter the B. R. Co., an Illinois corporation, filed the present suit against the four who were defendants in the former suit and certain others, making no reference to the former suit, or to any acts anterior to that decree, but charged that all of the defendants were violating complainant's rights with reference to the sale of nontransferable tickets, and were threatening and intending to continue to do so, alleging as a particular exigency for the relief sought that several national conventions were about to be held in Denver, Colo., involving the issuance of an unprecedented number of reduced rate tickets, the sale of which by the defendants was essential to have enjoined in order to pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ject complainant's rights. *Held*, that the continuance of the permanent injunction granted in the former suit was not ground for the abatement of the present one as to the defendants who were parties thereto, on the theory that the present suit was vexatious; neither the parties nor the subject-matter being the same, and since the court, if necessary to protect the rights of the defendants who were parties to the prior suit, could require as a condition to granting the relief sought that the injunction granted therein be withdrawn or abandoned as to them.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-85; Dec. Dig. §§ 8, 9.*]

Pendency of action in state or federal court as ground for abatement of action in the other, see notes to *Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co.*, 47 C. C. A. 205; *Barnsdall v. Waltemeyer*, 73 C. C. A. 521.]

Appeal from the Circuit Court of the United States for the District of Colorado.

Bill by the Chicago, Burlington & Quincy Railroad Company against I. C. Weil and others. From a decree sustaining as to certain of the defendants an alleged plea in bar in the nature of a plea in abatement, and denying plaintiff leave to take issue thereon, it appeals. Reversed, with directions.

Ernest Knaebel (Joel F. Vaile, Henry McAllister, Jr., and William N. Vaile, on the brief), for appellants.

Clay B. Whitford (Henry E. May, on the brief), for appellee.

Before VAN DEVANTER, HOOK and ADAMS, Circuit Judges.

VAN DEVANTER, Circuit Judge. This is a suit by a railroad company doing an interstate passenger business against divers ticket brokers and scalpers in Colorado, who, as is alleged, are wrongfully dealing in round-trip nontransferable tickets issued at reduced rates. According to the allegations of the bill the case is like that considered in *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, and unless those allegations be untrue, or there be otherwise an adequate objection, the complainant is entitled to an injunction such as was approved in that case.

Four of the defendants interposed a joint and several plea, alleging that a like suit had been instituted against them and several others, not parties to the present bill, by the Chicago, Burlington & Quincy Railway Company in the district court of Pueblo county, Colo., that in that suit the railway company obtained a final decree granting an injunction much like that sought by the present bill, and that that decree remains in full force. In the Circuit Court the complainant set the plea down to be argued, and upon argument it was allowed. Two other defendants joined in the plea; but their relation to the former suit was somewhat different, and as to them the plea was overruled.

After the partial allowance of the plea, the complainant in a timely and appropriate way sought to take issue thereon, but was not permitted to do so, and a decree was entered dismissing the bill as to the four defendants, but otherwise granting the relief sought. From so much of the decree as dismissed the bill, the complainant appealed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Plainly the complainant was entitled, after the allowance of the plea, to take issue thereon and to be heard in respect of its truth, and the ruling to the contrary was error. *Zimmerman v. So Relle*, 25 C. C. A. 518, 80 Fed. 417; *United States v. Dalles Military Road Co.*, 140 U. S. 599, 616, 11 Sup. Ct. 988, 35 L. Ed. 560; *Green v. Bogue*, 158 U. S. 478, 500, 15 Sup. Ct. 975, 39 L. Ed. 1061.

It appears from the bill and plea that the complainant in the present suit is the Chicago, Burlington & Quincy *Railroad* Company, an Illinois corporation, and that the complainant in the state court was the Chicago, Burlington & Quincy *Railway* Company, an Iowa corporation. Thus the complainant in the present suit is not identical with the complainant in the other. Not only so, but there is nothing in the plea which indicates that they are in privity. The plea, therefore, should have been entirely overruled, not partly allowed.

But as the fault just mentioned may be due to some omission on the part of the pleader, and as it is not present in other cases submitted in connection with this one, we turn to the larger question, whether in other respects the decree in the state court is an obstacle to the maintenance of the suit in the Circuit Court. This question was considered by the Circuit Court, has been fully argued here, and its determination now may shorten the litigation.

Primarily it is to be observed that, for the purpose of determining the sufficiency of the plea, the four defendants must be regarded as admitting the truth of what is well pleaded in the bill, and the complainant who set the plea down to be argued must be regarded as admitting the truth of what is well pleaded in it. In other words, the bill and the plea must be treated as true in point of fact.

The gravamen of the case consists in the present and threatened future invasion by the defendants of the right of the complainant to issue round-trip nontransferable tickets at reduced rates, and to demand that the restriction upon their use be respected. In this regard the present bill is much the same as the one in the state court, and the prayer in each is much the same. We come, then, to the points of difference. The suit in the state court was commenced September 7, 1905. The bill therein charged that the defendants had been and were violating the rights of the complainant, and were threatening and intending to continue to do so; and the decree, being for the complainant, necessarily determined those matters in its favor. But whether any of the defendants subsequently violated or threatened to violate the rights of the plaintiff are matters which were not determined by that decree. The present bill was filed more than two years thereafter, and makes no reference to that suit, or to any acts anterior to that decree; but it does charge that all of the present defendants are violating the rights of the complainant, and are threatening and intending to continue to do so. By way of disclosing a particular exigency for the relief sought, it also alleges that at the time of its filing several national conventions and assemblies were about to meet in Denver, Colo., and that this would lead to the issuance of an unprecedented number of reduced rate tickets entitling the holders, and only the holders, to be carried from different points

in the United States to and from Denver. And it covers a class of nontransferable tickets, not included in the former suit, namely, tickets for winter trips from points in Colorado to and from points in Florida. Some, but not all, of the defendants in the other suit are parties to the present one, and some, but not all, of the defendants in the present suit were parties to the other one. But all of the present defendants, including such of them as were defendants to the other suit, are alleged to be acting in concert, and to be practically in a combination to defraud the complainant by persuading and inducing the traveling public to disregard the nontransferable feature of all the tickets described.

Such being the situation disclosed by the bill and plea, and the requisite elements of federal jurisdiction being present, the complainant plainly was entitled to maintain its bill in the Circuit Court, not only against such of the defendants as were not parties to the prior suit, but also against such of them as were parties thereto, unless the fact that what is now charged against the latter constituted a violation of the injunction in that suit, for which they could be required to answer unto the state court, was a sufficient reason for dismissing the bill as to them.

While the defendants interposing the plea insist that as to them the decree in the former suit is determinative of all the matters charged in the present bill, and is a bar to its prosecution, it must be ruled otherwise; for obviously that decree is not determinative of what has been done and threatened since its rendition. Not only so, but the rule against vexing one by repeated and unnecessary litigation is not always available to prevent a second suit in respect of the same matter, as is illustrated by the well-recognized rule that a debt for the payment of which a judgment has been recovered may, if the debt remain unpaid, be made the subject of a second action by the creditor against the debtor.

Although the present plea seems to have been styled a plea in bar, and although it concludes as would such a plea, it is more in the nature of a plea in abatement; for at most it only shows that what is now charged against those who interpose it constitutes a violation of the existing injunction in the state court for which they may be required to answer unto that court. Doubtless the plea would be well taken if the injunction had been granted but recently, and the defendants interposing the plea were not here charged with anything outside the scope of the injunction, or with acting in concert with others who are not bound by it. But, as the case is not of that character, we must consider whether, in view of its distinguishing features, there was any sufficient reason for abating it as to the four defendants. The question is one in respect of which pertinent decisions are few in number, but a reference to such as there are will fairly disclose the principles which must be regarded as controlling.

Of the cases relied upon by the defendants, *Livingston v. Gibbons*, 4 Johns. Ch. 571, alone deserves special mention. There a second injunction was sought in aid of an action at law; the second suit being wholly between the same parties and being indistinguishable from the suit in which the first injunction was obtained. Both suits were in the

same court. In refusing to grant a second injunction during the existence of the first, Chancellor Kent said:

"A repetition of the injunction, while the former was in force, would be idle and useless, and derogatory to the authority of the court. If that injunction has been violated, the remedy should be by application for an attachment; or if that injunction has been voluntarily withdrawn by the plaintiff, after it was served, by some arrangement between the parties (but of which nothing is stated in the bill), the fact, and the reason of it, and the new grounds for a renewed application, ought to have been fully stated."

The matter again came before the Chancellor upon a third application, as is shown in 5 Johns. Ch. 250, and that application also was denied, because it appeared that the plaintiff had withdrawn the first injunction, and thereby had obtained a valuable consideration and advantage not otherwise obtainable, and because, as was said by the Chancellor:

"It would seem to be contrary to equity and good faith for the plaintiff, after having obtained a valuable consideration for the dissolution of his injunction, to procure it to be restored. * * * It would be unjust in itself, and derogatory to the authority and dignity of the administration of justice, to suffer the process of the court, imposing great and inconvenient restrictions on the defendant, to be withdrawn, in order to procure, by the operation of that fact, advantages against that very defendant, * * * and then to be reinstated in its former vigor."

Plainly the facts upon which the Chancellor's rulings in that case were rested were such that what was said has but little application here.

In *Gordon v. Gilfoil*, 99 U. S. 168, 178, 25 L. Ed. 383, which was not a suit involving the actual or potential custody of property, the general rule was announced and applied that:

"The pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court."

And in *Insurance Co. v. Bruner's Assignee*, 96 U. S. 588, 592, 24 L. Ed. 737, the court, although observing that "at law the pendency (in a domestic court) of a former action between the same parties for the same cause is pleadable in abatement to a second action, because the latter is regarded as vexatious," quotes with approval Lord Hardwicke's statement in *Foster v. Vassall*, 3 Atkyns, 587, that:

"The general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with a more liberal discretion."

The existence of this discretion, its extent, and the purpose with which it is exercised are well shown in *Bates' Federal Equity Procedure*, vol. 1, § 263, where, following closely the decision of the Supreme Court of Connecticut in *Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 433, the author says:

"This rule (respecting abatement in courts of equity) is not a rule of unbending rigor, nor of universal application, nor a principle of absolute law. It is rather a rule of justice and equity, generally applicable, and always where the two suits are virtually alike and in the same jurisdiction. In applying the rule it should be kept steadily in mind that a plea in abatement, being a dilatory plea, is not like a plea of payment or satisfaction, or of

some other matter in bar of the merits of the claim, which would find more favor; but its object is to cause postponement and delay, and the language of the plea is that the second suit is unnecessary and vexatious, and should be abated. A second suit is not, of course, to be abated and dismissed as vexatious; but all the attending circumstances are to be first carefully considered, and the true inquiry will be whether or not the aim of the plaintiff is fair and just, or oppressive and vexatious. If the plaintiff, by a second suit, can place his claim in a more favorable condition for obtaining redress, he should be permitted to do it."

The case of *Massachusetts Mutual Life Insurance Co. v. Chicago & Alton R. R. Co.* (C. C.) 13 Fed. 857, 860, is in some respects much in point. The situation there considered and the ruling thereon are shown in the following extract from the opinion of Mr. Justice Harlan:

"These pleas relate to the pendency in this court of a prior suit instituted by Bond, as trustee for the present complainant, against these two defendants and others. I am of opinion that the facts averred in those pleas are insufficient to bar this suit. It may be, as it is averred to be, that the Bond suit is for the same matters and for the like relief and purposes against Mitchell and the Chicago & Illinois River Railroad Company as the present suit. But it is not inconsistent with the pleas that the complainant in this suit seeks as against other defendants (some of whom are also defendants in the Bond suit, and some of whom are not parties thereto) relief not asked in or embraced by the Bond suit. If the relief asked in this suit is materially different from, or more comprehensive and extended than, that asked by the Bond suit—that is to say, if the present suit embraces more as to parties and subject-matter than the Bond suit—although the relief asked as to Mitchell and the Chicago & Illinois River Railroad may be identical in the two suits, the court does not perceive how the pendency of the first can be a bar to the prosecution of the last suit. So far as the present suit in respect to these two defendants is identical with the former suit, it may be (assuming that the Bond suit is really in the interest or can be controlled by the present complainant) that, pending this, the further prosecution of that suit should be prevented by an order of the court. This because it is quite certain, upon the facts alleged in the pleas, that the final decree in this cause will be a conclusive adjudication of the matters involved in the Bond suit. These pleas are, for the reasons given, held to be insufficient to bar this suit."

We conclude that in equity the rule in respect of such pleas, although analogous to the rule at law, is not absolute or inflexible, but is a rule of justice, which is designed to be so administered as to prevent the oppression and unnecessary vexation of defendants, and yet to accord to complainants the right to pursue any remedy which is reasonably essential to their complete and adequate protection. And, applying this conclusion to the circumstances of the present case, we think the plea was not well taken and should have been overruled. Not only was the scope of the suit in the Circuit Court more extensive in its subject-matter and parties, but there was obvious propriety in directing it against all who were engaged in the concerted and combined violation of the complainant's rights. And if there was any reason to apprehend that the prior injunction in the state court would operate injuriously to the four defendants, the Circuit Court could have required, as a condition to granting the relief sought, that that injunction be withdrawn or abandoned as to them. *Mitchell v. Bunch*, 2 Paige, Ch. 606, 621, 22 Am. Dec. 669.

In so far, therefore, as the decree allowed the plea and dismissed the bill as to the four defendants, it is reversed, with directions that such further proceedings be had in the suit as may not be inconsistent with this opinion.

CHICAGO, R. I. & P. RY. CO. v. WEIL et al.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1911.)

Nos. 2,895, 2,897, 2,898, 2,899.

Appeals from the Circuit Court of the United States for the District of Colorado.

Bills by the Chicago, Rock Island & Pacific Railway Company, by the Missouri Pacific Railway Company, by the Atchison, Topeka & Santa Fé Railway Company, and by the Union Pacific Railroad Company against I. C. Weil and others. From a decree sustaining an alleged plea in bar in the nature of a plea in abatement as to certain of the defendants, and denying leave to take issue thereon, they appeal. Reversed, with directions.

William V. Hodges and Charles W. Waterman (Clayton C. Dorsey, Thomas H. Devine, Henry A. Dubbs, J. W. Preston, and Henry T. Rogers, on the brief), for appellants.

Clay B. Whitford (Henry E. May, on the brief), for appellees.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

VAN DEVANTER, Circuit Judge. Save that the complainant in the Circuit Court was identical with the complainant in the prior suit in the state court, these cases are in all respects like *Chicago, Burlington & Quincy Railroad Company v. Weil*, 183 Fed. 956, decided to-day; and for the reasons given in the opinion in that case the decree in each of these cases is reversed, to the same extent and with like directions as in that case.

KLAUDER-WELDON DYEING MACH. CO. v. GAGNON.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 81.

1. MASTER AND SERVANT (§§ 150, 151, 286*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DANGEROUS METHOD OF DOING WORK—FAILURE TO INSTRUCT SERVANT.

Plaintiff, employed as a blacksmith in the blacksmith shop of defendant, which was a manufacturer of machines, was injured by the explosion of a piston head which he and a fellow workman were heating for the purpose of shrinking it onto a new piston rod. The heating of the head, which was hollow, was extremely dangerous, unless a vent was made therein to allow the escape of steam, which was likely to be generated in the interior. The shop was under the control and direction of a foreman, who represented defendant and was not a fellow servant of plaintiff. The foreman knew the danger, and that a hole should be made in the head before it was heated, but gave no instructions therefor, and no warning of the danger to plaintiff, who testified that he had no knowledge of it. *Held* that, if the foreman directed the heating to be done without giving such instructions or warning, he was negligent, and his negligence was that of defendant, and that on the evidence that question was one for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 298, 1044; Dec. Dig. §§ 150, 151, 286.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 1046*)—REVIEW—HARMLESS ERROR—CONDUCT OF TRIAL.

The examination of witnesses by the trial judge in an action at law in a federal court, and commenting on their testimony, while a practice not to be approved, is not reversible error, where the matters commented on were not vital, and the jury were correctly instructed, and told that they were the final arbiters on all questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. § 1046.*]

In Error to the Circuit Court of the United States for the Northern District of New York.

Action at law by Simon Gagnon against the Klauder-Weldon Dyeing Machine Company. Judgment for plaintiff (174 Fed. 477), and defendant brings error. Affirmed.

On writ of error to review a judgment entered upon the verdict of a jury in the Circuit Court for the Northern District of New York for \$3,145.50. The action was at common law to recover damages sustained by the plaintiff while in the employ of the defendant by reason of the explosion of a piston head upon which the plaintiff was at work. The verdict as rendered by the jury was \$4,000, but was by stipulation of the plaintiff reduced to \$3,000 after the trial judge had decided that he would set the verdict aside unless so reduced. The case was here on a former review and the judgment was reversed because hearsay evidence was admitted. On the first trial the verdict was also for \$4,000. The opinion of this court on former review is reported in 166 Fed. 286, 92 C. C. A. 204.

Duell, Warfield & Duell (Charles H. Duell, Frederic P. Warfield, Holland S. Duell, and Royal W. France, of counsel), for plaintiff in error.

Henry V. Borst, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The defendant was at the time of the accident engaged in making dyeing machines at Amsterdam, N. Y. The plaintiff was employed by the defendant as a blacksmith. Henry Higgs was superintendent, and John C. Evenden was foreman of that part of the works where the plaintiff was employed. The work in hand at the time of the accident was fitting a new piston rod into the piston head of a small second-hand engine. One of the ways of doing this is heating the piston head until the metal expands sufficiently to admit the new rod and then inserting the rod, after the head has been removed from the fire. The contraction of the metal caused by cooling holds the head firmly on the rod. This was the method adopted in the present instance. Unless the precaution is taken to make a hole in the piston head, to permit the escape of steam and gases generated by the great heat, this process of shrinking on the head is a dangerous one and was known to be so by those familiar with the business. No vent was made in the present case and while the plaintiff and one Spore, a fellow machinist, were engaged in heating the head it exploded, killing Spore and injuring the plaintiff.

The principal question is—was the court justified in submitting the question of defendant's negligence to the jury?

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In considering this question, we think the following propositions must be regarded as established:

First. Evenden, the foreman, had full authority in the blacksmith shop and represented the defendant in the work carried on there. If he were negligent in the discharge of his duty while directing the work his negligence, as matter of law, must be imputed to the defendant. He was not a fellow servant.

Second. The work of repairing the piston head by the shrinking process was an exceedingly dangerous operation unless a vent were made to permit the escape of vapor.

Third. Evenden knew of this danger and did not communicate it to the plaintiff or direct any one else to do so.

Fourth. The explosion occurred because this vent was not made.

Fifth. The plaintiff, who was employed as a blacksmith, did not know of this particular danger, at least he swears that he had "never seen one of these heads before" and did not know that they contained moisture and were liable to explode.

In these circumstances the crucial question was one of fact: Did the foreman direct the plaintiff to use the heating process, as the plaintiff contends, or the cold driving process, as the defendant contends? Evenden says he directed the use of the latter and his evidence is not directly contradicted; indeed, this could not well be done, as Spore, to whom the direction was given, was killed by the explosion. There was testimony, however, from which the jury might have found that the heating process was ordered by the foreman. One witness testifies that he heard Evenden say to Spore:

"Be careful, Jim, when you take that out; don't let Sime (the plaintiff) burn it."

It would be absurd to use such language regarding the cold driving process, and, if this direction were given, the jury were warranted in assuming that Evenden had directed the use of the heating process. Again, two witnesses swear that about twenty minutes after the accident, they heard Evenden say, "We made a mistake, we forgot to tap it." This is criticised, because Evenden may have said, "*he* forgot to tap it," instead of "*we* forgot to tap it." The difficulty with this contention is that both witnesses agree that he said, "*We* forgot to tap it." But, in any view, the expression denotes surprise, not that the heating process had been used, but that it had been used carelessly. If Evenden had directed the use of the cold process, would not his first exclamation of surprise and indignation have been—"He made a mistake, he did not use the process I told him to use?" If the jury believed that Evenden used the language quoted, they were justified in taking it into consideration in determining the question whether the hot process was ordered. It was certainly incompatible with the theory that the cold process was ordered.

The defendant's brief contains a persuasive argument to prove that the plaintiff's witnesses upon this question are mistaken and that some of them are unworthy of belief. If we were sitting as triers of the facts, it is quite possible that we might agree with the contention of defendant's counsel in this regard, but we cannot say as matter of law

that the plaintiff's proof was so inadequate as to require the court to set aside a verdict based thereon. There was a sharp dispute upon the testimony as to which process was ordered; this was for the jury to settle and it would have been error for the court to have taken it from them. The inference to be drawn from the plaintiff's testimony is clearly to the effect that the hot process was ordered. Evenden was there immediately before the explosion giving directions regarding the piston head. The testimony shows that he was a man tenacious of his authority and accustomed to be obeyed. There is a strong presumption that the subordinates of such a man, being themselves ignorant of the best methods to pursue, would not deliberately disobey his orders. In other words, the jury, in addition to the testimony, had a right to take into consideration the presumption that the process actually used by the workmen was the one which their foreman directed them to use.

The question now under consideration has been already passed upon by this court on the former writ of error. After discussing the hearsay testimony which was improperly received, the court says:

"Undoubtedly there was other testimony in the plaintiff's case which, pieced together, would have warranted the jury in finding that Evenden gave instructions through Spore that the plaintiff should heat the piston-head."

We do not think the trial court misapplied or misconstrued the rule relating to latent defects. There can be no question whatever that the work, if done by the heating process, was exceedingly dangerous. The moment steam was generated in the piston head it became as unsafe as if it contained dynamite or gunpowder. If, however, a vent were made for the escape of steam, it became absolutely innocuous. The foreman knew all these facts—the blacksmith knew none of them. The danger was hidden, nothing which the blacksmith could see indicated to him the peril lurking in the piston head.

It was clearly the duty of the foreman to inform the plaintiff of this peril which would confront him the moment heat was applied, unless the escape of steam was provided for. The making of the vent was not a mere incident or detail in the heating process; it was a momentous fact of which it was absolutely essential the plaintiff should know before he was required to do the work.

Various exceptions are directed to the action of the court in examining the witnesses and commenting on their testimony. We have frequently had occasion to say that in the trial of jury causes the wise and orderly course to pursue is to leave the examination and cross-examination of witnesses to counsel. For the court to take a prominent part in the trial creates misunderstanding and irritation and is quite likely to give the jury a wrong impression as to the attitude of the court. In the present case the statements of the court particularly complained of took place during the examination of the expert witnesses and related, generally, to some question of mechanics upon which the court and the witness were not in perfect accord. In no instance did the court express an opinion upon a really vital question. In view of the clear statements of the charge, which presented the issues impartially, we cannot think that any of the statements of the

court worked injury to the defendant. Assuming that the language of the court can be construed into the expression of an opinion injurious to the defendant, it must be remembered that in the federal courts it is not error for the trial judge to express an opinion upon the facts provided he makes it plain to the jury that in this domain they are the final arbiters.

There is no evidence, certainly no competent evidence, that the verdict was influenced in any way by the suggestion that the defendant was protected by insurance.

Other exceptions have been argued, but we think none of them is well taken and that it is unnecessary, in view of what has already been said, to discuss them in detail.

The verdict was a reasonable one, even before it was reduced, and the judgment thereon should be affirmed with costs.

J. M. ROBINSON, NORTON & CO. v. TUSCALOOSA MILLS.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1911.)

No. 2,074

1. EVIDENCE (§ 96*)—AFFIRMATIVE MATTER OF DEFENSE—BURDEN OF PROOF.

Where a plea admits the material averments of a complaint such as are essential to the cause of action, but accompanies the admission with a statement of the affirmative matter by way of defense, the burden of proving the matter so pleaded is on the defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 119-121; Dec. Dig. § 96.*]

2. EVIDENCE (§ 96*) — CONTRACTS — BREACH — BUYER'S ACTION — BURDEN OF PROOF.

Where, in an action by a buyer to recover the price paid for goods sold and not delivered, defendant alleged that the goods were only to be shipped to plaintiff on orders, and that, when the time for delivery arrived, defendant advised plaintiff that the goods had been set aside and were being held subject to plaintiff's order, and while so held were destroyed by fire without defendant's fault, the burden of proving the affirmative of such plea was on the defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 119-121; Dec. Dig. § 96.*]

3. SALES (§ 218½*)—FAILURE TO DELIVER—DESTRUCTION OF GOODS—QUESTION FOR JURY.

Where in a buyer's action to recover the price paid for goods sold, but not delivered, the seller claimed that the goods were only to be delivered on orders from the buyer, and that, when the time for delivery arrived, the goods were set apart, and the buyer informed that they were held subject to its order, and while being so held were destroyed by fire without the seller's fault, evidence to establish such plea *held* to require submission thereof to the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 587; Dec. Dig. § 218½.*]

In Error to the Circuit Court of the United States for the Northern District of Alabama.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by J. M. Robinson, Norton & Co. against the Tuscaloosa Mills. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This is an action for breach of a contract of sale, brought by the buyer, J. M. Robinson, Norton & Co., a New York corporation, against the seller, the Tuscaloosa Mills, an Alabama corporation. There was verdict and judgment for defendant, and plaintiff brings error. The first count of the complaint contains an allegation of the contract and the breach: "Plaintiff claims of defendant the sum of, to wit, thirty-three hundred and ten and $\frac{13}{100}$ (\$3,310.13) dollars, with interest, for that plaintiff, to wit, on the 27th day of December, 1906, drew a check for the sum of thirty-three hundred and ten and $\frac{13}{100}$ (\$3,310.13) dollars on the American National Bank of Louisville, Ky., No. 13198, payable to the order of defendant, which said check was collected by defendant; that for and in consideration of said check defendant was to manufacture or deliver goods, wares, and merchandise to the amount of, to wit, the amount of said check, for the account of plaintiff, to be shipped to plaintiff or plaintiff's order as plaintiff should select and order same; that said defendant has failed and refused, and continues to fail and refuse, to manufacture or ship said goods, wares, and merchandise to plaintiff or plaintiff's order, as aforesaid, and has failed and refused, and continues to fail and refuse, to return to plaintiff the money collected on said check, as aforesaid, wherefore plaintiff brings this suit."

The defense relied on is elaborately stated in the following plea: "That on, to wit, the 3d day of February, 1906, the defendant was engaged in the business of manufacturing cotton goods, known as outings, at its cotton mill at Cottondale, Ala., and the plaintiff was a mercantile corporation doing a wholesale dry goods business at Louisville, in the state of Kentucky. That on said 3d day of February, 1906, defendant's traveling salesman made with the plaintiff a contract whereby the defendant contracted to sell to the plaintiff a lot, to wit, one hundred (100) cases of cotton goods, known as outings, at its said mill at Cottondale, Ala. That the \$3,310.13 paid by the plaintiff to the defendant, as averred in the first count of the complaint, was paid under and in pursuance of the said contract entered into between the plaintiff and the defendant on, to wit, the 3d day of February, 1906, as aforesaid, whereby plaintiff agreed to purchase from the defendant, and the defendant agreed to sell to the plaintiff, the said 100 cases of outings. That, according to the terms of said contract, defendant was to ship to plaintiff from its said mill at Cottondale twenty-six (26) cases of said goods in the month of July, 1906, and to hold the balance of said goods for instructions from the plaintiff up to the 1st day of December, 1906, and to deliver to plaintiff on December 1, 1906, all of the said goods not delivered prior to that time, at which time the plaintiff should take and pay for such balance of goods as had not been delivered up to that time. And the defendant avers: That, in pursuance of the terms of said contract, it shipped to the plaintiff on orders from it, in and prior to the month of July, 1906, 26 cases of said goods, and at various other times prior to the 1st day of December, 1906, shipped to the plaintiff, or to such of the plaintiff's customers as the plaintiff designated to the defendant, various different quantities of said goods, amounting in the whole to fifty-three (53) cases, for all of which the plaintiff paid the defendant according to said contract. That on the 1st day of December, 1906, there remained of the one hundred cases of goods covered by said contract twenty-one (21) cases which had not been delivered. That the defendant on, to wit, the 15th day of December, 1906, separated from its other goods, and laid aside by themselves separate and apart from any other goods in defendant's warehouse at Cottondale, in Tuscaloosa county, Ala., where said goods were manufactured, and at the point from which they were to be shipped, the 21 cases of goods remaining undelivered on said contract of February 3, 1906, of exactly the same kind, quality, and description called for by said contract and then undelivered, and appropriated them to the supplying and completion of the goods then due plaintiff under said contract, and made out and rendered to plaintiff an invoice or bill of said goods, and wrote plaintiff a letter inclosing said invoice or bill, informing plaintiff that said goods were held

in defendant's warehouse subject to plaintiff's order. That upon receipt of said invoice and letter from defendant plaintiff, in reply thereto, sent defendant a check for the \$3,310.13 mentioned in the several counts of the complaint in payment for said goods, and the defendant avers that from the time said goods were laid aside and set apart as aforesaid they remained in the defendant's warehouse at its mill in Cottondale, in a pile by themselves, separate and apart from any other property belonging to defendant or any one else, until, to wit, the 13th day of August, 1907, when, without fault on the part of the defendant, said goods were destroyed by fire." There were several other counts in the complaint, and numerous pleas, but, in view of the facts developed on the trial and the questions to be considered here, they are not material.

The plaintiff offered in evidence the order for goods, which, with its acceptance, constituted the contract. The order was dated February 3, 1906, and was for "100 cases of Caledonian outings," describing the assortments, and directing the defendant to ship part of the goods in July and to "hold balance for instructions." The order authorized the seller to charge to the buyer "such goods required to complete order December 1st." The order clearly meant, as construed by both parties, that after making the July shipment the other cases were to be shipped as ordered, and that, if directions for the shipment of all the goods were not given by the buyer before December 1st, the cases not ordered out could be charged by the seller to the buyer. The plaintiff offered evidence to show that he had not directed the shipment of, nor actually received, 21 cases of the goods embraced in the contract. Seventy-nine cases had been received or shipped on the buyer's order, and paid for. The controversy is confined to the 21 cases. The plaintiff's evidence showed that it had received a bill for the undelivered 21 cases, and that a check for \$3,310.13 had been sent to the sellers to pay for them. This check, payable to and indorsed by the Tuscaloosa Mills, was offered in evidence, together with some letters that will be referred to later. The plaintiff then rested.

The defendant's evidence did not conflict with that offered by the plaintiff as to the original contract and its part performance. The defendant, however, offered testimony to show that the 21 cases of goods were manufactured, marked, and set aside for the plaintiff separate from defendant's other goods on December 15, 1906, that notice was given plaintiff that they were held subject to its order, and that the goods, without fault of the defendant, were destroyed by fire on the 13th day of August, 1907. The defendant's evidence tended to show that the invoice sent plaintiff was indorsed that the goods were held subject to plaintiff's order, and that a letter accompanied the invoice to the same effect. The receipt of the letter and the invoice so indorsed was denied by the plaintiff, but it was admitted that the bill for the 21 cases was received, and that the check was sent to pay the bill. The contract and the evidence show that the goods had to be paid for within the year 1906 to obtain a discount of 3 per centum, which was, in fact, allowed. The correspondence between the parties to which we have referred is as follows:

On July 23, 1907, plaintiff wrote to the defendant: "We will appreciate it very much if you will send us sample cards of outing flannels. You know you have charged up to us about twenty cases of these goods, and we want to give you selections for the same." On July 24, 1907, defendant replied: "We have been waiting to hear from you in regard to the goods we have charged up to you. We think it would be best for both of us if you would send direct orders for goods to be shipped to your customers. We can give you nice assortments and know they will please you. This will enable us to give you more prompt deliveries." On August 8, 1907, plaintiff wrote to the defendant: "It was our pleasure a few days ago to receive a letter from you in answer to ours as regards samples of outing flannels you were going to send us to select from. Our fall trade is on us and we are needing these outing flannels, so we will appreciate it if you will send us these samples at once. Let us hear from you by return mail at once and oblige." On August 10, 1907, defendant wrote to the plaintiff: "Yours of the 8th received. We are sending you to-day by express one set of sample outing flannels. Kindly make

your selection and give us the privilege of substituting on what we have not in stock." On August 13, 1907, plaintiff wrote to the defendant: "Yours of Aug. 10th, also sample cards that it was your pleasure to send us, is at hand and contents noted. Kindly ship us two (2) cases each 69-55-67-118-66-97-49-96-44-43 and one (1) case 75. Let it come out under our ticket mill No. 3. If you have not just these styles and have something near them, substitute." On the night of August 13, 1907, as before stated, the defendant's cotton mills were burned, including the goods which are claimed to have been manufactured for plaintiff.

The charge of the learned trial judge contains a clear and able presentation of the facts bearing on the pivotal question to be decided by the jury. It contained no reference to the subject of the burden of proof. At the conclusion of the court's charge the following special charge was given at the request of the defendant: "The burden is on the plaintiff to make out its case to the reasonable satisfaction of the jury, and, in order to do this, it must show to the reasonable satisfaction of the jury that the defendant did not deliver the 21 cases of goods for the price of which the plaintiff is suing."

The plaintiff requested the following special charges, which were refused:

"(1) If the jury believe the evidence, they must find for the plaintiff.

"(2) The burden of proof is on the defendant to show that the defendant gave the plaintiff notice of any separation of said goods and setting them apart for the plaintiff.

"(3) I charge you that the burden of proof is on the defendant to show to your reasonable satisfaction that said goods were separated and set aside, and were of the kind and quality ordered."

The plaintiff reserved exceptions separately to the giving and refusing to give these charges, and the ruling of the court is assigned as error.

John W. Tomlinson and Roy McCullough (J. R. Duffin and M. T. Ormond, of counsel and on the brief), for plaintiff in error.

Henry A. Jones (Jones & Penick, on the brief), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

SHELBY, Circuit Judge (after stating the facts as above). Many general rules have been announced on the subject of the burden of proof, intending to show on whom it lies. It is often announced that the burden is on the plaintiff, and, again, that it is on the party having the affirmative allegation. But an examination of the precedents will show that the burden is often on the defendant; and sometimes on one who has a negative assertion to prove. It may be truly said that the burden is on one to whose case the fact to be proved is essential, but that serves no purpose as a general rule, for it merely presents another question. It seems clear that there can be no general rule for all cases. In the courts it must always remain a question of policy and fairness based on experience in different situations. The solution of the question in each case must depend on its own pleadings and facts. Cases occur where, on the pleadings, no evidence being offered on either side, the plaintiff is entitled to judgment. Such is the case where the plea admits the material averments of the complaint, such as are essential to the cause of action, but accompanies the admission with a statement of affirmative matter by way of defense. In such case the burden of proving the new matter set up as a defense is, of course, upon the defendant. Proof of it is essential to his defense, and, neither side offering evidence, judg-

ment on the pleadings should be entered for the plaintiff. *Cook v. Guirkin*, 119 N. C. 13, 25 S. E. 715. In the instant case, however, the plaintiff did not rest on the pleadings, and probably thought it not prudent to do so, as pleas other than the one containing the admissions had been filed.

The plaintiff sues for \$3,310.13, alleging that it paid that sum to the defendant for goods which the defendant was to manufacture and deliver to the plaintiff, and that the defendant failed to deliver the goods, and refuses to return the money. The plea that states the defendant's only defense, as shown by the evidence offered, admits the receipt of the money, admits the agreement to manufacture and deliver goods for the money, and admits that the money has not been returned. These admissions are coupled with the affirmative defense that the goods were manufactured, set aside for the plaintiff, notice of the fact given plaintiff, and that subsequently, without defendant's fault, the goods were destroyed by fire.

The real issue to be tried was the truth of the defensive statements in this plea. The plaintiff was in business in Kentucky. The defendant's warehouse, where it claimed the goods were set aside and destroyed by fire, was in Alabama. The facts pleaded, if they existed, were clearly within the knowledge of the defendant and easily susceptible of proof by it; but it would not be practicable, if possible, for the plaintiff to prove the negative—that the goods were not set aside in performance of the contract. Proof of a fact, which, if true, rests within the knowledge of the defendant, and which it might be impossible for the plaintiff to prove, "lay upon defendant." *Borthwick v. Carruthers*, 1 T. R. 648; *Stewart v. Ashley*, 34 Mich 183. Putting aside the suggestion that the plea admits the negative averment of the complaint—that the defendant had not actually delivered to the plaintiff the goods for which the check was given—it seems that under the circumstances the burden would not be on the plaintiff to prove the negative averment. In *United States v. Denver & R. G. R. R. Company*, 191 U. S. 84, 92, 24 Sup. Ct. 33, 35, 48 L. Ed. 106, the court said:

"When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must from the nature of the case himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it, or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative."

When, with admissions made by the defendant, evidence offered by the plaintiff makes a *prima facie* case, the plaintiff may rest, and the burden is on the defendant to prove an affirmative defense. *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901.

The case turns on the question of the ownership of the 21 cases of goods when they were burned. Their loss must fall on the owner. The ownership depends on the issue as to whether or not they were marked and set aside for the plaintiff in performance of the agreement,

of which notice was given the plaintiff, and to which it impliedly assented. Evidence was offered by the defendant tending to sustain its contention on this issue. The plaintiff, on the contrary, offers evidence tending to show that it received no notice; and it relies on the correspondence as showing that up to a few days before the fire neither party considered that the 21 cases had been selected and applied to the contract, and that the defendant did not claim to have selected and appropriated any particular goods to the settlement of the contract of purchase. We do not wish to intimate any opinion upon the weight of the evidence further than to say that on the record before us the correspondence, explanations of it, and the other evidence presented a question for the jury. On this issue the burden of proof was on the defendant. This is so for three reasons: (a) The defendant makes the affirmative defensive allegation; (b) it relates to a matter especially within the defendant's knowledge, the proof of which was necessary and essential to the defendant's defense; and (c) the plaintiff had made proof of a *prima facie* case, which, if not admitted by the pleadings, was undisputed by the evidence, excepting, of course, the evidence offered in support of the new matter pleaded.

In *Chicopee Bank v. Philadelphia Bank*, 75 U. S. 641, 19 L. Ed. 422, Mr. Justice Nelson observed in commenting upon the refusal of the court below to charge as to which side the burden of proof belonged:

"We think the court, after having submitted fairly the evidence on both sides bearing upon the question, had a right, in the exercise of its discretion, to refuse the request."

The opinion shows, however, that if the request had been granted—which was merely to instruct on the question of the burden of proof—the court should have instructed that the burden was on the party making the request. He was, therefore, not injured, but benefited, by the refusal. That case is entirely different from the case at bar. It may be that in the instant case the court, having fairly submitted the issue to the jury, would have been acting within its discretionary power if it had refused to charge on the subject of the burden of proof, although generally the jury should be instructed on that subject, and it has been held that it is error to refuse on request to give a proper charge as to the burden of proof. *Stevens v. Pendleton*, 94 Mich. 405, 411, 53 N. W. 1108.

But the defendant was not content with the silence of the court on the subject, and, at its request, the jury were charged that the burden was on the plaintiff to prove to the reasonable satisfaction of the jury "that the defendant did not deliver the 21 cases of goods for the price of which the plaintiff is suing." And the court refused to charge, at the request of the plaintiff, that the burden of proof was on the defendant to show that the goods were separated and set aside. These charges were not asked, nor would they be understood by the jury to apply to the *prima facie* case made by the plaintiff. That was undisputed, except by the evidence offered in support of the new matter pleaded. The charges would be understood as applying to the defensive averments of the plea.

We are of opinion that the giving of the defendant's requested charge and the refusal of the charge asked by the plaintiff was error, in view of the pleadings and the evidence on which the issue was submitted to the jury.

The judgment is reversed, and the cause remanded for a new trial.

A. Y. McDONALD & MORRISON MFG. CO. v. H. MUELLER MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. December 9, 1910.)

No. 2,994.

1. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—BURDEN OF PROOF.

To make a case of unfair competition, the burden is upon a complainant corporation to establish by clear and satisfactory proof that the use by another corporation of its own initials on its goods is with fraudulent intent to mislead purchasers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. TRADE-MARKS AND TRADE-NAMES (§ 75*)—UNFAIR COMPETITION—TEST.

The test of unfair competition by the imitation of labels or marks is, not whether a difference can be recognized when the goods are placed side by side, but whether, when they are not side by side, an ordinarily prudent purchaser would be liable to purchase the one, believing that he was purchasing the other.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 16*)—MARKS OR NAMES SUBJECTS OF OWNERSHIP—FORM OF ARTICLE.

One manufacturer cannot create a monopoly to be enjoyed by him by adopting a shape or form of product, and particularly when such product is one of general use; and this is emphasized when such product is made from material which is fashioned for its better use, and with economy for use, according to long-time usage.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 19; Dec. Dig. § 16.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION—INJUNCTION.

A manufacturer of plumbers' goods *held* chargeable with unfair competition in purposely imitating in appearance the goods of complainant, a competitor and properly enjoined; but the injunction *held* too broad, and so modified as to permit the defendant to use the common forms of the devices, although like complainants, provided it marked the same so as to unmistakably indicate their origin.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 95.*]

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Suit in equity by the H. Mueller Manufacturing Company against the A. Y. McDonald & Morrison Manufacturing Company. Decree for complainant (164 Fed. 1001), and defendant appeals. Modified and affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thomas A. Banning (Hurd, Lenahan & Kiesel and Banning & Banning, on the brief), for appellant.

J. L. Jackson (A. H. Adams; C. E. Pickard, and M. M. Cady, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and McPHERSON, District Judge.

SMITH McPHERSON, District Judge. This was a bill in equity brought by the appellee, as complainant, against A. Y. McDonald & Morrison Manufacturing Company, to enjoin it from making its manufactured products in imitation of complainant's. On the application for a preliminary injunction, the same was denied. 132 Fed. 585. On final hearing (164 Fed. 1001), the decree was for the complainant.

The complainant and defendant are rival manufacturers of, and dealers in, plumbers' goods. The complainant had received letters patent for improvements of interchangeable right and left stop and waste cocks, and that was litigated and went to final decree on the same day and in the same court that rendered the decree in the case at bar, resulting in a decree that the patent was void. 164 Fed. 991.

Each of the parties adopted as their trade-mark the initials of the principal words or names comprising the corporate name of each; the complainant adopting the capital letters "H. M.," and the defendant the capital letters "M. M." Those letters were placed upon plates upon the appliances; the defendant's being a diamond shape, and the complainant's upon a plate somewhat similar to the diamond, but hexagonal in form. The defendant had used the diamond upon its goods for nearly half a century. The sign of a diamond was painted on its building, and which sign is still used. The evidence satisfactorily shows that defendant had used the diamond as a trade-mark for its products a long time antedating the use by complainant of the shield, so that there can be no well-founded complaint with reference to such a device as used by the defendant.

It was decided in *Brown Chemical Company v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247, that the burden is upon complainant to establish by clear and satisfactory proof the fraudulent intent and purpose of the defendant in arranging and using the initials of its own name so as to mislead and deceive dealers in, and purchasers of, such goods. The contention of the complainant is that this rule has been fully complied with by the showing made, and that the arrangement of the letters "M. M." upon the diamond is calculated to, and in fact does, mislead and deceive dealers in, and consumers of, such goods; the letter "M" being upon each of the designs, and the letter "M" upon defendant's design being so much like the letter "H" upon complainant's design that the general public in dealing with such merchandise is deceived.

The well-known and leading case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, has long since settled the rule that, notwithstanding a person may have once enjoyed a monopoly under an expired patent, another person cannot afterwards so appropriate the generic name by which the patented ar-

ticle was known as to mislead the public into the belief that, when purchasing an article of merchandise made by the latter, they were in fact getting merchandise made by the former. This is because of the simple proposition that no man has the right to represent himself to be another and different person. He has no right by representations, nor by acts, to create the belief that his goods were manufactured by another.

The test is not whether, when goods are placed side by side, a difference can be recognized in the labels or marks; but the test is, when such goods are not placed side by side, would an ordinarily prudent purchaser be liable to purchase the one, believing that he was purchasing the other?

But one manufacturer cannot create a monopoly, to be by him enjoyed, because he has adopted a shape or form of a product, and particularly when such product is one of general use. And this is emphasized when such product is manufactured from material which is fashioned for its better use, and with economy for use, according to long-time usage. The proposition is illustrated by the cases of *Heide v. Wallace & Co.*, 135 Fed. 346, 68 C. C. A. 16; *Diamond Match Co. v. Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A. 59; *Globe-Wernicke Co. v. Macey Co.*, 119 Fed. 696, 56 C. C. A. 304; *Wrisley Co. v. Iowa Soap Co.*, 122 Fed. 796, 59 C. C. A. 54.

The Circuit Court held, and in which holding we concur, that the purpose of defendant in arranging the styles and designs and labeling of its products was to mislead and it did mislead, the public.

The decree in this case now before us for review permitted the defendant to use the figure of a diamond and the initial letters "M. M." of the principal names comprising its corporate name substantially as arranged by it as its trade-mark, and to impress the same upon all goods of its manufacture, including the body or shell of its stop and stop and waste cocks, but decreed that the defendant could not make the cap and handles it places upon such goods in simulation of the complainant's cap and handle, nor make its inverted key-curb cock in simulation of that of the complainant with or without the impress of its trade-mark thereon.

The decree is too broad. The manufacturers of plumbing appliances do, and necessarily must, make such goods from the same material, and largely of the same form or pattern, because necessity and convenience so require, and such have been so manufactured from the earliest days of the art. The handles and other appliances made by complainant and defendant are in the usual form, and are made with reference to convenience of use for such manufacture.

Their manufacture by defendant in that form and out of metals of that kind was well within its rights. It was entitled to make use of any material in the most available and efficient form, and to adopt such color and arrangement of parts as best served the mechanical uses for which its merchandise was designed. But it was not entitled to so use, color, or arrange the parts of its mechanism as to deceive purchasers of its goods, when exercising reasonable care, into believing that they were purchasing the goods of the complainant.

As already pointed out, the general appearance of the goods of the parties was alike. Fairness in trade, therefore, within the doctrine of the Singer Mfg. Co., Case, *supra*, required that the defendant should have marked its goods with some plain and unequivocal statement or showing that they were goods of its own manufacture.

By the decree below the defendant was enjoined from making use of the cap and handles or the inverted key-curb cock in simulation of complainant's goods. That decree might be interpreted so as to enjoin the defendant from coloring the handle black, or simulating the general appearance of complainant's key-curb cock, whether in form, material, or color. In these respects we think it was too broad.

The injunctive order should be modified, so as to enjoin the defendant from making the key-curb cock as it is now making it, unless it shows clearly and unmistakably in some conspicuous way, upon each cock and upon the advertising media employed by it, a statement or showing that it was manufactured by the McDonald & Morrison Manufacturing Company.

The case is remanded to the Circuit Court, with directions to modify the decree, so that it will be in conformity with this opinion, and, as thus modified, the decree is affirmed. The appellant will pay the taxable costs in this court.

And it is so ordered.

METROPOLITAN LIFE INS. CO. v. HARTMAN.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1911.)

No. 3,436.

1. LANDLORD AND TENANT (§ 169*)—INJURIES TO OCCUPANT—NEGLIGENCE.

Where plaintiff, a stenographer in an office building, slipped on a recently oiled floor of the room in which she was employed, and, falling, received serious injury, and there was evidence that after defendant's servant, shortly before the accident, had re-dressed the floor with an oiled dressing, it had not been wiped or made dry, and that the floor in such condition would be likely to cause one who had occasion to use it as did the plaintiff to slip thereon and receive injury, whether defendant was negligent was for the jury.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 646; Dec. Dig. § 169.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF DEFECTS.

An inadvertent error of the court in defining what constitutes ordinary care in an oral charge to the jury was not prejudicial, where the subject was fully clarified by what preceded and followed it, especially where the exception taken did not direct the court's attention to a particular fault therein.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Gertrude C. Hartman against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Morton Barrows, for plaintiff in error.

Francis B. Hart, for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

VAN DEVANTER, Circuit Judge. This is an action to recover for injuries sustained by slipping and falling upon the recently oiled margin of an office floor. The case was here once before. 174 Fed. 801, 98 C. C. A. 509. Afterwards the complaint was amended so as to charge (a) that the floor theretofore had been treated and rubbed until its surface was hard and smooth; (b) that on the morning in question the defendant, through its janitor, treated the margin of the floor with a fluid preparation of benzine and oil, and left it in a moist and oily condition, which rendered it exceedingly slippery and unsafe to walk upon; (c) that in the proper doing of that work it was customary and necessary to wipe or dry the floor, and thereby leave it in reasonably safe condition for use; and (d) that on the occasion in question the defendant not only negligently failed to complete the work in that way, but left the floor as ready for use without giving any warning that it was in an unsafe condition. In the answer the defendant admitted that it had re-dressed the floor at the time stated, but denied all else that went to show negligence upon its part. The trial of the issues resulted in a verdict and judgment for the plaintiff, and the defendant now seeks to reverse the judgment.

The chief complaint is that the court denied a request for a directed verdict. No evidence was produced by the defendant, and the case went to the jury upon that produced by the plaintiff, which tended quite substantially to sustain each of the matters charged in the amended complaint as just described, and to show that as a result of the condition in which the floor was left the plaintiff, without fault upon her part and without any knowledge that the floor had been incompletely treated, slipped thereon and fell, receiving considerable injury.

The real question upon the evidence is whether, in that view of it which is most favorable to the plaintiff, it reasonably can be said that the defendant should have anticipated that leaving the floor in the condition in which it was left—that is, freshly oiled, but not wiped or made dry—would be likely to cause one who had occasion to use it, as did the plaintiff, to slip thereon and receive injury. We have attentively read the evidence, and have thoughtfully considered it, with the result that we are of opinion that this question must be answered in the affirmative, and that it also must be held that the court rightly declined to take the case from the jury.

Various complaints are made of the court's action in other respects; but these complaints are all devoid of any merit save one, which challenges one of several of the court's statements, in its charge to the jury, of what constitutes ordinary care. If this part of the charge stood alone, it would be subject to serious objection; but the fault was not misleading. At most it was a mere inadvertence in the course of an oral charge, and was fully clarified by what preceded and fol-

lowed it. Not only so, but the exception taken to this part of the charge was not calculated to direct the court's attention to the fault therein. Had the exception been appropriate to the occasion, we do not doubt that the fault would have been corrected immediately. But without the correction the charge as a whole could not, as we think, have failed to convey to the jury a correct understanding and appreciation of what constitutes ordinary care.

The judgment is affirmed.

HAMMOND PACKING CO. v. DICKEY.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1911.)

No. 3,346.

1. EVIDENCE (§ 213*)—RELEVANCY—ATTEMPT TO COMPROMISE.

In an action for injuries, evidence of an unsuccessful effort on the part of defendant's attorney to effect a compromise or settlement is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 745; Dec. Dig. § 213.*]

2. EVIDENCE (§ 380*)—PHOTOGRAPHS—PRELIMINARY PROOF.

In an action for injuries to plaintiff's leg, a photograph of a man's leg, showing considerable injury and a scar at the place where plaintiff claimed he had been injured and scarred, was inadmissible, in the absence of proof identifying the photograph, indicating when it was taken, whose leg was shown thereon, and that the injury and scar illustrated therein truly represented the extent or character of plaintiff's injury or scar.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657; Dec. Dig. § 380.*]

Photographs as evidence in civil actions, see note to Porter v. Buckley, 78 C. C. A. 145.]

In Error to the Circuit Court of the United States for the District of Colorado.

Action by John Dickey against the Hammond Packing Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions to grant a new trial.

J. H. Burkhardt and L. F. Twitchell (Frank C. Goudy, on the brief), for plaintiff in error.

George Q. Richmond (C. F. Clay, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

VAN DEVANTER, Circuit Judge. This was an action to recover for personal injuries, and the verdict and judgment were for the plaintiff. At best the case was so close upon the evidence, and the plaintiff's right of recovery was so uncertain, that errors in the admission of evidence were calculated to be more harmful than usual.

In the course of the trial the plaintiff was permitted, over the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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fendant's objection, to make proof of an unsuccessful effort on the part of the defendant's attorney to effect a compromise or settlement of the plaintiff's cause of action. In this there was error. As we had occasion to say in *Moffitt-West Drug Co. v. Byrd*, 34 C. C. A. 351, 352, 92 Fed. 290, 291, and again in *New York Life Ins. Co. v. Rankin*, 162 Fed. 103, 108, 89 C. C. A. 103, 108:

"It is the policy of the law to favor the settlement of disputes, to foster compromises, and to promote peace. If every offer to buy peace could be used as evidence against him who presents it, many settlements would be prevented, and unnecessary litigation would be produced and prolonged. For this reason unaccepted offers to compromise claims or to purchase peace are inadmissible in evidence at the trial of controversies over the claims to which they appertain, and should not be permitted to affect the rights of the parties, or to influence the results of the trials."

There was also admitted in evidence, over the defendant's objection, a photograph of a man's leg, showing a considerable injury or scar at the place where the plaintiff claimed that he had been injured and scarred. But there was no evidence identifying the photograph, or indicating when it was taken, or whose leg was shown therein, or that the injury and scar illustrated therein truly represented the extent or character of the plaintiff's injury or scar. In this situation, we think the photograph ought not to have been admitted.

Because of these rulings, the judgment is reversed, with a direction to grant a new trial.

RUBBER TIRE WHEEL CO. et al. v. GOODYEAR TIRE & RUBBER CO.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1910.)

No. 2,037.

PATENTS (§ 327*)—DECREE ADJUDGING PATENT INVALID—RIGHTS OF DEFENDANT.

A decree in an infringement suit adjudging the patent void for lack of patentable invention leaves the defendant with the same rights as though the patent had never been issued, including the right to make and sell the whole or any part of the patented device without interference with its business by the complainant by harassing its customers with suits or threats of suit for infringement, in which right it is entitled to protection by injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

Operation and effect of decision in equitable suit for infringement, see note to *Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co.*, 68 C. C. A. 541.]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Suit in equity by the Goodyear Tire & Rubber Company against the Rubber Tire Wheel Company and the Consolidated Rubber Tire Company. From an interlocutory order granting a preliminary injunction, defendants appeal. Modified and affirmed.

See, also, 164 Fed. 869.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This cause is here upon appeal from an interlocutory order made in the court below enjoining appellants, *pendente lite*, from instituting or prosecuting certain suits against customers of appellee. The suit was begun by a bill in equity of the appellee, as complainant, against the appellants as defendants. It is averred in the bill that complainant is engaged in the business of manufacturing and selling solid rubber tires for vehicles; that in 1900 defendants sought by suit commenced in the Circuit Court of the United States for the Northern District of Ohio, to enjoin the present complainant from making and vending its tires on the ground that they embodied the elements of a certain patent issued to one Grant in 1896, No. 554,675, for rubber tired wheels, the letters patent having been acquired by the present defendants; that the suit resulted ultimately in a decision of this court holding the Grant patent to be null and void, and directing that the bill be dismissed; and that a petition for a writ of certiorari to this court was subsequently denied by the Supreme Court. It is further averred in the present bill that, notwithstanding such adjudged nullity of the Grant patent, the defendants are seeking to enforce it against customers of complainant, some of whom are specially named in the original bill and an amendment thereto, and against whom suits have been brought; that many of its customers are being intimidated by such suits and by threats made by defendants to commence suits against others, some withholding orders for complainant's rubber tires unless indemnified by it. An injunction is prayed against defendants from so diverting, and interfering with, complainant's business and trade in rubber tires.

In the opinion rendered in the court below, allowing the interlocutory order, this statement of facts appears:

"In July, 1908, the defendants in this case, who were the complainants in the original suit brought in the Northern district of Ohio, filed a bill in one of the federal courts sitting in New York to restrain and enjoin one Doherty from infringing the Grant patent. Doherty is a small dealer, of small means, and has been a customer of the complainant since December, 1907. The affidavit shows him to have stated that some persons unknown to him, desiring to equip a carriage wheel with a rubber tire, directed that the tire must be of the complainant's manufacture, and Doherty thereupon purchased such a tire. Thereafter Roberts, New York manager of the Consolidated Tire Company, before the fitting of a rubber to the wheel, directed him to buy the necessary wiring and steel channel of some one other than the complainant or any of its agents or branch houses. He thereupon purchased the wire of B. F. Goodrich, and the steel channel of the Rutherford Rubber Company. He says he was further directed by Roberts to mark the wheel to which he applied the tire so he could identify it, and to send his bill for services rendered to the company of which Roberts was the New York manager. Doherty did this and credit was given him on his account by such company. The evidence is undisputed that Doherty purchased his materials as above stated and fitted them to the carriage wheel. The statements attributed to him are not denied."

By the preliminary injunction the appellants are restrained, *pendente lite*, from prosecuting the suit against Doherty (mentioned in the statement quoted), and also from "instituting, maintaining or prosecuting any action in any court of the United States, based on alleged infringement of letters patent No. 554,675 * * * against any person, firm or corporation for dealing in, buying, selling or using any of complainant's solid rubber tires or any of the component parts thereof," and also "from interfering with the business of complainant by threatening to bring such suits against complainant's customers, whether the business conducted with those customers is the vending to them of the whole of complainant's tire or some one or more of the elements which enter into it."

Staley & Bowman, for appellants.

H. A. Toulmin, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The important question concerns appellants' suit against John Doherty, and the preliminary injunction granted in the present case against the further prosecution of that suit. One objection made is that the court below relied on affidavits containing hearsay statements. Doherty is one of appellee's customers whose names are not stated in the pleadings, but against whom, as a class, threats of suit are alleged to have been made by appellants. Doherty has admittedly been a customer of appellee in the purchases of rubber tires since 1907; and the facts that he purchased a solid rubber tire of appellee and placed it on a wheel and received his pay from one of the appellants as found by the court below are not open to the charge of hearsay and are not disputed. The hearsay statements are those tending to show that one of appellants caused orders for purchases of materials by Doherty and the work done by him to be given and executed in a particular way, with a view of instituting against him the suit before mentioned. Whether hearsay statements can be considered or not on interlocutory motion (Chase's Stephen's Dig. Ev. [2d Ed.] 311, note 4), or whether effective waiver could arise through failure, as here, to present any motion, objection, or denial in the court below concerning such statements (San Pedro, etc., Co. v. United States, 146 U. S. 120, 137, 13 Sup. Ct. 94, 36 L. Ed. 911; White v. Wansey [6th Circuit] 116 Fed. 345, 347, 53 C. C. A. 634), we need not decide; for, as before indicated, the facts which we regard as material were shown by direct evidence. Then in addition to the averments of a portion of the bill, which are in substance set out in the statement, it is stated among other things in the amended answer:

"* * * Defendants do know and aver the fact to be that in the trade a carriage manufacturer often handles and sells different makes of rubber tires, and that the practice in trade is to purchase rubber, namely, one element of a combination of the Grant patent, from rubber companies and apply this rubber themselves by means of special machinery, or have it applied for them by some blacksmith or machine company, to channel irons furnished by the customer of said carriage company or purchased direct from some steel or rubber company, or furnished direct from some steel or rubber company, and that a large part of the rubber tire business of the carriage manufacturer is often done by applying the rubber by means of two independent retaining wires to their own make of wheels and to wheels furnished them having different makes of channel irons, but all of that peculiar shaped rim which co-operates with the two independent retaining wires and the rubber to form the Grant patented combination. * * *

The result is that the features of the Doherty case, which consist of his purchase of the solid rubber tire from appellee, the wire from Goodrich, and the steel channel from the Rutherford Rubber Co., and of then assembling these articles in violation of the terms of the Grant patent, present one of the typical cases described in appellants' amended answer, not to speak further of the bill; and learned counsel for appellants insist that:

"The pivotal question in this case is whether the court in construing the Grant patent can treat any one element as more material than some other element."

We thus reach a consideration of the restraint of the interlocutory order upon appellants' prosecution of the Doherty suit. The basis of

that suit is the Grant patent. As pointed out in the statement, in a suit between the parties to the present action the Grant patent was adjudged invalid, the decision being that it was "void for want of patentable novelty." *Goodyear Rubber Co. v. Tire & Rubber W. Co.* (6th Circuit) 116 Fed. 363, 365, 366, 377, 53 C. C. A. 583. It was a combination patent, its first claim consisting of three elements, viz., a metallic channel rim, a solid rubber tire, and independent retaining wires passing entirely through the rubber tires horizontally. So far as the effect of the decree in that case is concerned, counsel for appellants in substance admit that if Doherty had purchased all of these elements—the rim, the tire, and the wires—from appellee, complete privity between appellee and its customer would have arisen, and so have justified the preliminary injunction as to him. This, of course, includes the further concession on the part of counsel that one effect of the former judgment is that, where a court of equity as here has jurisdiction of appellants, it may enjoin them by decree in personam from doing any acts at places beyond the jurisdiction of the court, as well as within it, which would interfere with the right of appellee to make sales of all, as distinguished from part, of the elements (the articles aforesaid) embraced in the patented combination. The concessions so made, as under the authorities they were bound to be, render it unnecessary to do more with respect to the history of the Grant patent than allude to the fact that the patent was held to be valid in a case to which appellee was not a party. *Consolidated Rubber Tire Co. v. Firestone T. & R. Co.* (2d Circuit) 151 Fed. 237, 80 C. C. A. 589. A number of cases in which the patent was involved are cited in *Consolidated Rubber Tire Co. v. Diamond Rubber Co.* (2d Circuit) 157 Fed. 677, 85 C. C. A. 349.

The point of departure from the concessions of counsel, as well as their insistence, is that the protection of the former judgment cannot be invoked respecting sales of one or less than the whole of the elements covered by the combination. As it seems to us, counsel refuse to accord due effect to the main feature of the bill. It is injury to appellee's business, through interference with its customers, that is made the subject of complaint.

In *Goodyear Tire & Rubber Co. v. Rubber Tire W. Co.* (C. C.) 164 Fed. 869, 871, 877, the present appellee sought by bill to enjoin defendants from interfering with one of complainant's customers who was doing business in Havana. One of the allegations of the bill was that under the protection of the former decree complainant was making rubber tires to sell to all who would buy. An interlocutory injunction was denied, but solely upon the ground that defendants had registered the Grant patent in the republic of Cuba, and so had obtained "a Cuban patent for the same invention." In other words, the court could not protect the present appellee in virtue of the decree declaring the Grant patent void, without interfering with independent rights acquired by defendants through the Cuban grant respecting business carried on in Cuba. It is true that the point now relied on concerning sales of only one element of the combination does not appear to have been presented. But apparently it was as open to consideration there as it is here. The

case was heard before Judge Lurton, sitting in the Circuit Court, and in the course of the opinion he said:

"This court, as a court of equity having jurisdiction over the persons of the defendants, may control them, by decree in personam, from doing any act within or without the jurisdiction, at home or abroad, by bringing suit or otherwise, which shall be an interference with the right of the complainant to prosecute its business without interference with the defendants by virtue of the Grant patent."

In *Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065, the right of a holder of one patent, who had failed in a suit for infringement against the holder of another patent, to maintain an action against a customer of the latter for using one of the latter's patented devices, was passed upon; and one of the controlling features of the decision is that such a suit, if not enjoined, would, in violation of the previous judgment, interfere with the business of the successful party in the original infringement suit.

Counsel for appellants earnestly endeavor to distinguish that case, on the ground that the customer was there using the entire patented device. They place stress upon the following language of Mr. Justice Moody, who announced the opinion of the court (206 U. S. 288, 27 Sup. Ct. 612, 51 L. Ed. 1065):

"Whether the judgment between *Kessler* and *Eldred* is a bar to the suit of *Eldred v. Breitwieser* (the customer of *Kessler* and user of his device), either because *Breitwieser* was a privy to the original judgment, or because the articles themselves were by that judgment freed from the control of that patent, we deem it unnecessary to inquire. We need not stop to consider whether the judgment in the case of *Eldred v. Kessler* had any other effect than to fix unalterably the rights and duties of the immediate parties to it, for the reason that only the rights and duties of those parties are necessarily in question here. It may be that the judgment in *Kessler v. Eldred* will not afford *Breitwieser*, a customer of *Kessler*, a defense to *Eldred's* suit against him. Upon that question we express no opinion. Neither it nor the case in which it is raised are before us."

It would seem, also, that questions of the character there stated are not before this court, and for the same obvious reasons. But it is difficult to perceive why the absence of such questions renders the decision inapplicable to the present case; nor are we able to understand why the principles announced in that decision are not in point here. It is plain that *Kessler* did not gain any more freedom through the result of *Eldred's* infringement suit to manufacture and sell the *Kessler* device than the *Goodyear* Company acquired respecting the *Grant* device in its original suit with the present appellants. Can it be that such freedom as to the whole device does not include its parts as well separately as collectively? Why, as between the parties to the present suit, did not the former judgment operate to remove the ban of the *Grant* patent from each of its elements, and also to destroy all right to the combination of those elements? It was found in the opinion declaring the invalidity of the *Grant* patent that its parts, as also the result accomplished by the combination, were alike old in the art. 116 Fed. 369, 371, 53 C. C. A. 583.

It appears that the appellee in fact both before and at the date of the *Grant* patent conducted the business, and that it has ever since

then maintained the business, of manufacturing and selling rubber tires. Manifestly that business, irrespective of the wire and rim trade, must be impaired if the appellants are to be allowed to prosecute suits against appellee's customers for rubber tires. There is no pretense that such suits can be maintained, except through the Grant patent.

Returning to *Kessler v. Eldred*, it was said by Mr. Justice Moody (206 U. S. 288, 289, 27 Sup. Ct. 613, 51 L. Ed. 1065):

"But the question here is whether, by bringing a suit against one of Kessler's customers, Eldred has violated the right of Kessler. The effect which may reasonably be anticipated of harassing the purchasers of Kessler's manufactures by claims for damages on account of the use of them would be to diminish Kessler's opportunities for sale. No one wishes to buy anything, if with it he must buy a lawsuit. * * * Leaving entirely out of view any rights which Kessler's customers have or may have, it is Kessler's right that those customers should, in respect of the articles before the court in the previous judgment, be let alone by Eldred, and it is Eldred's duty to let them alone. The judgment in the previous case fails of the full effect which the law attaches to it if this is not so."

Now, keeping in mind, in the first place, the distinction between the rights of Kessler as against Eldred and those of Eldred as against Breitweiser, and, in the next place, the right of Kessler in that suit to have his right vindicated as against Eldred regardless of the latter's rights against Breitweiser, the relevance of the principle of the Kessler case to the case in hand becomes apparent. Kessler's right as against Eldred to make and sell the Kessler device had been established against Eldred's charge of infringement, not of invalidity, of the Eldred patent. The present appellee's right as against appellants to make and sell solid rubber tires, metal rims, and wire was adjudged to be unaffected by the Grant patent because it was invalid and void. The inevitable effect of the final adjudication, as between these parties, was, we think, to restore appellee to the same rights respecting the sale of its tires that it would have possessed had the Grant patent never been issued. To say anything less than this—to say that appellee may sell all the elements of the Grant patent as an entirety but may not sell them separately—is to deny to appellee in regard to a void patent a privilege equivalent to that accorded to a licensee under a valid patent to use less than the whole of the patented device (*Young v. Foerster* [C. C.] 37 Fed. 203, 204), or to a purchaser of a valid patented device to use as part of it an unpatentable article (*Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 433, 14 Sup. Ct. 627, 38 L. Ed. 500). It follows that appellee's right as against appellants to make sales of any or all of the articles comprised in the Grant patent is at last referable to that principle which recognizes an absolute power in every man to dispose of his own property. The sanction then of any result of the former judgment which necessarily hampers and injures the successful party to the suit in the prosecution of its business would be at once illogical and unjust.

The effort made to escape this through the decisions of *Aspden v. Nixon*, 4 How. 467, 11 L. Ed. 1059, and *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768, cannot be sustained. Those cases are not analogous. It is manifest that the elements of the Grant patent and the rights of the parties in respect of each of those elements,

as well as the combination, were involved in the issues of the original case in the sense that they were heard and adjudged on their merits; and consequently the subject-matter of the former suit and judgment must in accordance with familiar principles be held to have included the subject-matter of this suit.

In respect to the license agreement, it is sufficient to say that it was entered into expressly without prejudice to the rights of any of the parties in August, 1903, for one year, and was neither renewed nor observed thereafter. If the agreement was not invalid on its face, which we do not decide, we are unable to see how anything done in pursuance of it could as claimed estop appellee from insisting upon the observance of the right adjudged in its favor in the former suit.

We are not satisfied, however, with the scope of the preliminary injunction. The suit commenced by appellants in St. Louis does not involve appellee's make of tires. The pleadings respecting the firm of Jose Alvarez & Co. of Cuba do not seem to change the situation touching the Cuban patent, as explained in *Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.*, supra. But, apart from these observations, we do not think that a proper showing was made to require a preliminary injunction as to acts alleged in respect to customers other than Doherty. We are of opinion, however, that the order should stand as to the prosecution of the suit against him. It is not contended, as plainly it could not be, that the remedy in equity cannot be invoked to prevent the prosecution of a single case like that against Doherty. *Kessler v. Eldred*, 206 U. S. 289, 27 Sup. Ct. 611, 51 L. Ed. 1065.

The order must be modified as thus indicated; and, subject to this, the order of the court below granting the preliminary injunction will be affirmed, with costs.

NU BONE CORSET CO. et al. v. SPIRELLA CO.

(Circuit Court of Appeals, Third Circuit. January 24, 1911.)

No. 1,420.

PATENTS (§ 328*)—INFRINGEMENT—CORSET STAY.

The Beeman patent, No. 507,875, and the White and Rider patent, No. 645,444, each for a dress or corset stay made of a single wire, bent into loops which overlap and come into contact with each other, are neither of them infringed by the device of the Dean patent, No. 868,763, in which two or three interlocking wires are used.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Suit in equity by the Spirella Company against the Nu Bone Corset Company and others. Decree for complainant (180 Fed. 470), and defendants appeal. Reversed.

Hugh C. Lord, for appellants.

Frederick W. Winter, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LANNING, Circuit Judge. By the decree of the court below the defendants, the appellants here, were adjudged infringers of the two patents in suit. They are both for corset stays or stiffeners, one being the Beeman patent, No. 507,875, dated October 31, 1903, and the other the White and Rider patent, No. 645,444, dated March 13, 1900.

The only claim of the Beeman patent is as follows:

"As an improved article of manufacture, a dress stay comprising a body consisting of a wire bent to form a series of oppositely disposed pear-shaped eyes, each side of which normally bears against and partly overlaps the adjacent side of the adjoining eye, and a protecting covering secured to and inclosing said body, as specified."

The White and Rider patent has two claims, of which the first claim only is here in suit. It is as follows:

"A garment stay or stiffener formed from a single piece of wire capable of being flexed in all directions, and comprising a series of flattened loops or convolutions overlapping one another, said stay or stiffener being bent longitudinally between its edges, whereby the said overlapped portions of the convolutions are brought into more intimate contact with each other and the stay or stiffener rendered more rigid, substantially as described."

Each of these claims calls, it will be observed, for the use of a single wire only. The defendants' stay or stiffener is composed of a plurality of wires. In some of their stays two wires, and in others three wires, are used. The single wire of the complainant's stay is so bent that each of its pear-shaped eyes or loops partly overlaps and comes into contact with the sides of the adjoining eyes or loops. If, however, we take a single wire of the defendants' two-wire structure, or a single wire of their three-wire structure, and trace such wire through the structure itself, we find that the loops in such wire are not pear-shaped, and do not bear against, or to any extent overlap, any of the other loops in the same wire. There is contact between the successive loops of the defendants' two-wire and three-wire structures; but such contact is produced by the peculiar method of bending and interlocking the wires of their several structures, and not, as in the complainant's patents, by the overlapping of the loops of a single wire.

We cannot, by construction, enlarge a claim of a patent beyond the fair meaning of its language. If a patentee discloses in his specification an invention not sufficiently covered by the claims of his patent, he may, if the limited character of the claim is the result of inadvertence, accident, or mistake, surrender his patent and apply for a re-issue, with a claim or claims sufficiently definite and exact to cover the whole of his invention. If he fails to do that, the part of his invention outside of his claims belongs to the public. While, therefore, we must give to the claims of the patents in suit such construction as the language employed in them reasonably demands, they cannot cover the defendants' structures, unless those structures are the mechanical equivalents of the single-wire structure described in the two claims of the two patents in suit. We think they are not such equivalents. There are fundamental differences in the stays of the complainant and the defendants. The complainant has one wire; the defendants have two or three wires. The eyes or loops of the complainant's single-

wire structure partially overlap one another; the eyes or loops of any one of the wires of the defendants' structures do not overlap one another. The eyes or loops of the complainant's single-wire structure come into contact because of their overlapping; the eyes or loops of the defendants' structures come into contact because of the plaiting or interlocking of their plural wires. The complainant's single-wire structure has a protecting covering, which is secured to and incloses the whole of the wire structure, the manner in which it is so secured being stated in the specification to be by pasting or securing a piece of fabric upon the front or back, or both, of the wire structure; the defendants' structures have no covering, pasted or otherwise, secured thereto, the naked wire structures being merely inserted into a pocket composed of a piece of fabric.

It is true that a mere splitting up of the parts of a patented structure, the functions remaining the same, does not avoid infringement. But we do not find such a splitting up of parts by the defendants in the present case. We think there would be little profit in discussing at any length the principles upon which the structures of the complainant and of the defendants operate. It has been done by the experts and by counsel in their briefs. That the stiffness and resiliency of the defendants' structures are the result, in part, of the same causes that produce resiliency and stiffness in the complainant's structures, may, for the purposes of the argument, be conceded. But there is another element in the defendants' structures which contributes to their stiffness and resiliency, and that is the interlocking of the different wires. The defendants' structures, therefore, are not the equivalents of the complainant's. The complainant's claims are narrow. The defendants' structures utilize elements not found in either of the complainant's patents. There is nothing in either of the complainant's patents that would apprise other inventors or the public that the complainant's invention includes or embodies two-wire or three-wire structures with interlocking loops. It seems to us this disposes of the case, and necessarily leads to the conclusion that the defendants do not infringe either of the claims of the complainant's patents.

The decree of the Circuit Court must accordingly be reversed, and the record remitted, with instructions to enter a decree dismissing the bill of complaint. The defendants are entitled to costs in both courts.

MOTION PICTURE PATENTS CO. v. CHAMPION FILM CO.

(Circuit Court, S. D. New York. December 29, 1910.)

PATENTS (§ 328*)—INFRINGEMENT—KINETOSCOPE.

The Edison reissue patent, No. 12,037 (original No. 589,168), for a kinetoscope, *held* infringed, on motion for a preliminary injunction.

In Equity. Suit by the Motion Picture Patents Company against the Champion Film Company. On motion for preliminary injunction. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Warren H. Small and J. Edgar Bull, for complainant.
 Briesen & Knauth, for defendant.

LACOMBE, Circuit Judge. This is an application for preliminary injunction under reissue patent No. 12,037, to Thomas A. Edison, for a kinetoscope, which was sustained and its claims construed by the Circuit Court of Appeals in this circuit in *Edison v. Am. Mutoscope & B. Co.*, 151 Fed. 767, 81 C. C. A. 391. An earlier decision of that court discussed the original patent. 114 Fed. 926, 52 C. C. A. 546. Nothing that was said in either of these opinions need be repeated here. It is assumed that they will be consulted. They described the device of the patent and analyzed the claims so fully, illustrating the decision by describing the cameras which were held, the one to infringe, the other not to, that it seems not difficult to apply the principles of the decision to the Gaumont and Champion-Gaumont cameras now before the court. The differences between these two alleged infringing cameras are unimportant. Defendant apparently does not contend otherwise. Therefore this discussion will be confined to the Champion-Gaumont type, of which an operative camera has been submitted for inspection.

The film-moving mechanism of both, however, is so well shown in the drawing and blue print filed with the papers that their operation may be easily understood. The film passes from the delivery roll to a delivery wheel, whose sprockets engage positively with holes in the sides of the film. This wheel revolves, not intermittently, but continuously, and in operation there is always a loop or slack part of the film between it and the film guide. In consequence the delivery wheel does not itself advance the film through the guide. In the *Mutoscope Case* it was held that these circumstances did not negative infringement. The film passes through the guide, around a cam eccentrically mounted on a continuously moving wheel, to the take-up reel, where it engages with sprockets; the latter reel revolving continuously. The operation is as follows: The device being at rest, there is the loop or slack above the guide entirely free to be drawn down through the guide, the same as in the *Biograph* and in the *Warwick* cameras, which were considered in the *Mutoscope Case*. In the *Biograph* instrument this slack was pulled through by two friction rollers revolving continuously; the movement of the film being intermittently checked by a so-called tension leaf. "The engagement with the film was wholly frictional; * * * no such interlocking as will hold the film firmly, advancing it with mathematical accuracy. * * * There was the possibility of slip." In the *Warwick* the film was pulled through by a bifurcated fork, which engaged with holes and advanced the film mathematically a certain distance and then disengaged. The Court of Appeals held that the bifurcated fork was a fair equivalent of the wheel with sprockets.

In the *Champion-Gaumont*, when at rest, the film is stretched taut between the guide and the take-up sprocket wheel resting snugly against the cam. We may assume that at that time the outer edge of the cam is on the side of the wheel furthest away from the film. Its position is not essential. Substantially the same cycle of movement may be worked out if it be in the reverse position. The machine being

started, what happens in a given space of time? The moving sprocket wheel revolves through a predetermined arc, and, carrying the film on its sprockets, advances the film a predetermined distance. During the same time the outer edge of the eccentric cam is brought into engagement with the taut film, and, revolving, pushes it out a distance predetermined by the amount of the cam's eccentricity. The film thus pushed out cannot come from the side of the take-up wheel, where it is held firmly on sprockets. It can readily come, and does come, out of the film-guide; the slack above the guide allowing it to move easily forward. As the revolving eccentric cam recedes to the inner side of its wheel axis, it leaves the film which it has pushed out, and for a brief interval there is no movement of the film out of the guide, because the cam is no longer pushing on it, and the sprocket wheel cannot pull on it till it has first taken up slack. During that period the film is at rest for receiving impressions from the lens.

Defendant contends that this operation of advancing the film is wholly frictional, that there is every possibility to slip, and that the spacing cannot be mathematically accurate. This contention is not found persuasive. There is friction between the cam and the film; but it is very different from the action of two rollers, whose frictional contact alone gives a grip and produces a pull. One end of the film (the part on the sprocket wheel) is firmly held. It cannot slip back, and in reality it is this which causes it to advance when the cam pushes it. It must advance or break. I find it impossible, from a study of the drawings or from a manipulation of the exhibit, to see any possibility of slip. Why the spacing should not be mathematically accurate is not apparent. The arc through which the sprocket wheel will move in a given time is predetermined. The equivalent in linear movement of the film is known. The additional length of film which will be hauled out of the guide to accommodate the eccentric cam is also predetermined by the measure of the cam's eccentricity. The total distance the film will advance past the lens, being the sum of these two predetermined items, is itself predetermined. The period of rest may also be predetermined, it would seem, with mathematical accuracy. It is the time necessary for a sprocket wheel, of a given diameter revolving at a given speed, to reel up the amount of film required to accommodate a protruding cam, the extent of whose eccentricity is accurately known.

The conclusion is reached that the Champion-Gaumont and the Gaumont machines infringe. It is conceded that the Pathe machine, one of which is owned by defendant, also infringes. This and its Champion-Gaumont may, as suggested, be impounded in the custody of defendant's counsel until final hearing.

Preliminary injunction may issue.

MOTION PICTURE PATENTS CO. v. YANKEE FILM CO.

SAME v. STEINER et al.

(Circuit Court, S. D. New York. January 3, 1911.)

PATENTS (§ 328*)—INFRINGEMENT—KINETOSCOPE.

The Edison reissue patent, No. 12,037 (original No. 589,168), for a kinetoscope, *held infringed*, on motion for a preliminary injunction.

In Equity. Suits by the Motion Picture Patents Company against the Yankee Film Company and against William Steiner and others. On motions for preliminary injunction. Motions granted.

Philip Farnsworth (J. Edgar Bull, of counsel), for complainant.
Seward Davis, for defendants.

LACOMBE, Circuit Judge. The defense of failure to disclaim as to claim 4 was disposed of in decision on the demurrer.

The defense of prior invention by Frieese-Greene, now presented for the first time after the patent has been for several years in litigation and long since sustained by the Circuit Court of Appeals, is one to be passed upon at final hearing.

The defense that the suit against the Mutoscope Company, in which the Circuit Court of Appeals sustained the validity of the patent, was a collusive one, must also be reserved for final hearing.

As to infringement: Defendants have been engaged in one way or another in having moving pictures taken by two different cameras, or in selling or leasing the reproduction of exposures thereon. Apparently, on their own admissions, they were satisfied with the statements of the persons taking the pictures that the machines did not infringe. They took no steps to assure themselves that these statements were correct. It was so easy to demonstrate noninfringement by showing either that the film moved continuously, or that the lens (or lenses) moved—a demonstration which might have been made to the court, if not to the adversary—that the failure to do so arouses suspicion. Undoubtedly the detectives who testify for complainant were able to give but a hasty glance at the interior on the two occasions when the covering cloth was disarranged; but the affidavit of the defendant Henkel, in connection with the other testimony, seems to indicate sufficiently to make out a *prima facie* case that these two cameras are really of the Gaumont or so-called "beater" type, which have been held to infringe in *Motion Picture Company v. Champion Co.* (recently decided). 183 Fed. 986.

Injunction may be taken against all the defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

JONES et al. v. EDWARD B. SMITH CO.

(Circuit Court, E. D. Pennsylvania. December 30, 1910.)

No. 25.

COSTS (§ 251*)—PREMIUM PAID SURETY COMPANY FOR SUPERSEDEAS BOND.

The premium paid by a plaintiff in error to a surety company for a supersedeas bond on a writ of error to a Circuit Court, required by a rule of the Circuit Court of Appeals, is properly taxable as costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 959; Dec. Dig. § 251.*]

At Law. Action by Thomas A. Jones and others against the Edward B. Smith Company. On appeal from the clerk's taxation of costs. Taxation affirmed.

See, also, 170 Fed. 622.

Brown & Lloyd, for plaintiffs.

Wm. A. Glasgow, Jr., for defendant.

J. B. McPHERSON, District Judge. The only item in dispute is the premium paid to a surety company upon a supersedeas bond given upon a writ of error to a judgment of the Circuit Court. The bond was entered under rule 13 of the Circuit Court of Appeals (150 Fed. xxxix, 79 C. C. A. xxxix), and there is no controversy concerning the amount paid as premium. In my opinion the clerk of the Circuit Court was right in following the decision in *The Bencliff*, 158 Fed. 377. I need not repeat what was said in that case. As far as I am aware, all the other decisions upon this subject are cited there, and the item now in dispute seems to be justified by the rule that a disbursement may be properly allowed when it is made necessary by the standing order of a court.

As the question depends upon the construction and effect to be given to rule 13 of the Circuit Court of Appeals, I should have preferred to leave the decision to that tribunal; but it is properly presented upon the taxation of costs in the Circuit Court, and it seems to be necessary that I should first decide it.

The taxation of the clerk is affirmed.

In re OSHWITZ et al.

(District Court, S. D. New York. October 17, 1910.)

In Bankruptcy, No. 14,082-4.

BANKRUPTCY (§ 114*)—RECEIVERS—ATTORNEY'S AGREEMENT—UNPROFESSIONAL CONDUCT.

Where, after the appointment of a receiver in bankruptcy proceedings, it was claimed that the receiver had agreed to appoint the attorney for the petitioning creditors as his attorney and various negotiations were with a view to an arrangement for a division of fees, and the receiver proposed that all the fees of the receiver and the attorneys should be divided into three equal parts to be shared equally between the attorney

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the petitioning creditors, the receiver, and the attorney he desired to appoint, and each of the representatives of the two attorneys who conducted the negotiations offered to divide the fees on certain conditions, such propositions were illegal and unprofessional, and required the appointment of a new receiver without any allowance either to the old receiver or to his attorneys for their services except for disbursements.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Morris Oshwitz and Annie Feldstein. On an application to vacate an order appointing a receiver. Granted.

Moses Cohen, for petitioning creditors.

Walter T. Kohn, for receiver.

HOLT, District Judge. The attorney for the petitioning creditors in this case claimed that the receiver had agreed to appoint him as his attorney. The receiver desired to appoint another person as his attorney. It is admitted by all the parties that various negotiations took place having in view some arrangement for the division of fees, and in my opinion the preponderance of evidence establishes that the receiver proposed to the two attorneys that all the fees of the receiver and of the attorneys should be divided into three parts and shared equally between them. Each of the representatives of the two attorneys who conducted the negotiations in their behalf offered to divide fees on certain conditions. All such propositions were illegal and unprofessional. The order appointing the receiver in this case is vacated. A new receiver will be appointed, with a bond of the same amount as previously given, and the present receiver is directed to turn over all assets in his hands to his successor and to account. Actual proper disbursements made by the receiver or either of the attorneys will be allowed, but no compensation will be allowed to the receiver or either of the attorneys.

In re DESROCHERS.

(District Court, N. D. New York. January 4, 1911.)

No. 3,789.

1. BANKRUPTCY (§ 114*)—RECEIVERS.

Receivers in bankruptcy are necessary, and should be appointed only when the preservation of the estate demands their intervention.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 114.*]

2. BANKRUPTCY (§ 117*)—RECEIVERS—SALE.

Sales by receivers are justified only when the property is perishable, or is rapidly depreciating in value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 167; Dec. Dig. § 117.*]

3. BANKRUPTCY (§ 469*)—RECEIVERS—APPRAISEMENT OF ASSETS—NECESSARY PROCEEDING.

Where immediately on the filing of a bankruptcy petition by a dry goods merchant certain lawyers by purchasing a claim and having the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same assigned to a clerk in the office of one of them obtained the appointment of one of them as receiver on false representations to the judge, and further secured other associated lawyers to be appointed as appraisers who made no proper appraisal, and then sought, but failed, to obtain an order for the immediate sale of the assets which was unnecessary, on false representations that it was necessary, to save rent and because insurance could not be obtained, such receivership and the proceedings thereunder were irregular and improper and of no value to the estate, and hence an allowance would not be made for the services of a receiver or his attorney or those of the appraisers.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 469.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Octavius B. Desrochers. On objections to receiver's accounts and allowances to his attorney and to the appraisers on report of a special master, and motion to confirm. Objections sustained. Allowances denied.

Muhlfelder & Illch, for trustee.

W. E. Ward, for certain creditors.

Benj. Terk, for petitioning creditor for appointment of receiver.

Wm. Dewey Loucks, attorney for receiver.

Del B. Salmon and Geo. G. Schieffelin, appraisers in person.

RAY, District Judge. On the 2d day of February, 1910, Octavius B. Desrochers, the above-named bankrupt, through Mr. Norton of Troy, N. Y., a reputable attorney, filed with the clerk of this court his voluntary petition and schedules in bankruptcy. On the evening before filing such petition he closed and locked his stores, one in the city of Troy, N. Y., and the other in the city of Schenectady, N. Y. He left the stock of goods in each store as they had been while conducting business, and neither removed any of such goods, nor did anything indicating, or that could give rise to a suspicion, that goods were being removed or would be removed from said stores, or either of them, and nothing was done by any person indicating that any removal was going on, or that indicated in any way that the stock of goods or property in either store was being disturbed or in any way interfered with. At the time of filing his said petition Desrochers had not been sued or threatened with any legal proceedings or suits, except it may be inferred that his landlord, one McDonald, intended dispossession proceedings or a suit as he had given until February 2, 1910, for payment of rent.

On February 2, 1910, the same morning said voluntary petition in bankruptcy was filed, Samuel Levy, William Dewey Loucks, and Benjamin Terk, all of the city of Schenectady, were in the city of New York. All three are attorneys of the Supreme Court, state of New York, and of this court, and were ignorant of such bankruptcy proceedings, and of the fact that said Desrochers was in any way financially embarrassed. Neither of them was in any way interested in said matter, nor did they or either of them at that time represent any person interested in the affairs of said Desrochers as creditor or otherwise. The Schenectady store of said Desrochers was nearly opposite the law office of Del B. Salmon, formerly a partner of said Sam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

uel Levy, and on the morning of February 2, 1910, he noticed that said store was closed, or at least not opened. Thereupon Salmon at Schenectady called up Levy in New York by telephone, but, Levy not being present to answer the call and Loucks and Terk being there, Loucks answered the call, and the matter of getting business out of the Desrochers matter was discussed. Terk, at the suggestion of Loucks, or at least with his knowledge and assent, called up the clerk of the district court at Utica, and learned that a petition in bankruptcy had been filed, but that no receiver had been appointed. Thereupon Loucks drew up in his own handwriting a petition for the appointment of a receiver and also a bond for costs, etc., in case the petition should be dismissed, in which bond the names of Loucks and Terk were inserted as sureties by Loucks himself, a blank space being left in both petition and bond for the name of a petitioning creditor for the appointment of a receiver when one should be found. In the meantime Terk and Loucks were engaged in concert in an effort to find some one who would be willing or consent to act as a petitioner for the appointment of a receiver of the property, etc., of said Desrochers. Neither had any knowledge or information tending to indicate any necessity for the appointment of a receiver in the case. Some of these efforts were made in New York City, but, failing to find any one there who would act as a petitioner on such an application, Loucks and Terk, by telephone, requested one George W. Donnan, who, while an attorney at law, was employed in Terk's law office at Schenectady to go to New York City; the intention being to have him act as petitioner in case a claim should be secured. Donnan went to New York City, arriving there on the morning of February 3d. The same day, February 2d, Loucks returned home to Schenectady, where he arrived after 11 o'clock p. m. Thursday morning, February 3d Loucks reached his office in Schenectady at about 7:30 a. m., and Henry R. Gifford, a clerk in his office, arrived a few minutes thereafter. Loucks then made efforts to find a creditor of Desrochers who would assign his claim to Donnan. He applied to four such creditors, but three of them refused to assign their respective claims, and the claim of the other was too small to be of use. Finally, the Atwood Suspender Company was applied to by Loucks. This company declined to become a petitioner itself, but, having a claim of \$23.38 against Desrochers, assigned it to Donnan by written assignment prepared by Loucks, and sent by him to said company by said Gifford for execution, who also took along and delivered the check of said Loucks for \$23.38 in payment for such claim. It is at once apparent who the real owner of this claim was. The legal title, however, was in Donnan, as it was assigned to him. Loucks then telephoned what had been done to New York City, and the name of Donnan was inserted in the blank space in the petition for a receiver and affidavit of verification thereto, and the date of such verification was changed from February 2d to 3d. The bond had been executed the day before—that is, February 2d—so far as appears on its face. It recites:

"Whereas a petition has been filed by the above-named bankrupt praying that he be adjudicated a bankrupt and an application has been made by

George W. Donnan asking for the appointment of a receiver therein: Now, therefore, we, George W. Donnan of Schenectady, New York City, N. Y., as principal," etc.

It is certified by Hazel K. Grandin, a notary public of New York City, under her seal to have been acknowledged by Donnan on the 2d day of February, and to have been subscribed and sworn to as to qualification as sureties by Loucks and Terk on the same day. On that day Donnan was not a creditor or a petitioner. He had no claim against and no interest in the estate of Desrochers. That petition reads as follows, and shows that the name "George W. Donnan" was inserted wherever it occurs after the remainder thereof, except signatures "Geo. W. Donnan" and "Narciso C. Donato," and figures "\$2338" and words "for goods sold and delivered and holds no security" had been written by Loucks and written by him before he returned to Schenectady and before Terk returned there from New York, viz.:

"U. S. Dist. Court, N. Dist. N. Y.

"In the Matter of Octavius B. Desrochers, Bankrupt.

"The petition of George W. Donnan respectfully shows to the court:

"That a petition in bankruptcy has been duly filed by the above-named bankrupt asking that he be duly adjudicated a bankrupt in accordance with the acts of Congress relating to bankruptcy, on February 2nd, 1910.

"That the estate of said bankrupt consists mainly of a stock of merchandise in two stores, one in Schenectady and one in Troy in said district and that the value of the same does not exceed the sum of five thousand dollars.

"That your petitioner is a creditor of said bankrupt in the sum of \$2338 for goods sold and delivered and holds no security.

"That the stock is of such a nature it can be easily concealed and made away with. That a number of creditors have sued the said bankrupt as your petitioner is informed and believes and are about to levy on the said stock of goods and the said bankrupt has carried away and is carrying away said property for the purpose of concealment. That unless a receiver is appointed at once to take charge of said property until the election of a trustee, the creditors rights and interests will be greatly jeopardized and injured.

"That the petitioner herewith files a bond in the penalty of \$250.00 in accordance with section 3-e of the bankruptcy law.

"Wherefore your petitioner prays that Samuel Levy of Schenectady, N. Y., be appointed receiver of said property. Geo. W. Donnan, Petitioner.

"Benjamin Terk, Atty. for Petitioner,

"Orpheum Theatre Bldg., Schenectady, N. Y.

"State of New York, County of New York—ss.:

"I, George W. Donnan the petitioner mentioned and described in the foregoing petition do hereby make solemn oath that the statement of fact therein contained are true according to the best of my knowledge, information and belief. Geo. W. Donnan.

"Sworn to before me this 3rd day of February, 1910.

"Narciso C. Donato, Notary Public, N. Y. Co."

The blanks in the petition were filled and the additions made by Terk. The figures "\$2338" are in a large bold hand, but on close inspection and with special attention called it can be seen that there is a very fine dot under the lower curl of the second figure "3." The stock of merchandise exceeded \$5,000 in value. The statement in said petition is as follows:

"That a number of creditors have sued the said bankrupt as your petitioner is informed and believes, and about to levy on the said stock of goods, and

the said bankrupt has carried away and is carrying away said property for the purpose of concealment."

The only ground stated which could justify the judge in appointing a receiver was wholly false and untrue, and there was no ground of belief that it was true. When that petition was drawn, neither Loucks nor Terk had any information whatever that Desrochers was in serious financial difficulty, and only by the telephone communication from Salmon did they suspect it and by communicating with the clerk's office at Utica only did they learn that a petition had been filed.

This petition for a receiver was presented to the district judge on the 3d day of February, 1910, at his chambers in the city of New York, with the bond mentioned and an order, carbon copy typewritten, but with blank spaces for the name of the bankrupt, the name of the attorney for the petitioners, the name of the receiver, and the penalty of the bond and day of the month. It was dated "2d" in ink "day of February," and the name of the bankrupt had been written in as had the name of the attorney "Benjamin Terk" after some other name had been erased. Attached thereto was this note, the judge being on the bench at the time:

"I take the liberty of suggesting the name of Samuel Levy for appointment as receiver. Mr. Levy is a responsible attorney at law, and he has been named by you as receiver in other matters. Respy, Benj. Terk, Petitioner's Atty."

On this petition and note the judge signed the order, first inserting the name of Levy. The conclusion is irresistible that an understanding existed by which Terk was to act as attorney for the said Donnan. Levy was to be made receiver, and from what had taken place and what immediately took place that Loucks was to act as attorney for the receiver, and that the appointment of said Salmon and said Gifford as appraisers was to be secured. February 3, 1910, the same day, Levy executed a bond as receiver with the American Surety Company as surety, executed also by one Shaible as resident vice president, and attested by said Loucks as resident assistant secretary of the company. The acknowledgment was taken and certified by George G. Schieffelin as notary public, the third appraiser. This bond was presented to the judge, and approved February 4th, and at the same time the appointment of said Del B. Salmon, Henry R. Gifford, and George G. Schieffelin as appraisers was requested, and the judge, in ignorance of the facts, appointed them. It is needless to say that the appointment of a receiver was unnecessary and secured by an imposition on the court, and that, under the circumstances, the appointment of Levy was improper and the selection by him of Loucks as his attorney improper. Loucks asserts that he drew the petition for Terk and at his request as a mere form for the guidance of Terk in a proper case with no idea it was to be used in this proceeding. But how about the bond drawn and executed by him at the same time in this matter in which he was named as a surety? Was that a real bond and intended for actual use? The inventory was commenced very soon, almost at once. On the 5th day of February, 1910, the

day after the appraisers were appointed, and the second day after the receiver was appointed, Loucks appeared as attorney for the said receiver, and drew up and caused to be signed and verified by Levy on the 5th day of February a petition for the sale of the stock of goods in the Schenectady store, by far the largest and most valuable stock, in which is found, after stating, in substance, that the entire stock will inventory about \$5,000, the following allegations:

"That the said Dr. George McDonald demands one hundred dollars (\$100.00) a week rent from your receiver, which amount your receiver believes to be the fair rental value of the said store, the said store being very large, although only partially filled with stock. That your petitioner verily believes that the said stock of goods in the Schenectady store should be sold immediately by your said petitioner, at public auction, for the following reasons: If the said sale does not take place at once, and said sale is delayed until after a trustee is appointed, and then and in that event a delay of at least six weeks will occur before a sale can take place under the direction of the trustee, this will mean an outlay of six hundred dollars (\$600.00), which can be saved to the creditors by an immediate sale of the assets of the said Schenectady store, and your petitioner verily believes that the said stock should be sold at once, in order to save said item of six hundred dollars (\$600.00). For the further reason that your petitioner has endeavored to obtain insurance upon the said stock, in the city of Schenectady, N. Y., and that the said insurance has been absolutely refused, no matter what price your petitioner would pay for the same, by reason of the character and situation of the stock, and for the further reason that it is a bankrupt stock. Your petitioner further believes that a sale should take place upon five days' notice to all creditors mentioned in the schedules, and upon publication in a newspaper in the city of Schenectady, N. Y., where your receiver resides, and has his place of business, daily for five days, so that an additional week's rent may be saved, by cutting the sale from 10 days to five days' notice. Your petitioner further shows: That the expense of having a caretaker take care of the heater and attend to the building will be saved, if said sale can be had at the earliest possible moment. That the said goods, or a majority of them, are of a perishable nature, and especially of an inflammable nature, and come under the meaning and purview of general order XVIII [89 Fed. viii. 32 C. C. A. xx], and therefore the five days' notice can be held as sufficient. That the Troy store is not situated as the Schenectady store is, and there is no very large rental being run up, and therefore the sale of the Troy store is not deemed necessary by your petitioner."

The district judge refused to grant the order presented and prayed for, which was drawn by the attorney for the receiver in accordance with the suggestions and recommendations of the petition, and struck out all provisions for a sale and inserted a clause granting permission to remove the entire stock into one store. This was not done, the saving of the rent suggested by the petition not appealing to the business instincts and enterprise of the receiver and of his attorney. The taking of the inventory was continued and resulted in an appraisal by the receiver of the Schenectady stock at \$1,800.43, fixtures at \$246.20, total \$2,046.63, of the Troy stock at \$2,899.08, fixtures \$1,299.75, total \$4,198.83, grand total \$6,245.46. It has been shown beyond dispute and without substantial contradiction that no part of either stock of goods was perishable in its nature, and that there was no difficulty in obtaining or continuing insurance.

In the meantime Loucks, Salmon, and Terk were writing letters to the creditors, or some of them, of Desrochers, each stating, in substance, that he represented a number of creditors and soliciting

claims and power of attorney to vote for the trustee. Terk's letter in evidence is dated February 3d, and reads as follows:

"Benjamin Terk, Attorney and Counselor at Law, 409 State Street,
Schenectady, N. Y.

"February 3d, 1910.

"Mohawk Valley Paper Co., Albany, N. Y.

"Gentlemen: I have been retained by several of the creditors of Octavius B. Desrochers, who is in business in this city and also in Troy, and am seeking to obtain the assistance of other creditors in order that a trustee may be appointed who will represent the creditors and not be friendly to the bankrupt.

"I am informed that the bankrupt himself, through an attorney, has sent out a circular letter to creditors with a view to obtaining the appointment of a friendly trustee.

"If you desire to co-operate with us will you kindly send me a proof of claim and power of attorney properly executed. There will be no cost to you for filing the same and I will immediately take up with you the matter of finding a trustee who will be mutually satisfactory.

"Respectfully,

Benjamin Terk."

The letter of Loucks in evidence is dated February 3d, and reads as follows:

"County Attorney.

"U. S. Commissioner.

"Wm. Dewey Loucks, Lawyer,

"Parker Bldg., Schenectady, N. Y.

"February 3rd, 1910.

"Nussbaum-Livingstone Co., Albany, N. Y.

"Dear Sir: Octavius B. Desrochers of Schenectady and Troy has filed a petition in bankruptcy, and I am informed that his attorney is sending out circular letters, requesting forbearance on the part of creditors, and the said attorney is attempting to control the selection of a trustee. Concededly, a trustee representing the bankrupt, is ridiculous.

"I represent a number of creditors, and am seeking to co-operate with other creditors, in the selection of a proper trustee, who will represent the creditors and not the bankrupt.

"In this matter, I enclose you blank proof of claim and power of attorney, and if you desire to join in a movement of this kind, if you will send the same to me, properly executed, there will be no charge for filing the same, and I will submit to you the name of the proposed trustee, before voting upon the same. Very truly yours,

Wm. Dewey Loucks."

The similar letter of Salmon is dated February 7th. Here evidently was a concerted effort to control the appointment of the trustee. This effort was not successful, and at the first meeting of creditors held February 15, 1910, one Gilbert Doctor, an upright and experienced business man, was appointed trustee and qualified as such. He found the inventory and appraisal made by the receivers and the appraisers named, Salmon, Gifford, and Schieffelin, so erroneous and incorrect as to be misleading, untrustworthy, and worthless. The referee appointed appraisers skilled in the business, and they with the trustee inventoried and appraised the Schenectady stock at \$5,254.60 and fixtures at \$2,000, total \$7,254.60 as against \$1,800.43, the receiver's valuation of the stock, and \$246.20, his valuation of the fixtures, total \$2,046.63. And the trustee appraised the Troy stock at \$1,689.55 and the fixtures at \$1,500, total \$3,189.55, as against \$2,899.08, the receiver's valuation of the stock, and \$1,299.75 for the fixtures, total

\$4,198.83. This throws some light on the anxiety of the receiver and his attorney to procure an order for the sale of the Schenectady stock on five days' notice, one-half the time required by law. If the court had accepted the allegations of the petition as true and ordered the sale as of perishable goods on short notice and 75 per cent. of the appraised value as fixed by the receiver had been offered and accepted the Schenectady stock would have gone for \$1,350.32, about one-third its actual cash value as after-events demonstrated by bankrupt sale. If it had sold for the full appraised value as fixed by the receiver and his appraisers, it would have gone for about one-half its actual value at bankrupt sale as afterwards demonstrated.

It is not necessary to infer an intent on the part of any one to sacrifice the Schenectady stock in the interest of any person or persons. It is evident that had the policy and requests of the receiver and his attorney been acceded to by the court that stock would have been sacrificed; that the services rendered by both the receiver and his attorney were without value or benefit to the estate is self-evident. In fact, these acts have injured the estate. These acts at best show great carelessness and inattention on the part of both the receiver and his attorney. As the alleged services were not only worthless to the estate, but unnecessary, and this fact became apparent and was well known to both immediately after the appointment, no compensation to either from the estate is warranted or justified. The voluntary petition in bankruptcy was filed on the morning of February 2d. The adjudication was made February 3d. The bankrupt was directed to attend before the referee February 9th. A meeting of creditors was held February 15th, on notice served February 5th, and a trustee appointed on that day, the 15th, and he qualified and executed his bond the same day, and it was approved and filed the next day, February 16th. The petition to sell the stock at Schenectady on short notice was urged upon the judge February 11th, four days before the meeting of creditors at which a trustee was to be appointed by the referee. The fact that a meeting of creditors was to be held on the 15th was not disclosed to the judge, but the inference was conveyed that the appointment of a trustee was to be delayed.

The appointment of a receiver was entirely unnecessary. The employment of an attorney for the receiver was unnecessary. No legal questions were involved. If the stock of dry goods in either store was in danger of damage from the cold or dampness, it was a part of the duty of the receiver to see to it that coal was purchased and fires kept. It does not appear that the bankrupt or his attorney would have allowed any damage to the stock. The character and standing of Mr. Norton repels the suggestion. The application to the court for a speedy sale was unnecessary and unwarranted both in fact and law. It was a part of the duty of the receiver to give a bond and the services of an attorney in that regard were unnecessary. It was the duty of the appraisers to make a correct and a true inventory, giving their personal attention thereto. If unable to do so, it was their duty, respectively, to refuse to act. The evidence shows conclusively that the two stocks of goods were not handled by the appraisers or their alleged assistants with any care or view of ascertaining the true

value, if at all, and, in any event, assistance was unnecessary. The typewriting in making the inventory was done by stenographers and typewriters in the office and employ of Loucks. The evidence and report of the special master show correctly and in considerable detail what the appraisers actually did. Clearly they did not do their duty or examine the stock. Neither one of them did an actual full day's work unless it be Salmon. Schieffelin merely looked over the report of Salmon regarding the Schenectady stock, and spent about four hours at the Troy store. He was the managing clerk in Loucks' law office. Loucks really owned the assigned claim, and Donnan employed as an assistant in the making of the inventory was the legal owner. Neither he nor Gifford had any qualifications for appraiser in such a matter except in a mere clerical capacity. Gifford did not examine the stock in the Schenectady store at all, but he and Schieffelin looked over the fixtures. Salmon spent about four or five hours in the Schenectady store dictating to stenographers from Loucks' office, and this covers substantially the extent of his real work at that store. Later he spent one day at Troy to verify the list of that stock prepared by Gifford, Schieffelin, and one Carl S. Salmon, a brother of Del B. Salmon. It is evident that such an appraisal was worthless, and that an estate in bankruptcy should not be subjected to the burden of compensating appraisers for time spent in acting in that manner. While the typewriters from Loucks' office acted in good faith, so far as appears, and did quite a large amount of typewriting, they were employed by Loucks, and, if paid, were paid by him in their regular course of employment. Their work was of no value to the estate. These appraisers present a bill for five days' services each, and each asking for \$50—that is, compensation at the rate of \$10 per day. The affidavit annexed to the bill does not state the extent of service, but places stress on the alleged difficulties attending the work. They say, not that they spent five days each in making the inventory, but:

"That the said taking of the appraisal of the said property of the said bankrupt was unusually difficult for the reason that the stock of goods to be appraised consisted of a great many thousand items each of which had to be handled and appraised by the said appraisers and counted."

This was not true, but, if it ought to have been done, it was not done. The receiver, Samuel Levy, in his account, prepared by Loucks and verified by himself, charges as an expense paid February 11, 1910, "To expenses W. D. Loucks to New York City to interview Judge Ray as to instructions in regard to receivership \$18." This was the application for the sale of the Schenectady stock already referred to. The interview with Judge Ray occupied about 10 minutes, and resulted as stated, in an order to transfer the Schenectady stock to Troy so as to save the large rent. In the same account Levy as receiver makes the following charge:

"To cash paid five assistants, including three stenographers at \$3. per day each for four days in assisting in taking inventory in the two stores of bankrupt, \$60."

He attached to the account voucher for this as follows: Receipt of Carl S. Salmon for \$12; of Geo. W. Donnan (who petitioned for

the receiver) for \$12; of M. McManus for \$12; of A. M. Brickner for \$12; and of J. A. Myers for \$12, total \$60. Neither of these persons had been or has been paid by the receiver or by Loucks. In his account against the receiver and presented to the court for allowance Loucks made the following additional charge:

"Feb. 8, 9 & 10, To services of W. D. Loucks and three stenographers and one assistant in office in preparation of inventory of bankrupt and reducing same to proper form to be filed \$75.00."

This would make the expense of taking the inventory, not including traveling expenses and hotel bills, the accuracy and value of which has been mentioned, as follows: Three appraisers, \$150; to Loucks, attorney, and three stenographers and one assistant, \$75; to assistants in sorting stock and taking inventory, \$60—total, \$285.

And in addition the receiver in his account verified and signed by him says:

"That the undersigned with the three appraisers with three stenographers and with three assistants, in addition to three stenographers, was constantly engaged from the 4th day of February, 1910, to the 10th day of February, 1910, taking an inventory of the stock of goods in the two stores," etc.

The evidence taken by the special master fully sustains him in finding that this was untrue. The inventory is on file and was filed with the clerk February 15, 1910, and is made up of (1) the oath of said appraisers taken February 4th; (2) the certificate of said appraisers, which reads as follows:

"In the United States District Court, for the Northern District of New York.

"In the Matter of Octavius B. Desrochers, Bankrupt.

"We, the undersigned, having been notified that we were appointed to estimate and appraise the property of the above named bankrupt in the Schenectady store, have attended to the duties assigned us and after a strict examination and careful inquiry we do estimate and appraise the said property of the said bankrupt as set forth in detail upon the annexed pages.

"In witness whereof we have hereunto set our hands at Schenectady, N. Y., this 8th day of February, 1910.

Henry R. Gifford,
"George S. Schieffelin,
"Del B. Salmon,
"Appraisers."

It is dated February 8th. The words "in the Schenectady store" have been inserted with ink and pen at some time. There is no certificate or statement attached that the Troy store was ever inventoried. The "annexed pages" cover both the Schenectady and the Troy stores. Gifford and Schieffelin have filed affidavits that on the 10th "did put together the said inventory and obtained the execution thereof upon the 10th day of February, 1910." There is no execution of it except the certificate, and one half hour's work would have put the pages together. The receiver by his said attorney submitted a claim of \$100 as compensation for his services. As the receiver did substantially nothing outside of taking the inventory, assuming he did the work claimed in that regard, at least \$50 of his claim should be charged to expense of inventory, swelling the cost to \$335, which the court was asked to allow and charge against and direct paid from this estate.

Said Benjamin Terk, who took the part in this transaction above described, submitted an affidavit on which he claimed an allowance for obtaining the appointment of the said receiver which reads as follows:

"United States District Court, Northern District of New York—ss.:

"In the Matter of Octavius B. Desrochers, Bankrupt.

"State of New York, City and County of Schenectady—ss.:

"Benjamin Terk, being duly sworn says that he is an attorney at law and resides and has his office in the City of Schenectady, N. Y., and is licensed to practice in this Court; that he was the attorney for the petitioner for the appointment of a receiver herein, and upon such petition, Samuel Levy, the receiver, was so appointed; that deponent prepared all the papers upon such petition, including the petition, petitioner's bond, order appointing receiver, arranged for the receiver's bond, prepared order appointing appraisers and he incurred an expense of \$4.75 in connection with said proceedings.

"Wherefore deponent asks that he be given an allowance of the reasonable value of his said services and that he be reimbursed for such expenditures so made by him.

Benjamin Terk.

"Sworn to before me March 21, 1910.

"Geo. W. Donnan, Commissioner of Deeds."

As Loucks drew the petition and the bond, and as the order appointing the receiver was merely a carbon copy of an order in some other case, or one on hand for use in any case and was furnished by Loucks, and the order appointing the appraisers could not have occupied over ten or fifteen minutes in its preparation, it is seen that Terk did not prepare "all the papers upon such petition" except in the sense that he filled in the blank spaces as stated, but this fact was not shown to the court. At best, such affidavit was calculated to mislead the court. It is now claimed, in substance, that Loucks was acting as attorney or mere amanuensis for Terk; but, in view of all the undisputed facts, this seems improbable. All the facts recited and others are found by the special master, Edwin A. King, to whom the whole matter was referred for examination and report, with considerable amplification in many respects, except I have gone to the papers on file for quotations and some facts not stated in detail by him. Mr. King is a gentleman of the highest character and standing. He was appointed referee in bankruptcy by Judge Coxe in 1898, and has been continued by me. His honor and integrity and ability have never been questioned, except by these appraisers in their affidavits filed in answer to the objections to the receiver's account. In view of all the facts, I do not think their impeachment of Mr. King in an attempt to defend their own acts entitled to weight. It only deepens the color of their own acts. He has given this matter, on the objections made and filed, careful and conscientious attention, and his findings of fact and report are conservative. They are fully sustained by the evidence. I do not see how he could have found the facts otherwise than he has. This court is compelled to sustain the findings. It regrets the necessity of so doing. Mr. Loucks, Mr. Levy, and Mr. Salmon have enjoyed the confidence of this court in bankruptcy matters, notwithstanding considerable complaint and many rumors of discontent, these never assuming the form of formal objections, however, until the objecting parties here, as was their duty, presented this case for investigation. Although the order of reference did not contemplate an examination of

the witnesses separately, it was so worded as to permit it. The special master, probably wisely in the interest of truth and the honest administration of justice, conducted the examination in that manner for some time, but later, understanding the attitude of the court, all the parties in interest with counsel were permitted to be present and to amend and add to their statements and call witnesses. No injustice was done. Confronted with the situation, Loucks admits that it was a mistake to procure the appointment of this receiver, and that the receivership was unnecessary, and he says that when he discovered this, which was when he learned the name of the attorney for the bankrupt, he tried to turn it to the advantage of the estate and creditors. When communicating with the clerk's office at Utica, February 2d, it would have been easy to learn the name of Desrochers' attorney. And the continuance of the inventory and the application for a sale of the Schenectady stock on short notice made February 11th, and after he knew who Desrochers' attorney was, and the running up of expenses, etc., as described are hardly consistent with the claim now made. The account of the receiver drawn by Loucks was verified February 26, 1910. That account, among other things, says:

"Schedule B, hereto annexed, contains a statement of all the moneys paid out by the undersigned in the administration of the said estate, and the indebtedness incurred in said administration with the exception of the receiver's attorney, Wm. Dewey Loucks, and also includes the moneys paid in accordance with the order of the court made upon February 4, 1910, for a caretaker to take care of the heater and for coal to run the same."

Schedule B contains the item of \$60, viz.:

"To cash paid five assistants, including three stenographers, at \$3. per day each for four days in assisting taking inventory in the two stores of bankrupt."

As the special master finds and as the evidence conclusively shows the receiver had made no such payments. Did he suppose Loucks, his attorney, had made these payments? If so, the items should have been included in Loucks' bill as disbursements made by him, but this would not have done, as Loucks included in his unpaid bill a charge of \$75 for the three stenographers and one assistant, including his own services on the inventory. The vouchers acknowledge payment from Levy, not Loucks. The evidence is that Loucks, not Levy, if any one, had agreed to pay. The verification of that account signed by Levy says:

"That the payments reported in said account to have been made by the said receiver have been made and that said account hereto annexed is true," etc.

After the objections to the account were filed and the order of reference to a special master was made, Mr. Loucks made a long affidavit, verified March 30, 1910, in which he took the position that, when he learned on returning to Schenectady February 3d that his bank was not affected by the failure of Desrochers, he lost all interest in the receivership, etc.; also, that the petition and proposed order for a sale of the property in the Schenectady store was mailed to Judge Ray in New York February 5th, and that as the judge did not grant or return the order he sent Schieffelin to New York on the 9th to urge the mat-

ter, and that Schieffelin returned on the 10th with information that the judge would not grant the order without further information as to the showing of the inventory, whereupon he, Loucks, immediately went to New York to see the judge regarding it at an expense of \$18 cash and two days' time. Clearly it was not necessary to go to New York City to induce the judge not to sign the proposed order which he had already refused to do, and it is evident the situation had not changed, and that no actual fact existed justifying such order. Judge Ray on the 11th again refused to sign it, but did authorize a transfer of the Schenectady stock to Troy to save the \$100 per week rent for six weeks and the expense of coal and caretaker, but which was not done. The trips of Schieffelin and Loucks to New York City on the 9th and 10th, respectively, and after Loucks states he had lost interest in the receivership, and which were made to induce the judge to sign the order authorizing a speedy sale on that petition, which by silence he had declined to do prior to the appearance before him of Schieffelin, and which in words to him he refused to do, are conceded facts absolutely inconsistent with a claim of loss of interest in the receivership, and such visits were absolutely unnecessary. These acts fail to indicate a desire to turn an unnecessary receivership to the benefit of the estate, but something quite different. It was the urging of the court to grant an improper order upon a petition containing unjustifiable allegations, and the purpose is, I think, plainly inferable. In relation to the bond of \$250, Loucks states that he executed it in blank. This was, of course, indiscreet and improper. The only blank was for the name of a petitioning creditor not yet found when the bond was executed. Loucks also swears in his affidavit:

"That in the application for the receivership this deponent was not present when the petition for the receiver was executed, but had simply drawn a blank form for such application for receiver, the attorney who was going to make said application and sign the same, stating that he did not know the form to use without a form book, and deponent simply drew a proposed blank form of petition which deponent supposed the said attorney for petitioner. Benjamin Terk, would fill out to conform to the facts of the case when it was executed."

The great difficulty with this statement is the fact that only three blank spaces were left in the petition drawn by Loucks in his own handwriting, viz., one for the name of the petitioner, one for the insertion of the amount of the claim, barely sufficient for the insertion of the dollar mark and four figures, and the last one for the signature of the petitioner above the word "Petitioner" at the end of such petition proper. The words "Wherefore your petitioner prays that Samuel Levy of Schenectady, N. Y., be appointed receiver of said property," are in Loucks' handwriting. He knew who the court was to be asked to appoint. The words "for goods sold and delivered and holds no security" are an interlineation by Terk, coming in at the top of the second page, however. When Loucks reached Schenectady on the morning of February 3d, his first inquiry should have been at his own bank as to whether or not it was interested. He did learn that it was not a creditor early that day. Rather than inquire at his own bank, he made three unsuccessful efforts to obtain a petitioner

for a receiver, and finally purchased a small claim of \$23.38 and paid for it himself, and had it assigned to the clerk, Donnan, and then sent word to New York City to execute the petition which had been left with Terk. All due allowance is to be made for youth, inexperience, excessive zeal, a desire for business, haste, misinformation, etc. When Loucks found his bank and his clients were not interested, he should have abandoned all efforts for a receiver. When he found the receivership was unnecessary, he should have brought the fact to the attention of the court or the judge, instead of continuing an expensive inventory and sending a clerk in his office to New York City, and then going himself at an expense of \$18 cash and two days' time to press for an order for an immediate sale of a stock of dry goods on one-half the legal notice on the ground such stock was perishable, and that insurance could not be obtained, when, in fact, insurance then existed and was in force, and a rebate was had later by the trustee, and the stock was not perishable. Again, in his affidavit, Loucks makes unwarranted charges against the special master, as do the clerks in his office, Schieffelin and Gifford, two of said appraisers. If the judge had been apprised of the fact that Loucks was to act as attorney for the receiver, Levy, a lawyer, it is improbable that he would have appointed Salmon, a lawyer, and formerly a partner of Levy, the one who conveyed information to Terk and Loucks in New York that the Desrochers store was closed, and Gifford, and Schieffelin, both in Loucks' office, one a lawyer and the other a law student, to appraise these stocks of dry goods. Appraisers must be disinterested and competent in the line of work to which they are assigned by the court. The evidence concedes that it was understood before Loucks left New York that he was to act for the receiver Levy, if appointed. Terk was not dealing fairly with the court when he suggested Salmon, Schieffelin, and Gifford for appointment as appraisers. The court or judge in appointing appraisers at points far distant and in localities where the judge has little or no acquaintance must necessarily depend largely on the representations of the attorney requesting the appointment. It seems to me inconceivable that a reputable attorney exercising good, honest judgment, would ask the appointment of two lawyers and a law student to make the inventory and appraisal of a stock of dry goods in the hands of a receiver who was also a lawyer with a fifth lawyer for adviser. Clearly no sane judge would knowingly make such an appointment, except for special and extraordinary reasons. If the judge cannot rely upon the statements in the papers presented and upon the fairness and honesty of the attorneys coming before him and the truth of their representations, the administration of justice is indeed hampered and obstructed, if not made impossible. Dividends in bankruptcy matters depend upon the careful and economical administration of the estate. Receivers are necessary only when the preservation of the estate demands their intervention. Sales by receivers are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. No bankrupt estate should be charged with the expense of such a proceeding except in case of plain necessity.

I must refuse to allow any compensation to either the receiver or his attorney or to the attorney for Donnan the petitioner or said appraisers, or any of the expenses incurred or paid by them or either of them. The rent of the Schenectady store which was occupied from February 3d to February 15th will be paid by the trustee, also the coal bill and caretaker. The trustee will also pay to Edwin A. King, the special master, the sum of \$170 for his services, and \$6.88 for his personal expenses at and to and from Schenectady and \$90.60 for stenographer's services, in all \$267.48, all of which is allowed and will be paid from the estate. He will also pay his own attorneys their reasonable charges and Walter E. Ward, representing certain objecting creditors, the sum of \$50, and also his disbursements, which is allowed to him, as he has substantially aided the trustee and his attorney in protecting and preserving this estate.

TEXAS & PAC. RY. CO. et al. v. RAILROAD COMMISSION OF LOUISIANA.

(Circuit Court, E. D. Louisiana, Baton Rouge Division. December 22, 1910.)

No. 55.

COMMERCE (§ 34*)—INTERSTATE COMMERCE—RATES—CHARACTER OF SHIPMENT—INTERSTATE OR INTRASTATE SHIPMENT.

Complainant railroad companies filed with the Interstate Commerce Commission a schedule of rates from points in Louisiana to New Orleans for export shipments. The Railroad Commission of Louisiana had also fixed a schedule of different and lower rates on local shipments between the same points. It also by an order allowed 4 days free storage on local shipments and 20 days on shipments intended for export, in which order the railroads acquiesced, and also delivered shipments for export at ship's side free of charge for switching. Certain shipments were delivered to complainants from points in Louisiana for carriage to New Orleans on bills of lading of substantially the local form, and on their arrival the consignees demanded and received the free storage accorded export shipments and free delivery to the vessel carrier; the shipments being delivered by complainants directly from their cars to such carrier, as was intended by the owner when it was shipped. *Held* that, notwithstanding the use of the local bills of lading, the contract between the shippers and complainants was one for an export shipment, over which the Louisiana Railroad Commission had no jurisdiction, and that complainants were entitled, and even required, to charge the rates on such shipments fixed by their schedules filed with the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 34.*]

In Equity. Suit by the Texas & Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, and the Kansas City Southern Railway Company, against the Railroad Commission of Louisiana. Decree for complainants.

Howe, Spencer & Cocke, Hudson, Potts & Bernstein, and Alexander & Wilkinson, for plaintiffs.

Walter Guion, Atty. Gen., and E. H. McCaleb, Jr., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FOSTER, District Judge. It appears that the Texas & Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, and the Kansas City Southern Railway Company, complainants herein, had filed with the Interstate Commerce Commission a schedule of rates for the carriage from points in Louisiana to New Orleans on export shipments. The Railway Commission of Louisiana had also fixed a schedule of different and lower rates on local shipments between the same points. By order of the Railway Commission of Louisiana, 4 days free storage was allowed on local shipments, and 20 days on shipments intended for export. The railroads acquiesced in allowing 20 days free storage on freight intended for export and also delivered same at ship's side free of charge for switching.

Thereafter some 21 cars of staves and poplar logs intended for export were shipped from interior points in Louisiana to New Orleans on bills of lading of substantially the local form. On arrival the consignees demanded, and received, the free storage accorded export shipments, and in due course, at their request, the freight was switched to ship's side without additional cost, and was never out of the physical possession of the carriers until actually delivered to the ship. In collecting charges, the said railroads applied the higher rate fixed by the Interstate Commerce Commission for export shipments. On complaint of the consignees, the Railroad Commission of Louisiana assessed certain fines, exceeding \$2,000, against complainants, and complainants seek by this proceeding to have the collection of those fines enjoined.

It is contended by complainants that the said shipments constituted foreign commerce, and therefore the Interstate Commerce Commission had jurisdiction over their movement, and the Louisiana Railroad Commission had not. They rely upon the cases of *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999, *Coe v. Errol*, 116 U. S. 524, 6 Sup. Ct. 475, 29 L. Ed. 715, *Swift & Co. v. U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, *Armour Packing Co. v. U. S.*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754, and *Cutting v. Florida R. & Nav. Co. (C. C.)* 46 Fed. 641, and various other decisions to the same effect not necessary to more fully cite. The defendants, on the other hand, say the shipments must be considered intrastate commerce, that the cases above cited do not apply, except the *Cutting Case*, and this decision is overruled by the case of *Gulf, Colorado & Santa Fé R. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, hereafter referred to as the *Texas Case*, which must be considered the controlling authority.

On the facts as found by him, which are not disputed, the master adopted the contention of defendants, and, basing his conclusions of law entirely on the *Texas Case*, has recommended that the bill be dismissed. The matter is before me on exceptions of complainants to the master's conclusions of law, and the sole question to be determined is whether the shipments constitute intrastate or foreign commerce.

Undoubtedly the Interstate Commerce Commission has jurisdiction and authority to regulate rates on freight actually moving in foreign commerce, for that part of the carriage through the United States, whether such transportation be interstate or wholly within one state. So, too, the Railroad Commission of Louisiana has authority to regulate rates of transportation on all shipments beginning and ending in the state. In their respective spheres each is supreme, and neither can infringe the authority of the other. But it is plain that both railroad and shipper should be enabled to decide with certainty as to which rules to obey when there is conflict between them, and neither should be permitted to take advantage of the incidental conditions imposed, or privileges allowed, in connection with one rate when applying the other rate to the shipment.

Under the bills of lading, in the instant case, the consignee might have demanded delivery at New Orleans on payment of the lower rate; but he would have received the goods at the depot, or the usual place of delivery, and the railroad was under no obligation to deliver anywhere else; and he would not have been entitled to more than 4 days free storage, nor to any free belting or switching at all. Instead of doing so, however, he notified the railroad to hold the goods for export, and the carrier acquiesced, allowed free storage on the cars at an average of about 14 days, a period far beyond that allowed on local shipments, and subsequently belted the cars to ship's side without extra charge.

I do not consider the facts in the Texas Case analogous. There an interstate shipment terminated at Texarkana, Tex. The freight was paid. Delivery was accepted, and the goods changed ownership. An entirely new shipment was then made to Goldthwaite, Tex. The goods were intended for consumption in Texas, and the shipment began and ended in Texas. The owners of the goods intended to make an intrastate shipment, for the purpose of obtaining the local rate. They made their contract of carriage accordingly, and the whole contract was contained in the bill of lading. By the intention of the owners, by the contract of carriage, and by the ultimate disposition of the goods the shipment was intrastate.

In the instant case the shipments originated in Louisiana, but they did not terminate at New Orleans. The consignees did not accept delivery at all. For the purpose of obtaining the free storage and free switching, allowed only in connection with the export rate, they notified the railroad to hold the goods for export, and subsequently required delivery at ship's side to the connecting carrier. In all of this the railroad acquiesced. The stoppage at New Orleans was merely incidental to the ultimate exporting of the goods. New Orleans was never intended to be, and, in fact, never did become, the final destination. From the time the goods started from the interior point they were intended for foreign consumption, and there was one continuous passage until they reached a destination out of the United States. By the intention of the owners, and the ultimate disposition of the goods, it was an export shipment. In every respect the facts differ from those of the Texas Case, except as to the form of the bill of lading.

In the Texas Case I do not understand the Supreme Court intended to do more than decide the case presented on the facts as found by the Texas courts, and I do not consider the decision at all in conflict with those cited. The whole contract of carriage was expressed in the bill of lading, yet the Supreme Court, in holding that the contract determined the character of the shipment, was careful not to confuse the *bill of lading* with the *contract*. Necessarily a bill of lading, like any other written contract, may be altered, or amended, by subsequent verbal agreement, except as to things against public policy or prohibited by law or valid regulation.

In the case at bar, had the railroad issued through bills of lading from the interior points to the foreign ports, it is conceded by defendants the State Commission could not have imposed the fines. Yet in that case the service would have been exactly the same as was here rendered, with the exception that the railroad would have selected the ocean carrier, instead of the shipper doing so.

I can see no difference in the two cases. It is the trend of modern legislation to allow the shipper great latitude in routing his goods. In the statute of 1910, known as the "Mann-Elkins Act," the interstate shipper is given the right to designate over which of two or more connecting roads his property shall be transported to destination. Act June 18, 1910, c. 309, § 12, par. 5, 36 Stat. 553. It is manifestly of great benefit to the exporter to be allowed to accumulate freight at a seaport, and to hold it for a reasonable time without additional cost. Ocean rates vary according to the supply and demand, and these privileges advantage the exporter in securing favorable rates for the water carriage. I can conceive of no reason why the railroad and shipper, instead of getting out a through bill of lading to the foreign port, should not agree to apply the export rate, with its incidental privileges, to all shipments which are, in reality, intended for export, and to allow the shipper to select the ocean carrier, provided, of course, no fraud or violation of law or public policy is contemplated. If they can do so by express agreement, they can certainly do so by tacit understanding or acquiescence.

In the instant case both parties have treated the shipments as export shipments, and that is what they in fact were. It is not even hinted there was any evasion of law or violation of public policy by their so doing. Therefore I do not think the form of the bill of lading should absolutely fix the status of the freight, as I consider the contract of carriage should be held to be what the parties really intended it to be.

Notwithstanding my great respect for the opinion of the master in this case, I must disagree with him, as I am convinced that as a matter of fact, as well as by the intention of the owners and the contract of carriage, the freight, in the instant case, was an export shipment actually moving in foreign commerce, and the Railroad Commission of Louisiana was without jurisdiction. I am not called upon to reconcile the difference between the rates, nor to pass upon the reasonableness of either. If either is to be amended, it is entirely for the respective railroad commissions to say so. On the facts of this

case, as I understand them, I do not see how the railroads could have demanded or received any other rate than the one they collected.

There will be a decree as prayed for, perpetually enjoining the collection of the fines imposed.

CARTON v. WEST VIRGINIA BRIDGE & CONST. CO. et al.

(Circuit Court, N. D. West Virginia. December 28, 1910.)

1. CORPORATIONS (§ 586*)—CONSOLIDATION OF BUSINESS CORPORATIONS—RIGHTS OF CREDITORS.

A New Jersey and a West Virginia corporation engaged in the same business planned to consolidate. The name of the New Jersey corporation was changed and its capital increased, and an attempt was made to consolidate by an exchange of stock, but the proceedings taken while securing a union of interest and operation on the part of the two corporations did not effect a consolidation as provided by the New Jersey corporation act. They were both operated thereafter, however, as one company, while their business was kept entirely separate, and, the new corporation company becoming insolvent and the business so conducted being unsatisfactory, agreements were entered into for their separation by a re-exchange of stock, and, after attempts made to carry this out, the New Jersey company became a bankrupt. *Held*, that such separation agreement, while enforceable as between the companies themselves, could not be enforced so as to injure the creditors of the united company existing at the time the debts were contracted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2348, 2349; Dec. Dig. § 586.*]

2. CORPORATIONS (§ 586*)—CONSOLIDATION—SEPARATION—ISSUANCE OF BONDS.

The West Virginia company, after obtaining a return of its stock given in exchange for the stock of the consolidated company, could not convert a large portion thereof into bonds to be issued to the stockholders, secured by a mortgage on all the property of the corporation, either to the detriment of its own creditors or those of the united company, who became such while the two companies were joined.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 586.*]

3. CORPORATIONS (§ 586*)—CONSOLIDATION—INVALID PROCEEDINGS—EFFECT.

Where two corporations attempted but failed to effect a legal consolidation, and thereafter conducted their business together, though maintaining separate organizations, they should be regarded as to such business as partners.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2348, 2349; Dec. Dig. § 586.*]

In Equity. Bill by James D. Carton, trustee in bankruptcy of the New Jersey-West Virginia Bridge Company, a corporation, against the West Virginia Bridge & Construction Company and others. Decree for complainant.

Prior to the year 1905 a corporation existed under the laws of New Jersey, known as the New Jersey Bridge Company, engaged in the business of erecting bridges and similar structures and having its plant at Manasquan, N. J. At the same time the defendant The West Virginia Bridge & Construction Company was existing as a corporation under the laws of West Virginia, engaged in the same business, and having its plant near Wheeling, W. Va. At this time both companies were regarded as solvent and doing a profitable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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business. In this year a scheme to unite the two companies was consummated, whereby the New Jersey company changed its name to the New Jersey-West Virginia Bridge Company, increased its capital stock from \$200,000 to \$500,000, of which \$150,000 was to be issued to the holders of the stock of the New Jersey Bridge Company in exchange for the like amount of stock of that company outstanding. One hundred forty-five thousand five hundred dollars was to be issued to the stockholders of the West Virginia Bridge & Construction Company in exchange for the total issue of \$160,700 of stock outstanding of this latter company, except 22 shares, the holders of which it seems could not at the time be ascertained. The remainder of the \$500,000 of stock was to remain in the treasury of the New Jersey-West Virginia company to secure a working capital. By this plan, which was approved and consummated by the stockholders of both companies, the entire issue of stock of the West Virginia company passed to and became vested in the New Jersey-West Virginia company, except 22 shares, and the stockholders of the West Virginia company became stockholders of the New Jersey-West Virginia company to the extent of \$145,500 par value. It is further shown that a majority of the directors of the New Jersey-West Virginia company was thereafter composed of persons formerly holding the stock of the West Virginia company. Both companies maintained their corporate existence, and one F. M. Peet became president of both.

It is to be noted that, while this secured a union of interest and operation on the part of the two companies, it did not effect a consolidation as provided for by the New Jersey corporation act. Under this arrangement, however, the New Jersey-West Virginia company became the operating one, and in this operation Peet became the controlling factor. Large and expensive contracts were undertaken, beyond the capacity of the plants to economically perform, and at prices necessarily involving large losses. As stated, all these contracts were taken in the name of the New Jersey-West Virginia company, although it appears that the undertakings of each company were entered separately on the books, but of this there is no evidence that creditors had notice. The inevitable result was that about April, 1907, the affairs of these two companies, thus linked together, became involved and all parties became dissatisfied.

Peet at the time acting as president of both companies claimed the New Jersey-West Virginia company owed him \$240,000 and the West Virginia company \$42,000 for cash advances made by him in the prosecution of the joint business. Stockholders of the West Virginia company charged that Peet's management had been improvident, and that concealment and misrepresentations of the true value of the assets of the old New Jersey company had been made, whereby they had been misled into the combination. Peet threatened to close out existing contracts and shut both plants down. On the other hand, Paxton, a former stockholder of the West Virginia company, who had exchanged his stock for that of the New Jersey-West Virginia one, demanded of Peet that he buy his stock under pain of having a receiver appointed for the New Jersey-West Virginia company. Under these conditions, after various interviews and negotiations, a new scheme developed to sever the connection of the two companies, whereby Peet should take over all the "quick" assets of the West Virginia company, pay its debts, including the amount due himself, and, when this was done, the stock of the West Virginia company held by the New Jersey-West Virginia company should be returned to the original stockholders of the former company, who, in return, should surrender the stock taken in exchange therefor in the New Jersey-West Virginia company to the latter company for cancellation.

The scheme further involved the transfer by these stockholders of the West Virginia company when they should secure their original stock back by exchange to one Wyant (who was a stockholder and one intimately associated with Peet in the management of the New Jersey-West Virginia company) for \$50,000, for which it seems he was not to become personally liable, but to secure payment of which a mortgage was to be executed upon the plant and property of the West Virginia company to secure \$50,000 of bonds, which bonds were to be prorated and taken by these stockholders in full payment for their stock which was to become the absolute property of Wyant.

All this resulted in a written agreement between W. A. Wilson, acting for himself and as trustee for his co-stockholders, seeking to secure the exchange of the stock held by them in the New Jersey-West Virginia company for that of the West Virginia company formerly held by them, and Peet and Wyant, under date of April 25, 1907, and a supplemental agreement, under date of May 7, 1907, between Wilson and Wyant. Substantially by these agreements Peet was to take the "quick" assets of the West Virginia company at once, collect the same, and pay this company's debts within 90 days, during which time the stocks to be exchanged were to be deposited in escrow with the First National Bank of Manasquan, N. J. At this time the debts outstanding against the New Jersey-West Virginia company aggregated near \$400,000, and those against the West Virginia company \$112,000. None of these debts were, however, secured by lien upon the properties of the companies. Peet, it seems, took over the "quick" assets of the West Virginia company, which at the time were estimated to be sufficient to pay its debts, and collected a considerable portion thereof, and paid some of the debts, but not all. He claimed these assets were not delivered to him until something like 60 days after the agreements were made instead of at once, and that difficulties were encountered in their collection which rendered it impossible for him to comply within the 90-day limitation provided by the contracts. In the meantime agreements of re-exchange had been approved by the stockholders of the two companies, and the stocks had been deposited with the Manasquan bank in escrow, and Wilson and those associated with him were demanding the prompt exchange and the execution by Peet, as president, of the mortgage upon the property of the West Virginia company, whereby their \$160,700 of stock should, in effect, be converted into \$50,000 of mortgage bonds. Peet delayed and finally refused to execute this mortgage, claiming both sides had failed to comply with the terms of the contract. The total insolvency of the New Jersey-West Virginia company became apparent, the First National Bank of Manasquan, largely by reason of its having carried this company, failed, and in May, 1908, this New Jersey-West Virginia Bridge Company was in the District Court of the United States for New Jersey adjudged bankrupt, and the plaintiff Carton, in August following, was appointed and qualified as its trustee. On June 10, 1908, a special meeting of the original stockholders of the West Virginia Bridge company, claiming to be such stockholders by reason of the re-exchange provided for by the agreements of April and May, 1907, was held, a resolution was adopted authorizing and directing the issue of \$50,000 of bonds and deed of trust to secure the same, to be executed by W. A. Wilson, its vice president. These bonds were to run 10 years, with interest at 6 per cent. payable semiannually, and failure of payment of such interest should constitute a default authorizing sale of the property by the trustee. This deed of trust was executed as of June 11, 1908, to the Dollar Savings & Trust Company as trustee. Default was made in payment of interest, and a sale of the property of this West Virginia company by the trustee was advertised.

Thereupon the plaintiff Carton, trustee in bankruptcy for the New Jersey-West Virginia company, with the assent of the District Court of New Jersey, filed in this court his bill, setting forth substantially the facts as above, but much more in detail, and prays that the re-exchange of stocks contemplated by the two agreements of April 25 and May 7, 1907, be declared fraudulent and void as to the creditors of the New Jersey-West Virginia company, and that title and ownership in and of the \$160,700 of stock of the West Virginia company, so sought to be re-exchanged, be vested in him as trustee for the bankrupt, the New Jersey-West Virginia company; that the authorization and execution of the \$50,000 bonds and of the deed of trust to the Dollar Savings & Trust Company, trustee, to secure the same, by the West Virginia company, be declared to have been made without authority by those who were not in fact stockholders, and be wholly set aside and annulled as being without consideration, fraudulent, and void; that the sale under this deed of trust be enjoined, a receiver be appointed, the interest of the New Jersey-West Virginia company in and to the property of the West Virginia company be ascertained, the property be sold, and such interest be paid over to plaintiff as trustee aforesaid. Answers to this bill have been made by W. A.

Wilson and by F. C. Wincher and other original stockholders of the West Virginia company jointly, replications thereto have been entered, voluminous testimony has been taken, and receivers appointed to care for the property of the West Virginia company. In addition to this, the Citizens' Trust & Guaranty Company of West Virginia, a West Virginia corporation, has filed its petition, alleging itself to be a judgment creditor of the West Virginia company to the extent of \$10,500, with interest from May 17, 1909, until paid, and \$598.75 costs, rendered by the circuit court of Ohio county, W. Va.; that it has sued out execution upon said judgment, and levied the same upon certain specified property of the West Virginia company, and acquired an execution lien thereon; that the basis of this judgment was a debt incurred long prior to the mortgage and agreements to re-exchange stocks; that it was for compensation for the performance of certain construction work done by petitioner solely for the West Virginia company, with which the New Jersey-West Virginia company had no concern. To this petition Carton, trustee, has filed answer, in substance a general denial of its allegations.

Edmund Wilson, Warren H. Smock, Durand, Ivins & Carton, T. S. Riley, and J. B. Handlan, for plaintiff.

Russell & Russell, for defendants.

Nelson C. Hubbard, for petitioner Citizens' Trust & Guaranty Co.

DAYTON, District Judge (after stating the facts as above). Long and earnest study of this record and of the comprehensive and able briefs submitted by counsel upon both sides has compelled me to the conclusions: First. That the agreements of April 25 and May 7, 1908, seeking to effectuate a re-exchange of the stocks, so that the West Virginia company might be freed from its union with the New Jersey-West Virginia one and have its property restored to its original stockholders, while enforceable as between the companies themselves, cannot be so enforced to the injury and loss of creditors of the New Jersey-West Virginia company, existing at the time these contracts were executed. Second. That the original stockholders of the West Virginia company, claiming to have gotten back their stock under such agreements, were not justified or authorized to convert such \$160,700 of stock into \$50,000 of bonds to be issued to themselves and secured by mortgage upon all the property of the company, either to the detriment of the company's own creditors, or those of the New Jersey-West Virginia company, incurred while the two companies were joined together. It is true that the union of these companies was not such as to effect a legal consolidation, and that the separate organizations were maintained and the work undertaken, and the obligations, receipts, and disbursements of these companies were kept separate and apart upon their respective books, and it is for these reasons that I am of opinion that free from debt and as between themselves there existed no legal reason why they could not dissolve the union as contemplated by the agreements of April and May, 1907. On the other hand, it seems to me clear that creditors had no knowledge of the methods resorted to and of the internal management of these companies; that the New Jersey-West Virginia one was held out to the world as the owner of the properties of both; that it was in fact, so far as creditors could know, a consolidation of the two old companies, the operating, purchasing, and contracting one for both plants; and that under such circumstances they had right to extend credit to this New Jersey-West

Virginia company with the full expectation that the property of both companies would be held bound for the payment of debts.

It is well settled that both stockholders and officers of corporations are in a sense trustees of the corporate effects, and must fulfill these quasi fiduciary obligations to creditors before they can look to their individual interests as such stockholders and officers. To permit, in the first place, the stockholders of these two companies to effect what was to all appearances a legal consolidation through the increase of stock of one with which the stock of the other was purchased, the same man to become president and the controlling force, large and disastrous contracts to be taken, whereby the operating company is rendered insolvent and then allow the apparently absorbed company to resume its identity, take back its stock, pay only such debts as it saw fit to assume, and leave the other company bankrupt, would not, in my judgment, meet the obligation required by law of corporate stockholders. And, in the second place, to allow the stockholders of any corporation, so long as it has debts outstanding, to convert their stockholdings into bonds secured by mortgage upon the property of the company, whereby its creditors would be excluded from payment of their debts, or hindered or delayed in their collection, cannot be justified by any principle of equity.

While this union of these companies was not a legal consolidation, it was in effect like a partnership between individuals, and much the same rules should govern in the application of equity principles in adjusting here the rights of parties, especially those of creditors. The bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides that in cases of partnerships, where bankruptcy ensues, that the net proceeds of the individual estate of each partner shall be applied to the payment of his personal debts, and only the surplus remaining can be applied to partnership debts, and, on the other hand, the net proceeds of partnership property shall be applied first to partnership debts and only the surplus to the individual debts of the partners. See *In re Henderson* (D. C.) 142 Fed. 588; *Euclid Nat. Bk. v. Union Deposit Co.*, 149 Fed. 975, 79 C. C. A. 485. In this case, it may be a novel application of these principles governing partnerships between individuals to this union between these corporations, yet, I have not been able to see why they should not under general principles of equity be in effect made applicable. At the date of the union both corporations were indebted, large indebtedness was incurred by the two companies so united, for which, as I have herein set forth, in my judgment, both were liable. The New Jersey-West Virginia company is now in bankruptcy. It is true that when the union was to be dissolved by agreements of April-May, 1907, it was provided that the debts owing by the West Virginia company should be paid out of its "quick" assets by Peet, but at least one of these debts as set up in the petition of the Citizens' Trust & Guaranty Company of West Virginia, alleged to be represented by judgment and execution lien, has not been paid, and perhaps others exist. Touching this judgment of the Citizens' Trust & Guaranty Company of West Virginia, it is true its validity is denied by plaintiff in his answer to this company's petition and, that while ab-

stracts from the lien docket and copies of the execution and the levy are filed, no copy of the judgment itself, which alone can verify its existence, is filed. This is so clearly an oversight that it will be in the interest of justice allowed to be corrected, for the debt in the evidence filed in the main cause is recognized and admitted. Its existence was admitted in the re-exchange agreements.

It seems to me under all the circumstances that the plaintiff Carton, trustee, is entitled to relief, and that this relief shall in effect be (a) the holding of the agreements of April-May, 1907, void as to creditors of the New Jersey-West Virginia company now existing, incurred while the two companies were joined; (b) to the holding that the execution of the \$50,000 bonds and of the deed of trust to secure the same was null and void as to creditors of the West Virginia company itself and as to creditors of the New Jersey-West Virginia company, whose debts were incurred while the companies were joined; (c) to having the debts of the West Virginia company itself ascertained and also an ascertainment of the debts of the New Jersey-West Virginia company, incurred while the two companies were joined; and (d) to having a sale made of the property of the West Virginia company, and out of the proceeds arising therefrom, payment, first, of the costs of this suit and of the expenses of sale, second, of the costs of the receivership, including the certificates hereinbefore authorized, third, of the debts of the West Virginia company itself, and, fourth, of the application of surplus to debts of the New Jersey-West Virginia company, incurred while the two companies were united.

If counsel can agree as to the several items of these debts and payments to be made, decree of sale can at once be entered, otherwise reference to a master will be necessary.

WENDELL v. WILLETTS.

(Circuit Court, S. D. New York. January 4, 1911.)

1. TRIAL (§ 78*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE.

Where evidence is apparently competent when offered, a motion must be made to strike it out, or a request made for instructions to the jury to disregard it, if in the course of the trial it becomes evident that it is in fact immaterial, or is, or may be, inadmissible and prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 191; Dec. Dig. § 78.*]

2. MASTER AND SERVANT (§ 70*)—EXPERTS—NATURE OF SERVICES.

Defendant had a valuable library, including old and rare books, first editions, prints, etc. These having been destroyed by fire, defendant employed plaintiff, an expert in the book business, to assist in the preparation of an inventory of the books and prints to be submitted as a part of the defendant's proof of loss. Plaintiff was so engaged from December 2, 1909, to February 4, 1910. Plaintiff had assisted in the selection of many, if not nearly all, of the books, and had sold or assisted in the sale of some of them to defendant, and prior to the fire had been employed to catalog the same, during which work he had made copious and correct memoranda regarding the books and prints which he had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

preserved, and calling to mind the books and prints in the library or collection of defendant prior to the fire and by going to the printed lists, catalogs, etc., of book houses and works descriptive of such books and prints which were in existence and accessible at slight cost, plaintiff was able to give an accurate description of the ones destroyed, and this was what he in fact did and in what his services largely consisted. Defendant furnished and paid for all stenographic work and typewriting and for the making of lists, and for all that kind of work except pen and pencil memoranda. *Held*, that so far as plaintiff's services consisted of the disclosure of his knowledge of the books and prints gained by him while in defendant's employ or in selling them to the defendant, or in dictating their descriptions to a stenographer, or reading the same from a book when found, it was mere exercise of memory, or a consultation of other descriptive books or catalogs, and a search for memoranda or an application thereof which was expert services for which plaintiff was entitled to recover expert compensation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 70.*]

Action by Edwin H. Wendell against Howard Willetts to recover for services rendered in assisting defendant in the preparation of proofs of loss to recover insurance on defendant's library. A verdict having been returned for plaintiff for \$3,500, defendant moves to set the verdict aside and for a new trial on the stenographer's minutes, exhibits, etc., on the ground that the verdict is contrary to and unsupported by the evidence, and that the damages awarded are excessive. Motion granted, unless plaintiff stipulates within 20 days to consent to a reduction of the verdict to \$2,500.

Clifford Seasongood, for plaintiff.

Frank L. Hall (Ernest P. Hoes, of counsel), for defendant.

RAY, District Judge. The defendant had a valuable house with furniture therein at White Plains, N. Y. He also had therein a valuable and quite extensive library, including rare and old books, first editions, and prints, etc., of great value on account of age, rarity, etc. On November 30, 1909, all this property was totally destroyed by fire. All or nearly all was quite well insured. With the library, prints, etc., all catalogs, or lists and all memoranda belonging to Mr. Willetts and relating to the same were destroyed. In order to collect the insurance, it became necessary for Mr. Willetts to prepare and present proofs of loss, including an inventory of such books, prints, etc., with their true values. To illustrate the value of some of these books and prints and the importance of the work to Mr. Willetts, it may be mentioned that, as shown by a "Statement of Loss" in evidence, a set "Cruikshankiana" was valued at \$35,875, total loss; "Original edition of Thackeray" was valued at \$25,250; "Grolier Society Publications" at \$2,025; "Original edition of Lever" at \$1,575; "Original edition of Stevenson" at \$1,200—total \$65,925. Also "Books (per inventory, 20 foolscap pages), various bills, \$30,000." Prior and up to 1901 the plaintiff had been in the employ of Dodd, Mead & Co. in the book and print business, and he had assisted in the selection of many if not nearly all these books, etc., and had sold or assisted in the sale of same to Mr. Willetts. He had also been employed prior to the fire to catalog these

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

books, prints, etc., and had done so, and after the fire and after being employed to make an inventory and appraisal, for the purpose of preparing proofs of loss, he wrote Mr. Willetts, amongst other things:

"The work I did on your library at various times caused these books to be photographed in my mind and the memoranda I made when I appraised the library some six years ago has resulted in my being able to give minute particulars about them. I can come pretty close to giving a complete account of every book and print in the library. * * * I can give an absolutely complete list of every item in the sets of Thackeray, Lever and Grolier Club publications. The preparation of the Cruikshank inventory, however, is an enormous task to be accomplished in so short a time," etc.

Willetts employed Wendell soon after the fire to make an inventory and appraisal of the books and prints, the one referred to in the above-mentioned letter. The compensation was not agreed upon, and, after the work was done, a difference arose as to the value of the work done, and this suit was brought to recover what such services were reasonably worth. In his verified complaint the plaintiff placed the value of such services at \$4,500, but on the trial he testified they were reasonably worth the sum of \$7,500. The nature, extent, and quality of the work was in question, of course, as bearing on the question of value. The rendition of service commenced on the 2d day of December, 1909, and ended February 4, 1910. There were intervening days on which no work was done, and there was a dispute as to the actual number of days on which the plaintiff worked. Experts were called on each side who gave testimony as to the value of the services, which was the only question.

The employment and rendition of services were conceded. The evidence of plaintiff's witnesses tended to sustain his contention. That of defendant's witnesses was to the effect the value of such services was not to exceed the sum of \$1,200. The jury found a verdict of \$3,500. It is contended this was so contrary to and unsupported by the great weight of evidence that the verdict should be set aside or reduced. No exception was taken by either party to the charge of this court, and on this motion the defendant does not complain that there was any error in the admission or rejection of evidence. I have examined the voluminous record on my own motion to see if there was any prejudicial error in this regard. I find none that would justify setting aside the verdict and granting a new trial. Slight errors will creep into any trial of length such as this was, as will more or less immaterial evidence, the bearing of which cannot be accurately determined until the case is ready for submission. If such evidence is apparently competent at the time, a motion should be made to strike out or a request made for instructions to the jury to disregard same if in the course of the trial it becomes evident that the evidence is in fact immaterial, and is or may be in fact prejudicial. I find nothing of this kind in this case. The recovery in this case gives the plaintiff about \$70 per day for his services if he worked only work days, including Saturdays, and only about \$55 per day if he worked every day including Sundays. This makes no allowance for overtime evenings. There was respectable evidence, not contradicted, that the ruling compensation in New York for such services requiring the skill and knowledge

of an experienced expert was \$20 per day. The evidence demonstrated, and was uncontradicted, that the defendant furnished and paid for all stenographic work and typewriting in making lists, etc., all that kind of work except pencil or pen memoranda; also, that the plaintiff had made, when making the prior inventories of this library and of those prints and when selling them to Mr. Willetts or obtaining them for him, copious and correct memoranda regarding same which he had preserved. Calling to mind the books or prints in the library or collection of defendant prior to the fire by going to the printed lists, catalogs, etc., of book houses and works descriptive of such books and prints, which were in existence and accessible without cost of moment, the plaintiff was able to give an accurate description of the ones destroyed, and that is what he in fact did. It was not disputed that most of the work was done in that way; that is, the plaintiff would recall the book or print, then hunt out its description, and dictate same to a stenographer. There were cases where the plaintiff had a special memory as to books and prints in this collection not found in any book or catalog, etc. The defendant contends that, while this took time, it did not require special skill or experience on the part of the plaintiff, or expert skill or knowledge, but only the use and giving up of knowledge by the plaintiff of these books and prints gained by him when in the employ of the defendant on former occasions, or when selling them to the defendant, and that to tell its description to a stenographer or read it from a book when found was not expert work, but merely clerical and dictation work from memory.

The defendant contends that the plaintiff might have been called into court and compelled to disclose all this information gained before and possessed by him on payment of legal witness fees; that, while a legal contract for using his memory and disclosing his knowledge of these books and prints and for payment therefor might have been made, none was made, and that, inasmuch as the suit is based on a quantum meruit, the plaintiff can only recover compensation based on time spent on ability to hunt up the description of these destroyed books and prints in other existing and accessible descriptive books or catalogs and transcribe such information or cause it to be transcribed and arranged in the way mentioned, and that nothing could be claimed legally or given by the jury for using or giving up this information, inasmuch as he agreed to make as complete and accurate an inventory and statement of values as he could, and bargained for no extra compensation on account of using his special knowledge or information gained in the manner described. The court so instructed the jury.

The making of this inventory and appraisal of these destroyed books and prints, so far as they were pictured on the plaintiff's memory or mentioned and described in his written memoranda, demanded no skill or expertness other than a mere exercise of memory, a consultation of other descriptive books and catalogs, and a hunting up of such memoranda and research and amplification thereof. However, Mr. Wendell was an expert man in this business of books and prints. He knew where to look for descriptions, values, etc. The knowledge he had gained and possessed of this particular collection was a part of his

expert knowledge. Not the fact that Mr. Willetts owned them or had them in his collection, as that was a mere matter of memory and a part of his general information on general subjects. He was an expert, and he possessed special knowledge regarding these books and prints, and Mr. Wendell employed him to do the work. I think he was doing the work of an expert and entitled to the pay of one, all things considered, but am far from the opinion that the main part of the work actually done was that of an expert in the business. If A., not an expert in the book and print business, should see a shelf of books and prints, and should have them accurately described to him with cost and value of each, and should happen to remember the description and cost of each, and they should be destroyed, and A. should be employed to give in writing a list and description thereof with cost or value and should do so, I am of the opinion he would not be doing the work of an expert. The necessity for complete, accurate, and speedy work was apparent. It was necessary to show that these prints and books, or some of them, were originals and first editions, etc. Their value and hence the amount of insurance recoverable, to an extent depended on this. But Mr. Wendell knew that the prints sold Mr. Willetts were originals, and that the books were first editions, and Wendell was not entitled to compensation for corroborating Mr. Willetts in that statement in his proofs of loss. He could have been compelled to say all that and to have given from memory a list and description of books and prints so far as he could remember them. That knowledge was not his special property which he could refuse to disclose in a proper place when called upon in a proper and legal manner. It was in no way privileged. While the interests involved, the importance of the matter, were proper subjects of consideration in estimating and determining the value of the service rendered, they do not and did not justify a forced contribution from Mr. Willetts. It was not shown that Mr. Willetts could not have given an accurate list of all these books and prints. It did appear, inferentially at least, that he was not expert enough to absolutely determine the prints were originals and the books first editions. However, he knew they were claimed to be such, and that they had been represented to be such, and had been sold to him and paid for by him as such and that he had obtained them from Dodd, Mead & Co. through Wendell, their salesman, or from Wendell. If the insurance companies had contested his claim in this regard, he could have called Wendell as a witness and shown the fact. However, there were elements of considerable value in the services of Wendell and much that required expert knowledge and ability. It appeared, of course, this was inevitable, that Mr. Willetts was a man of considerable property, but this did not enhance the value of the services rendered.

I was not satisfied at the time with the verdict rendered, being of the opinion it was excessive in amount considering the character and the quality of the service rendered, the time required, the interests involved, the necessity for accuracy and completeness, and the work done, measured as to value by the proof in the case as to compensation demanded by and paid to others of equal skill for like services under similar conditions in that vicinity. I am of that opinion now after a

careful review of all the evidence, and think the jury must have unconsciously disregarded the charge of the court and been carried away, so to speak, by the seeming affluence of the defendant, the fact that Mr. Wendell had this special knowledge at his command, which he only, aside from Mr. Willetts, possessed, and that his use of it at Willetts' request in obtaining a large insurance was of great value to Mr. Willetts in the emergency, and that Wendell should be compensated for disclosing the information. In short, the jury seems to have compensated the plaintiff on the basis of the value of the work to Mr. Willetts at that time and under those circumstances and in his emergency, rather than on the basis of the value of such services measured by what others of equal skill and attainment demanded and received in that vicinity for like or similar services under like conditions. The "discretion" of a jury, as it is sometimes called, in awarding damages for injuries, pain, and suffering, when there is no estimate of money value by witnesses, or in giving compensation for services, or in fixing the value of property, where there is a wide range in estimates of value given by witnesses, is not lightly to be interfered with, and, if interfered with, the power should be cautiously exercised. However, neither excessive verdicts nor inadequate verdicts should be sanctioned. Men are not to be paid excessive sums because poor for either work or property, and are not to pay excessive sums for either work or property because in affluent circumstances.

I do not think the plaintiff's services were extraordinary, or that he was entitled to compensation at the rate of over \$20,000 per year. If compensated at the rate of \$14,000 per year, I think it all-sufficient and exceedingly liberal. As there is some evidence to sustain a recovery of that amount, the verdict will be reduced to the sum of \$2,500. If the plaintiff files a stipulation within 20 days consenting that the verdict be reduced to that sum, \$2,500, the motion to set aside the verdict and grant a new trial is denied, otherwise the motion is granted.

In re ROBERTS.

(District Court, N. D. West Virginia. January 5, 1911.)

FRAUDULENT CONVEYANCES (§ 122*)—PREFERENCES.

Code W. Va. 1906, c. 100. § 13. provides that if any person transact business as a trader, with the addition of the words "factor," "agent," "and company," or "& Co.," and fail to disclose the name of his principal or partner by a certain method, or if any person transact such business in his own name without any such addition, all the property, stock, and choses in action acquired or used in such business shall, as to creditors of any such person, be liable for his debts; but such section shall not apply to a person transacting business under a license to him as an auctioneer or commission merchant. *Held*, that such section did not apply to or prohibit a merchant from conveying fixtures and property used in his business by a deed of trust to secure certain of his debts, though such conveyance operated to transfer the legal title to the trustee for the benefit of the secured creditors, preserving only an equity of redemption in the merchant.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 122.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Bruce Roberts. On objections to the lien claim of certain trust creditors. On petition to revise a referee's order overruling the objections and allowing the claim. Affirmed.

J. H. Brennan, for petitioners.

W. M. Werkman, for claimant Roberts.

J. C. Palmer, for claimant Ralson.

DAYTON, District Judge. The bankrupt was engaged in the ice cream and confectionery business, in partnership with Myer, and on June 25, 1907, these two as partners borrowed \$500 from Reed, and to secure the same executed a deed of trust on a soda fountain, four showcases, one wall case, and one marble top counter, fixtures in their place of business. Subsequently Myer retired, and Roberts undertook alone to conduct the business, and on March 31, 1909, he borrowed from Charles B. Roberts \$900, and sought to secure the same by a further deed of trust on the soda fountain, the four showcases, the wall case, and the counter, and also upon other articles of furniture and fixtures employed in the conduct of the business. In May, 1910, he became bankrupt, and in the settlement of the estate the trust creditors, Reed and Charles B. Roberts, have filed and been allowed their claims as having priority over general creditors.

To such preference, allowed by the referee, exception has been taken by the trustee and certain general creditors, who insist that under section 3468 (chapter 100, § 13) of the Code of 1906 of West Virginia, no such preference is permitted. This Code provision is as follows:

"If any person shall transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or '& Co.,' and fail to disclose the name of his principal or partner by a sign in letters, easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the town or county wherein the same is transacted, or if any person transact such business in his own name, without any such addition, all the property, stock, choses in action, acquired or used in such business, shall as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

This statute was first enacted by the Virginia Legislature in 1839 (Acts 1839, c. 72), and is literally copied into our law from the Virginia Code of 1860 (title 43, c. 145, § 13). Its purpose clearly was to prevent that species of fraud whereby one could carry on a business under a secret agency, and in case of misfortune permit the undisclosed principal or owner to withdraw the goods and allow creditors to suffer. It has been held, however, by the Supreme Court of Appeals of this state, that this statute does not apply to one selling farming implements, as agents for the manufacturers, upon commission. *Brown v. Deering*, 35 W. Va. 255, 13 S. E. 383. And the Supreme Court of Appeals of Virginia, construing the same statute, has held it does not apply to personal property stored with such trader with no power of sale, nor to furniture and fixtures rented with the building. *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472. In *Partlow v. Lick-*

liter, 100 Va. 631, 42 S. E. 671, it is held, that "property used in such business" is liable for the payment of the trader's debts, notwithstanding a bill of sale thereof may be recorded.

No construction of it that I can find directly clothes it with the power to prevent a trader from incumbering his stock to secure a debt, which power to secure is provided for by other statutes which have been universally recognized by the courts. While it is well settled that a conveyance of property by formal deed in trust carries with it title, and leaves only the equity of redemption in the grantor, yet a clear distinction must be drawn between such a conveyance of title for the sole purpose of securing debts and those made by absolute deed or bill of sale carrying the absolute property right. To the latter this chapter 100, § 13, may apply in many cases, although exceptions may be conceived; but, in my judgment, it cannot be made applicable to the former.

The ruling of the referee in this matter must be affirmed.

MEMORANDUM DECISIONS.

BALEY, U. S. Marshal, v. WOOLLEY et al. (Circuit Court of Appeals, Fourth Circuit. December 10, 1910.) No. 979. Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville. L. M. Bourne (Bourne, Parker & Morrison and Theo. F. Davidson, on the brief), for appellant. H. G. Ewart, for appellees. Before GOFF, Circuit Judge, and McDOWELL and ROSE, District Judges.

PER CURIAM. The record shows no error. The judgment of the court below (180 Fed. 573) is affirmed.

THE BEE. (Circuit Court of Appeals, Second Circuit. January 9, 1911.) No. 108. Appeal from the District Court of the United States for the Southern District of New York. Alexander & Ash (Peter Alexander, of counsel), for appellant. Harrington, Perkins & Englar (H. S. Harrington, of counsel), for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs, on opinion of Judge Adams (173 Fed. 925).

BERWIND-WHITE COAL MINING CO. v. CUNARD S. S. CO., Limited, et al. COXE BROS. & CO., Inc., v. SAME. M. P. SMITH & SONS CO. v. SAME. (Circuit Court of Appeals, Second Circuit. January 9, 1911.) Nos. 100-102. Appeal from the District Court of the United States for the Southern District of New York. L. H. Beers, for appellant. G. P. Nicholson, Herbert Green, W. U. Taylor, and W. S. Montgomery, for appellees. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decrees (174 Fed. 166) affirmed, with interest and costs.

EMPIRE CASUALTY CO. OF WEST VIRGINIA v. STEVENS et al. (Circuit Court of Appeals, Fourth Circuit. January 26, 1911.) No. 1,005. Appeal

from the Circuit Court of the United States for the Northern District of West Virginia, at Philippi. For opinion below, see 180 Fed. 283. W. W. Van Winkle, Mason G. Ambler, and H. F. Stockwell, for appellant. John Marshall, Alonzo L. Miles, and Luther E. Mackall, for appellees.

PER CURIAM. Dismissed under rule 20. Appellant to pay costs. Agreement filed.

HUDSON v. NEW YORK & A. TRANSP. CO. (Circuit Court of Appeals, Second Circuit. October 19, 1910.) Appeal from the Circuit Court of the United States for the Southern District of New York. A. I. Elkus, for Empire Trust Co. J. Parker Kirlin, for complainant. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We think the most satisfactory disposition of the matter submitted would be to allow delivery of the boats to proceed under the order upon the second purchaser giving security in the amount of \$25,000 that, in the event of the second sale being set aside, he will return the boats to the jurisdiction of this court in the same condition in which they were when taken by him. This we understand to be his offer, and we are prepared to dispose of the motion in that way, unless the first purchaser, now appellant, insists upon his right to a supersedeas, in which event he shall give sufficient security that in the event of the second sale proving abortive he will deposit in the registry of the court the sum of \$76,000—himself taking the boats, and without prejudice to any claims he may have against the money so deposited. See, also, 180 Fed. 973.

LUTCHER & MOORE LUMBER CO. v. KNIGHT et al.† (Circuit Court of Appeals, Fifth Circuit. January 24, 1911.) No. 1,629. In Error to the Circuit Court of the United States for the Western District of Louisiana. Geo. E. Holland, for plaintiff in error. A. J. Murff and M. J. Cunningham, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The Supreme Court having this case before it on certiorari has practically decided that the evidence rejected on the trial in the court below was admissible under the issues then presented. Litcher & Moore Lumber Company v. Knight, 217 U. S. 257, 30 Sup. Ct. 505, 54 L. Ed. 757. That evidence, if admissible, was certainly material to the issues involved, particularly the issue of simulation vel non, and this conclusion renders it necessary to reverse the judgment of the Circuit Court and remand the cause for a new trial; and it is so ordered.

For decision below, see 156 Fed. 1022, 84 C. C. A. 679.

PENSACOLA STATE BANK v. MERCHANTS' & FARMERS' BANK OF BROOKHAVEN, MISSISSIPPI.† (Circuit Court of Appeals, Fifth Circuit. Feb. 7, 1911.) No. 2,129. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. Edwin T. Merrick, Walter S. Lewis, Philip Genster, Jr., Ralph J. Schwarz, and A. C. Blount, Jr., for plaintiff in error. P. Z. Jones and A. C. McNair, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. So far as this is a suit to recover for money had and received, or, on the other hand, for money expended and paid out for defendant's account, the plaintiff has no case. If the Pensacola State Bank lost money through the transactions set forth, it was by and through the conduct of its own trusted employé, and no sufficient showing is made to warrant a transfer of the loss to the defendant. So far as the case is based upon book-keeping alone, it has no merit. The judgment of the Circuit Court is affirmed.

For opinion below on motion for new trial, see 180 Fed. 504.

† Rehearing denied February 21, 1911.

SUTHERLAND et al. v. PEARCE. (Circuit Court of Appeals, Ninth Circuit. January 3, 1911.) No. 1,932. Appeal from the District Court of the United States for the First Division of the District of Alaska. See, also, 164 Fed. 609, 90 C. C. A. 519. G. C. Israel, for appellee.

PER CURIAM. On motion of Mr. G. C. Israel, counsel for the appellee, ordered, appeal dismissed for noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of rules of practice.

HARLEY v. READING FINANCE & SECURITIES CO. (Circuit Court, S. E. D. Pennsylvania. January 6, 1911.) No. 1,142. On Motion for New Trial and Motion for Judgment Notwithstanding the Verdict. Harry F. Kantner and Alex. Simpson, Jr., for plaintiff. Oliver Lentz, Elwood H. Deysher, and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. The evidence in this case was in direct conflict upon the vital point, namely, whether the shares of stock which the company admitted having sold to the plaintiff were in the company's possession as collateral security for his notes, or merely as a matter of business convenience. The jury has settled this question in the plaintiff's favor, and, in view of the amount and quality of the evidence, I do not feel justified in disturbing the verdict. The motion for a new trial is therefore refused. The motion for judgment notwithstanding the verdict is also refused. The evidence in support of the plaintiff's theory was direct and positive. Part of it was oral and part in writing; and I do not see how the court could possibly take the question from the jury. To the refusal of this motion an exception is granted to the defendant.